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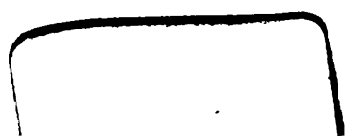
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Cases

Scotch reports
Cases



CASES

DECIDED IN

Best and.
**THE COURT OF SESSION,
COURT OF JUSTICIARY,**

AND

HOUSE OF LORDS, 723

FROM AUGUST 1, 1886, TO AUGUST 1, 1887.

REPORTED BY

**MIDDLETON RETTIE, JAMES PATTEN, C. C. MACONOCHIE,
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ESQUIRES, ADVOCATES.**

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* Reserved for next volume.

ERRATA.

At p. 610, transpose names of pursuers' and defenders' counsel.

At p. 1003, tenth line from top, *for "1882" read "1862."*

CASES

DECIDED IN

THE HOUSE OF LORDS,

1886-87.

UNION BANK OF SCOTLAND, LIMITED, Second Party (Appellants).—

Sir H. Davey, Q.C.—Macnaghten, Q.C.—Low.

NATIONAL BANK OF SCOTLAND, LIMITED, First Party (Respondents).—

Balfour, Q.C.—Murray.

No. 1.

Dec. 10, 1886.
Union Bank
of Scotland,
Limited, v.
National Bank
of Scotland,
Limited.

Right in security—Absolute disposition with back-letter—Advances by third party on assignation of reversionary interest intimated to the disponee.—A bank held a recorded absolute disposition granted by A of certain subjects, which by back-letter it agreed to hold “in security, and until full and final payment of all sums of money now due, or which may hereafter become due.” The back-letter was not recorded. Some months afterwards A, for onerous considerations, granted to another bank a deed by which she alienated, assigned, and disposed her whole right and interest and right of reversion in the subjects. Intimation of the assignation was made to the first bank. Thereafter advances were made to A by both banks. In a competition between the two banks, *held* (rev. judgment of the Court of Session) that, in a question between the two banks, the first bank’s security was limited to advances made prior to the date when the assignation was intimated.

(In the Court of Session, 18th December 1885, 13 R. 380.)

The Union Bank appealed.

At delivering judgment,—

LORD CHANCELLOR.—Two propositions appear to be established beyond dispute in the discussions of the learned Judges on this question. One, that the National Bank held an absolute disposition of the lands in question, dated 12th February 1879, and recorded some days later. Another, that the terms of a back-letter, the meaning and construction of which I will refer to presently, qualified the absolute disposition, and restricted the title to one in security.

Ld. Chancellor
(Halsbury).
Lord Black-
burn.
Lord Watson.

The interesting historical retrospect of the Lord President of the mode in which this form of transaction came to be adopted by Scotch conveyancers in order to avoid the common law and the Statute of 1696 is, I think, very relevant to the question of what is the substantial nature of the transaction in question. It certainly bears a very close analogy to the English mortgage of land, which conveys in the most absolute form the estate to the mortgagee, but which nevertheless is only held as a security for money advanced.

In the language of the back-letter the National Bank were to “hold the said disposition in security, and until full and final payment of all sums of money now due or” (and these are the cardinal words) “which may hereafter become due.” These words, it is contended, are enough in construing the personal con-

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tract to establish that by the contractual relations between the parties the National Bank were entitled to prevent Mrs M'Arthur borrowing elsewhere than from themselves anything upon the security of the lands in question.

The first observation that strikes one is that no such express contract appears on the face of the instrument. It might be that Mrs M'Arthur would continue to borrow to the full extent of the security, and, if she did so borrow from the National Bank, there is no doubt that the security would (as the language I have quoted obviously intended that it should) form a security for such further advances. But does it follow, because the back-letter makes provision for what in that event would be a natural and proper course of dealing, that thereby Mrs M'Arthur entered into a contract not to deal with the reversionary interest with anyone else?

It is certain that no obligation is imposed on the National Bank to advance any more money than they have already advanced, and the result would appear to be that by Mrs M'Arthur's entering into a contract to allow her property to be security for all sums already due, and for all sums which, upon terms to be afterwards settled between them, the bank might advance to her, she thereby undertook that she would remain with that bank as a customer (to use the language of one of the learned Judges) until the value of her security was exhausted.

It appears to me that this is the real ground of difference upon which the learned Judges have been divided. It is not denied—indeed it is insisted—that upon payment of all sums due Mrs M'Arthur would be entitled to demand reconveyance, and it cannot therefore be denied that if instead of fresh advances obtained from the National Bank Mrs M'Arthur had proceeded to some other bank, which was in a position to advance the whole of the sums already due and make to Mrs M'Arthur a further advance, such a transaction would have been perfectly competent. But although that would seem to shew that Mrs M'Arthur's interest in the unpledged value of the security was such as to enable her to get further money value for it, nevertheless, as long as the National Bank remained the absolute unqualified disponees she could not treat for, or dispose of in any effectual manner, her reversionary interest.

It would seem to be a strange result of what, the Lord President has pointed out, was a pure conveyancing expedient to avoid the operation of the common law and the statute law, that an admittedly valuable property is no longer at Mrs M'Arthur's disposition, but that on the personal contract, as distinguished from the feudal relation created by absolute disposition, she was not at liberty to seek for further advances elsewhere than from her original creditor. We are dealing here not with the rights of third parties, but with the rights of the immediate parties to the transaction, and I gather from the reasoning of some of the learned Judges that they think there is an implied term (for it certainly is not expressed) in the contract in question that she is not to seek elsewhere to borrow on the security of what is nevertheless admitted to be her own remaining interest.

If I am right as to the true nature of the contract between the parties, each fresh advance must have been the subject of a fresh agreement, in this sense, that the bank must have consented to advance it, and upon that consent Mrs M'Arthur's previous contract would make such fresh advance a charge upon her interest in the reversionary right. But the question is, whether Mrs M'Arthur, having bargained away and made an assignation of her reversionary right to the

knowledge of the National Bank, could then obtain further advances upon the security of an interest which she had for valuable consideration already assigned to a third person. It seems to me, that such a proceeding is contrary to good faith, and the decision of your Lordships' House in *Hopkinson v. Rolt* (9 Clark's House of Lords cases, 514) establishes the principle, and establishes it upon the broadest grounds of natural justice. I am not impressed with the completeness of the feudal ownership created by the absolute disposition. No question arises here which diminishes that complete and absolute character. Whether what remains in Mrs M'Arthur be regarded in the light of a *pactum de retrovendendo*, or whatever be the character of her interest, the real question comes back, not to the form of the transaction but to its substance, and to what is the actual bargain between the disponent and the disponent, as evidenced by the back-letter. Doubtless each of the two parties may be said to have proceeded upon a *bona fide* belief in their respective rights, and to have acted in pursuance of them, but how it can be suggested that Mrs M'Arthur could in good faith affect to charge with further sums borrowed that which she had already purported to assign I am at a loss to understand, and it is to be observed that the National Bank made the advances for which they now claim priority with the knowledge that Mrs M'Arthur had done so.

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I think the principle upon which *Hopkinson v. Rolt* was decided is one which governs this case, that its application is not confined to the law of England, but is applicable to the law of Scotland also, and I should feel myself bound by that case even did I not agree with the principle upon which it was decided. For these reasons I move that the interlocutor be reversed, and that the respondents should pay to the appellants the costs both here and below.

LORD WATSON.—This appeal raises a question of considerable importance to the law of Scotland. In disposing of it your Lordships have the great advantage of having before you the opinions of all the learned Judges of the Court of Session, which contain a clear statement of every reason that can be urged for or against the judgment appealed from.

The execution and recording of an absolute disposition of heritage, qualified by a personal contract in the form of an unrecorded back-letter, for the purpose of creating a security, has the effect of vesting the full feudal estate in the disponent, and the disponent's interest is thereby reduced to a personal right to have the estate, or the proceeds of its sale, as the case may be, reconveyed or paid to him, on payment or under deduction of the secured debts. As regards third parties who transact with him on the faith of the public records, the powers of the disponent are not affected by the private contract, and he can sell or burden the estate, and can give a valid title to the purchaser or encumbrancer, although the creation of these rights should be in direct violation of the terms of the back-letter. But in a question with the disponent himself, or with persons who through him have acquired an interest in the estate or in the personal contract, the disponent is affected by the back-letter, and is treated as the holder of a mere security. In all such cases the rights of parties must be determined, not according to the form of the disponent's title, but according to the substance of the transaction.

In *Robertson v. Duff* (2 D. 279) it was held, in the case of a security constituted by a disposition *ex facie* absolute, that the terms of the arrangement for securing debt, in pursuance of which the conveyance was made, might, as

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between the disponent and disponent, be instructed by the same kind of evidence which would be competent and sufficient to prove a trust in a question with an absolute disponent. Lord Fullerton and the other Judges who took part in the decision spoke of the case as one of trust, but the fact that they so described it does not affect the grounds of their judgment. I agree with the Lord President in thinking that the transaction with which we have to deal in this case is not within the category of proper trusts, but I do not think that it is in substance or in form a *pactum de retrovendendo*. The conveyance does not bear to be granted in implement of a contract of sale, and it was never contemplated by the parties that the National Bank should stand as purchasers with an obligation to re-sell; what they did contemplate was, that the bank should hold the subjects as a security for debt with power of sale, and under an obligation to reconvey (before sale) on receiving payment of the debt, or to account for the price under deduction of the debt. The effect of the unrecorded back-letter is to make the right of the respondents a mere security as between them on the one hand, and Mrs M'Arthur and all deriving right from her on the other. If the letter had been recorded in the Register of Sasines their right would have become a mere security in a question with the public, who would no longer have been entitled to deal with the respondents on the footing that they were the absolute proprietors of the estate.

In some of the judgments in the Court below there is a great deal of learned discussion as to the nature of the disponent's right under an unrecorded back-letter, but I do not think there is any real difference of opinion upon that point. In form it is a personal right consisting in *obligatione*, and it has been frequently described with perfect accuracy as a *jus actionis*. The right of a beneficiary under a proper trust constituted by an *ex facie* absolute disposition—the disponent acknowledging by a separate writing which does not enter the records the trust-purposes for which he holds—is a right of precisely the same quality. It is not, strictly speaking, a radical right, that being an expression which in the language of the feudal law is used to denote the right of a proprietor who, without divesting himself of his feudal estate, creates an incumbrance upon it, e.g., by means of a trust-conveyance bearing to be granted for payment of debt. But I am of opinion that the relations of the parties to this case do not depend upon feudal principles, and consequently that Lord Rutherford Clark was justified in saying that “the radical right to the subjects which had been conveyed to them (i.e., to the respondents) remained in Mrs M'Arthur.” Apart from considerations of feudal law Mrs M'Arthur had the radical right, in this sense, that according to the reality of the transaction she was the only person who had a proprietary interest in the subjects of the security, and that each successive advance, whilst it enlarged the bank's right of retention, imposed an additional burden upon her proprietary interest.

It appears to me that the key to the difference of opinion in the Court below is to be found in the widely different constructions which were put by the majority and minority of the learned Judges respectively upon Mrs M'Arthur's letter of the 12th February 1879, which contains the terms upon which the respondents agree to hold the disposition in their favour. In the opinion of the majority that letter gives the bank not only power to retain the property till they are relieved of advances made by them whilst Mrs M'Arthur continues to be owner of the reversionary interest, but an absolute right to retain it for advances made to her or her firm after she has, with the full knowledge of the

bank, transferred her whole rights as reversioner to an onerous assignee having No. 1.
 no interest in those advances, and being under no obligation to secure them. Dec. 10, 1886.
 At your Lordships' bar counsel for the respondents not only admitted but Union Bank
 maintained that, as a necessary consequence of that construction, the bank had of Scotland,
 the right to lend to Mrs M'Arthur on the security of the property, and to the Limited, v.
 full extent of its value, although she had sold the reversion as it stood, and National Bank
 had expressly undertaken not to borrow, and the sale and the terms of that of Scotland,
 undertaking had been intimated to the bank before any advance was made. Limited.
 According to the view taken by the minority, the only debts falling within the
 arrangement embodied in the letter are advances made by the bank upon the
 credit of Mrs M'Arthur, and affecting her beneficial interest in the estate which
 was feudally vested in them, and therefore the bank had no right to make
 advances affecting that beneficial interest after they became aware that she had
 been divested of her interest by an assignation to the appellants.

I cannot say that I have had any difficulty in preferring the construction of
 the personal contract between Mrs M'Arthur and the respondents which was
 adopted by the minority of the Judges, and seeing that I have been influenced
 by the very same reasons which have already been fully stated by their Lord-
 ships I shall not repeat them. It is a necessary consequence of that construc-
 tion that the preferable claim of the respondents upon the subjects vested in
 them must, in a question with the appellants, be limited to the debt due to
 them from Mrs M'Arthur and her firm at the time when the appellants' assign-
 ation was intimated, the appellants having priority for advances made after
 that date. Upon the terms of the back-letter I should have come to the con-
 clusion quite independently of the decision of this House in *Hopkinson v. Rolt*
 (9 H. of L. Cases, 514). The principle of that decision, of which I entirely
 approve, does not rest upon any rule or practice of English conveyancing, but
 upon principles of natural justice. The circumstances of the two cases are in
 many respects very analogous, but it is, in my opinion, quite sufficient for the
 decision of this case that the terms of their personal contract with Mrs M'Arthur
 precluded the respondents from making advances to her upon the security of
 property which was known by them to belong, in reality not to her, but to the
 appellants as her onerous assignees.

Notwithstanding the importance of the present case, I have confined myself
 to these somewhat desultory observations, because I entirely concur in and can
 add nothing to the reasoning of the five learned Judges who constituted the
 minority in the Court below.

I am of opinion that the interlocutor appealed from ought to be reversed,
 with costs, and that your Lordships ought to answer the second question in the
 special case in the affirmative.

LORD BLACKBURN.—I have read with attention the different judgments de-
 livered in this case below.

I have also had the advantage of reading in print the opinion of my noble
 and learned friend Lord Watson.

I do not think any benefit would be gained by my saying more than that I
 agree with the judgment proposed.

INTERLOCUTOR appealed from reversed, with costs, both on appeal
 and in Court of Session.

MURRAY, HUTCHINGS, & Co.—J. & F. ANDERSON, W.S.—ANDREW BEVERIDGE—
DOVE & LOCKHART, S.S.C.

No. 2.

July 30, 1886.
Tosh v. North
British Building
Society.

HENRY TOSH (Sixth Party), Appellant.—*Sol.-Gen. Davey—Farwell.*
GEORGE GUTHRIE (Seventh Party), Appellant.—*Sol.-Gen. Davey—Farwell.*
ROBERT FINLAY (Ninth Party), Appellant.—*Sol.-Gen. Davey—Farwell.*
NORTH BRITISH BUILDING SOCIETY AND LIQUIDATOR (First Parties),
Respondents.—*Cookson, Q.C.—MacClymont—C. E. Allan.*

Building Society—Rights of borrowing members—Effect of stopping business prior to liquidation—Liability for loss in questions between members.—The rules of a building society, constituted under the Building Societies Act, 6 and 7 Will. IV. c. 32, provided that a borrowing member who had given heritable security might have his property redeemed (1) on giving three months' notice before Whitsunday or Martinmas, by renouncing the shares representing the advance, and paying the amount of the advance under deduction of instalments already paid and interest thereon, his connection with the society, so far as these shares are concerned, then ceasing, or (2) by repaying the advance and retaining his shares, or (3) by the amount of his subscriptions with the profits allocated to him amounting to the sum advanced, his connection with the society then ceasing.

The society carried on business for some years prior to 13th May 1882, when it ceased to do so, and issued a circular to members intimating that the society had sustained loss through the depreciation of its securities, and suggesting that all members should give notice of withdrawal from the society, so as to prevent individual members obtaining preferences. On 9th July 1884 the society presented a petition for a winding-up order, which was granted on 19th July.

On 6th December 1882 Tosh, a borrowing member, paid by anticipation the final instalments on his shares, which would have fallen due and matured his shares on 3d June 1883, his subscriptions and profits allocated then amounting to the sum advanced.

On 17th April 1882 Guthrie, and on 16th May 1882 Finlay, both borrowing members, gave notice of withdrawal at Martinmas 1882.

In a special case the First Division held (1) that the society was to be held as having stopped business at 13th May 1882, and that the rights of members fell to be determined as at that date; (2) that there being no stipulation in the rules as to the incidence of loss sustained by the society, the loss fell to be borne by all members entitled by the rules to a share of the profits, and that in proportion to the sums standing at the credit of their shares; and therefore (3) that, at 13th May 1882, the three members above mentioned remained members of the society and were liable for loss sustained by the society in proportion to the sums standing at their credit.

In an appeal *held* (rev. judgment of the Court of Session) that nothing had occurred prior to the winding-up order of July 1884 to suspend the operation of the rules of the society under which the shares of borrowing members matured, and under which borrowing members were entitled to withdraw.

Held further, that the judgment of the Court below was at variance with the judgment of the House in *Brownlie v. Russell*, L. R., 8 App. Ca. 235, 10 R. (H. of L.) 19, which decided that in building societies the rights of individual members in questions between them and the society fell to be determined solely by the terms of the contract embodied in the rules, and that, although the contract might give borrowing members a right to have shares of profits allocated to them it did not thereby make them responsible for loss when that was not expressly provided for by the rules.

Ld. Chancellor
(Herschell).
Lord Black-
burn.
Ld. Fitzgerald.

(In the Court of Session, 14th July 1885, 12 R. 1271.)

The North British Building Society was established in Glasgow in 1868, under the provisions of the Act 6 and 7 Will. IV. c. 32.

The Society carried on business, and for several years made profits, out of which annually a sum was set aside as a guarantee fund, and the remainder allocated to the shares of members, borrowing and non-borrowing, in proportion to the amounts respectively standing at their credit on their shares.*

* Rule 28 was—"The Society's books shall be balanced by the manager

A great portion of the Society's funds having been advanced to members on postponed securities, the fall in the value of heritable property in 1878 (which was aggravated by the stoppage of the City of Glasgow Bank) and the bankruptcy of several of the Society's borrowing members involved the Society in serious losses. On 11th April 1882 the directors resolved to obtain from Mr Robert Taylor, builder, Glasgow, a valuator of experience, a report upon the securities which they considered doubtful, and on finding their apprehensions regarding the securities confirmed by the report, they caused a circular, dated 13th May 1882, to be issued to the shareholders, borrowing as well as non-borrowing (excepting certain shareholders who were understood to have completed their shares but who had not been paid out), inviting them to give notice of withdrawal from the Society, so as to prevent individual members obtaining preferences. To the borrowing members there was sent along with the circular a special printed slip intimating that it would be understood that withdrawals by borrowing members were not to prejudice their rights under the rules of the Society.

No. 2.

July 30, 1886.
Tooh v. North
British Building
Society.

In compliance with that request all the non-borrowing shareholders, with the exception of five, and seventeen, or about one-half, of the solvent borrowing shareholders, gave notices withdrawing their shares.

The report issued by the directors for the financial year ending 30th November 1882 shewed that there fell to be treated as lost a sum of £16,044. 9s. 11d., which would completely absorb a sum of £5509, 19s. 3d. of profits then allocated in the Society's books, and standing at the credit of the different shareholders, borrowing and non-borrowing, as well as a large amount of the capital of the Society.

The Society was carried on as usual up till 13th May 1882,—new members were admitted, and matured and withdrawing members were paid out without any deduction being made from the sums at their credit,—but thereafter the Society virtually existed only for the purposes of liquidation.

Various questions having arisen as to the rights and liabilities of the different members in the circumstances mentioned above, a special case was presented to the Court by the trustees of the Society, and by eleven different members.

The case was first heard in July 1884, when the Court doubted its competency, but intimated that they would allow it to stand on the roll with a view to the Society's being put into liquidation, when the case as it stood might perhaps be made available for the decision of the questions between the parties.

Accordingly, on 9th July, a petition was presented to the Court under the Companies Acts, 1862-1883, for a liquidation order, which was granted on 19th July, and an official liquidator appointed. The liquidator was conjoined with the trustees of the Society as a first party to the case.

The appellants Henry Tooh, George Guthrie, and Robert Finlay were respectively the sixth, seventh, and ninth parties to the special case.

The principal questions raised in the special case related (1) to the effect to be given to the circular of 13th May 1882 in suspending the operation of the rules as to the maturing of shares and the right of

annually, at the end of November, and the profits of the year shall be ascertained, and, after setting aside a sum out of the same as a guarantee fund to meet any losses that may be sustained, divided equitably among the shares, and carried to the credit of each member's account in the Society's books, and also entered at the end of the members' pass-books; but, except to the extent stated in Rule 12, shall not form part of the funds that can be withdrawn from the Society until the shares are fully completed. . . ." This was the only rule which referred to losses.

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borrowing members to withdraw from the Society, and (2) the liability of borrowing members to contribute for losses sustained by the Society.

The sixth party (Tosh) originally held forty shares in the Society. In 1871 he obtained an advance of £1000 from the Society, being the nominal amount of his shares, in security of which he granted a bond and disposition in security. From time to time thirty-two of the shares were completed by the payment of instalments and the addition of profits till the amount at the credit of the shares was equal to £25 per share, and the Society thereupon discharged the bond to the extent of £800, being the nominal amount of the thirty-two shares. At 30th November 1882 there stood at the credit of the remaining eight shares the sum of £191, 19s. 1d., including profits allocated on these shares. Interest was paid on the £200 of the bond remaining undischarged up till Martinmas 1882, and on 6th December 1882 payment was made of £8, 0s. 11d. and thereby, as the sixth party contended, the remaining balance of his bond was paid. Had he continued to pay instalments regularly on the eight shares, in terms of Rule 3, the payments would have continued till June 1883. He maintained the affirmative of the first branch and the negative of the second branch of

Question 5. "Is the sixth party entitled to cease being a member of the Society, and to have his bond and disposition in security discharged in terms of Rule 27,* without any further payment, or is he liable to bear a share of the loss sustained by the Society in proportion to the sum standing at his credit on his shares at 11th April 1882, and, in any event, is he liable for interest on his bond up till June 1883?"

The seventh party (Guthrie) held fifty-six shares, taken out at different times, and had obtained advances of £600 and £400 against forty of these, for which he had granted bonds and dispositions in security in similar terms to those granted by the sixth party. On 27th April 1882 he gave intimation of his intention to withdraw from the Society "as regards the shares not yet fully matured," and of his desire to apply the sums at the credit of all his shares towards his bonds, and to pay up any balance that might thereafter be due by him to the Society. He maintained the affirmative of the first branch and the negative of the second branch of

Question 6. "Is the seventh party entitled to a discharge of his bonds, and to cease to be a member of the Society upon payment of the difference, if any, between the amount of his bonds, with interest thereon down to 27th April 1882, on the one hand, and, on the other hand, the amounts at the credit of (1) his sixteen earlier completed shares, with bank interest thereon, from the date of their completion, and (2) his forty later unmatured shares, with periodical interest on the amount of instalments from time to time paid on said shares at five per cent to 27th April 1882; or does he fall to bear a share of the losses of the Society in proportion

* Rule 27 was—"Any member who has given any property in security to the Society may, on giving three months' notice prior to the term of Martinmas or Whitsunday in any year, redeem the same, by renouncing the shares representing the advance made thereon, and paying the amount of said advance under deduction of the instalments paid in respect of the same, and interest thereon, and his interest in said Society, so far as said shares are concerned, shall cease; or, any member who has given any property in security to the Society may redeem the same, as above, by payment of the whole sum borrowed and other dues thereon, and retain his shares in the same manner as if no advance had been made in respect of said shares; . . . or when the subscriptions, with the share of profits, of any member who has received an advance, are equal to the amount of said advance, then the payments of said member, in respect of said shares on which the advance has been made, shall cease, and his connection with the Society in respect of the same shall terminate. . . ."

to the sum standing at his credit on his shares, or any of them, or in what other way is he to be settled with?" No. 2.

The ninth party (Finlay) was a borrowing member who had, on or about July 30, 1886, 16th May 1882, in compliance with the directors' suggestion contained in Tosh v. North British Building Society. the circular of 13th May 1882, sent notice of withdrawal of his shares, using for that purpose the printed form issued with the circular. But while taking that step for his protection *quantum valeat* he further intimated to the directors his desire to continue paying up his advance by instalments as formerly, under Rule 3. He maintained (1) that he was entitled to complete his shares by paying up the instalments remaining due, getting credit for all profits which had been allocated upon them, and that upon such completion he was entitled to have his bond discharged and to cease to be a member of the Society without any liability for its losses; (2) that while his instalments remained unpaid, he was not bound to pay the interest on the full amount of his advance, but was entitled to have it rebated to the extent of the reduction effected by the payment of previous instalments and by allotted profits; (3) that he was in no view liable to bear a share of the losses of the Society.

Question 8 accordingly was, "Is the ninth party, upon payment of instalments, amounting *in cumulo* to the difference between the sum at his credit on his shares, including profits allocated thereon, and the amount of his said advance, entitled to have his bond discharged; and is he liable, so long as any of said instalments remain unpaid, to pay to the Society interest at five per cent on the full amount of said advance, or is he entitled to have the said interest abated to the extent of the reduction effected on the principal sum due by previous instalments and allotted profits? Or does he fall to bear a share of the losses of the Society, in proportion to the sum standing at the credit of his shares at 11th April 1882?"

The Court of Session, on 14th July 1885, pronounced an interlocutor containing, *inter alia*, the following findings:—"In answer to query 5, find and declare that the sixth party is liable to bear a share of the loss sustained by the Society in proportion to the sum standing at the credit of his shares as at 11th April 1882: In answer to query 6, find and declare that so far as regards the seventh party's sixteen completed shares, he is entitled to be paid the instalments at his credit, with interest, in terms of rule 12th, without deduction, as soon as the funds of the Society permit, and in preference to all members whose shares were completed, or who gave notice of withdrawal subsequent to the date when the shares were completed; but so far as regards the other shares held by him, in respect of which the advances mentioned in article 24 of the case were made, he is liable to bear a share of the losses sustained by the Society in proportion to the sum standing at his credit on these shares as at 11th April 1882: . . . In answer to the 8th query, find and declare that the ninth party is liable to bear a share of the losses sustained by the Society, in proportion to the sum standing to the credit of his shares at 11th April 1882; that the power of withdrawal is limited to shares on which no advance has been made; and that the ninth party has no preference in respect of his intimation of withdrawal, and is liable to pay the balance due on his bond, and interest, at the term of Whitsunday or Martinmas after three months' notice by the liquidator. . . ."

The appellants maintained that the case was ruled by the decision in *Brownlie v. Russell*, 10 R. (H. of L.) 19, L. R., 8 App. Ca. 235. The Court below were in error in supposing that the advanced members in *Brownlie's* case did not share in profits.

The respondents admitted this, but contended that the present case was distinguishable from *Brownlie's* case on other grounds. (1) In

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Brownlie's case the building society was constituted under the Building Societies Act, 1874 (37 and 38 Vict. c. 42), sec. 14 of which limited the liability of any member "in respect of any share upon which an advance had been made . . . to the amount payable thereon under any mortgage or other security or under the rules of the society." The Act 6 and 7 Will. IV. contained no such clause. (2) In the present case the loan transaction was an independent contract, and the debtor was bound to pay the full sum unless his shares had matured. In *Brownlie's* case the contracts were not separate; by the rules each instalment operated as a payment to account of the loan, and a back-letter had been granted binding the Society not to enforce payment of the loan so long as the instalments were regularly paid.

LORD CHANCELLOR.—The question in the present case is, whether the appellants, who are borrowing or advanced members of the respondents' Society, are entitled to redeem their securities and have their bonds discharged in terms of the rules of the Society, or are bound to remain members and bear a share of the losses sustained by the Society. The Court of Session held that they were liable to bear a share of the losses of the Society in proportion to the sums standing at their credit on their share.

The Society was established in 1868 under the Building Societies Act (6 and 7 Will. IV. c. 32). It was a building society constituted in the manner and for the purposes contemplated by that Act, and it had, according to its constitution, what are known as advanced and unadvanced members. All advances were to be made on the security of heritable property to the satisfaction of the directors, and to be made to members only. Provision is made by rule 12 for non-borrowing members withdrawing from the Society, and under rule 13 for their receiving payment on the completion of their shares. Provision is also made for borrowing members redeeming their property given in security to the Society under rule 27.

The Society carried on business, and for some years realised profits, which profits were dealt with in the manner provided for by rule 28 of the Society, to which I shall hereafter call attention, a certain portion of the profits, after setting aside a sum as a guarantee fund, being carried to the credit of each member of the Society. The Society after proceeding prosperously for some years sustained considerable losses, which absorbed the guarantee or reserve fund, and left a loss still unprovided for. In the year 1882 or prior to that year, that condition of things having been discovered by the directors, the Society ceased on the 13th of May 1882 to carry on business, and existed only for the purpose of settling the rights of its members. The Society had no liabilities to meet except its liabilities to its own members. But although the Society was found to be in that condition in 1882, and ceased carrying on business on the 13th of May of that year, no petition for winding up the Society was filed until the 9th of July 1884, on which petition a few days later a winding-up order was made.

Under these circumstances a special case was stated for the purpose of determining whether the rights claimed by the advanced or borrowing members were well founded. That special case was stated between the Society and its liquidator of the first part (although I should imagine that the liquidator, who is now among the respondents, was added at a later stage, for the special case was agreed upon before the order for winding up was made), and certain of its members, representing, as it was supposed, different interests and different states

of fact, of the other parts. The Court of Session upon that special case pronounced an interlocutor, some parts of which are appealed against; of other parts of the interlocutor no complaint is made, and your Lordships' House have not to deal with them at all. The main complaint is this, that the Court of Session held, as I have stated, that the borrowing or advanced members were not entitled merely to complete the payments necessary for repaying their advances and then to cease to be members of the Society, but that they were bound not only to complete the payments for the purpose of redeeming their properties, but also to remain members for the purpose of bearing a portion of the losses. The ground of this decision of the Court of Session is thus stated in the judgment of Lord Shand,¹—"Under the rules of the present Society the borrowing members (rule 28) are entitled to have a share of the profits divided equitably among their shares—that is, allocated to their shares in the same way as such profits are allocated and credited to the shares of non-borrowing members, and that being so, it clearly follows that the borrowing members must bear their share of the losses. As already noticed, the Society's rules or contract do not contemplate losses. It is a settled rule or principle of law, however, that an agreement to share profits, nothing being said about losses, *prima facie* means an agreement to share losses, and that in the same ratio or proportion as the parties respectively have fixed with reference to the division of profits, unless there be some stipulation to a contrary effect. We are therefore of opinion that borrowing members, who were still indebted to the Society in any part of their advances on the 13th of May 1882, when the Society stopped, are liable to bear a share of the losses sustained by the Society in proportion to the sums standing at their credit respectively on their shares at the 11th of April 1882."

Now, the view there expressed appears to me to be in direct conflict with the judgment of your Lordships' House in the case of *Brownlie v. Russell*, March 9, 1883,² which was also the case of a building society very similar to the present. The very same argument was there addressed to your Lordships' House in favour of the advanced members being under an obligation to remain members for the purpose of bearing a portion of the losses, but in delivering his opinion in that case Lord Selborne thus expressed himself,—"This is not a joint stock company, still less is it a common law partnership, but it is a society of a special kind, formed and regulated under particular Acts of Parliament for special purposes. A fallacy which has pervaded much of the argument that has been offered to your Lordships in support of the appeal is, that because the members of this society are associated together for a common purpose, therefore there must in equity and in reason, and by implication from their contract, although not in terms expressed, be a right on the part of some of the members to hold all the others liable in contribution to them for any loss which in the actual state of things they may suffer. It appears to me that such a result cannot be arrived at by presumptions or inferences from the law relating to companies of a different kind, but that we must look at this particular contract." And again, Lord Bramwell in his judgment thus expresses himself,—"It is sought to qualify the rule in this way. 'True, you have paid instalments which would satisfy the claim of the society upon you to the extent of their amount, with interest upon them under that rule, were it not that the society has sustained losses, and the

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¹ 12 R. 1285.

² 8 App. Cas. 235, 10 R. (H. L.) 19.

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instalments which you have so paid must be taken to be attributable in part to those losses, and consequently you have not in reality and in substance paid so many instalments as you have nominally.' Now, that I understand to be the contention of the appellants. What is there in the rules to justify it? There is not one word in the rules about losses being borne either by the advanced or unadvanced members, and the only reason that can be given why the advanced members or anybody else should bear the losses is, that they are to have profits if there were any. So they will undoubtedly, but it does not follow from that that they are to bear losses. It might have been a reasonable stipulation to put in if they had thought of it, but either they did not think of it, or if they did think of it they did not consider that it was reasonable to put it in, and we cannot put it in upon some speculation that if they had thought of it they would have put it in."

That appears to me to shew that the ground upon which the Court of Session proceeded cannot be supported, inasmuch as your Lordships' House have decided that such a ground is not well founded. The Court of Session sought to distinguish the case now under consideration from *Brownlie's* case in this way. They said,—“These cases,” speaking of *Brownlie's* case and another case—*The Scottish Property Investment Company v. Boyd*, November 7, 1884, 12 R. 127, —“are to be distinguished from the present in this material respect, that the borrowing members in both cases were simply debtors to the society in the sums borrowed, and had no right and were not entitled to receive any share of the profits—*Ibid.* p. 1285.” Now, the answer to that suggested distinction is, that it is not well founded in point of fact. There was precisely the same right to share in profits in *Brownlie's* case as there is in the present case, and it was frankly admitted by the learned counsel who argued this case on behalf of the respondents that they could not support the distinction which the Court of Session had made between *Brownlie's* case and the case now before your Lordships. But it was open to them no doubt to support the judgment of the Court below if they could upon some other grounds than that upon which the case was rested by the judgment of the learned Judges who decided it. And this they have attempted to do. They have argued, as I understand, that there are three distinctions between the present case and *Brownlie's* case which are sufficient to differentiate it and to shew that the judgment ought to be different.

First, they say that the building society in *Brownlie's* case had been registered under the Statute of 1874, and was subject to its provisions, and that Lord Selborne placed reliance in that case upon the provision of section 14 in the Act of 1874, that “the liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share.” No doubt it is true that distinction does exist, but I think that although the fact of that provision existing in the Act of 1874 was alluded to by Lord Selborne, it is impossible to read his judgment without seeing that it would have been precisely the same if the society had been registered only under the statute of William IV.

Next, it is said that in *Brownlie's* case, at the time when the securities and a bond with a condition for repayment of the advance made to him were given by the member to the society, a back-letter was given by the directors which provided that, notwithstanding that the bond and disposition in security is in the usual terms, “it is nevertheless understood that the same shall not be enforced

by the directors and manager of the said society as long as the said James Russell shall continue the regular payment of the instalments, interest, and other sums to become due upon his said shares in terms of the rules of the said society." No. 2.
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It is perfectly true that in the present case there is no such back-letter, but I cannot see that this makes the slightest difference in the position of the parties. It was, I think, substantially admitted by Mr Cookson, in his argument on behalf of the respondents, that although the condition of the bond was in this case absolute, and there was no back-letter, yet it would not have been open to the Society, so long as the member continued to pay in accordance with the rules of the Society, to enforce payment of the bond any more than if there had been such a back-letter. I think that distinction therefore also fails.

But then it is said (and this no doubt is the point with most substance in it) that the matter must be determined after all by the rules of the Society, and that the rules of this Society differ from the rules which were the basis of the decision in *Brownlie's* case. Now, the rule in *Brownlie's* case with regard to a member withdrawing was the 12th rule, which provided that "it shall be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving the manager one month's notice in writing, and paying up the whole of his debt, interests, and penalties after deducting the amount of the monthly instalments paid upon his shares, with interest thereon calculated at the rates referred to in rule 9." It is said, first, that in that case the provision was that there was to be deducted the amount of monthly instalments "paid upon his shares," and that this shewed that the payments which were made from time to time by the borrowing member upon his shares were payments made in repayment of the advance made to him, and other expressions in the rules are relied upon for the purpose of establishing that fact. Then, it is said that in the present case the payments made by the member as member in respect of his shares are not to be regarded as repayments of his advance; that the loan was under the rules of this Society to be treated as an entirely independent transaction, at all events down to the moment of the full amount having been paid, and that on the one hand he received the loan and made the payments of interest upon that loan, and on the other hand, he made payments quite independently upon his shares as a member of the Society, and that he was not entitled to claim when the Society was in difficulties and the winding-up came about that the payments which he had made as a member upon his shares were to be treated in any way as payments *pro tanto* in discharge of the loan.

Now, that renders necessary some examination of the rules of the Society. I am quite unable to concur in the view thus contended for. I think that, as was pointed out by the Solicitor-General, the Building Societies Act itself, without reference even to the rules, indicates the character of these advances and what is the position of an advanced member, and that in truth his position is, that he receives his share in advance, making repayments, whilst a non-advanced member is to receive his share ultimately and in the end. I may refer to the description of advanced and non-advanced members which is given by Lord Watson—and I think quite accurately—in his judgment in *Brownlie's* case. But when these rules are looked at it appears to me that this is undistinguishable from *Brownlie's* case. Rule 16 provides that "any member who has been granted an advance may, with the consent of the directors, transfer his or her right and interest therein to any other person along with the shares representing the same." What could shew more clearly than that the connection between

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the shares and the advance, and that the advance was an advance on the shares, and that the shares represented the advance!

In rule 26 the same provision is found,—“Any member who has received an advance may transfer his or her right and interest in the same to any other person, along with the shares representing the same,” and then the purchaser is to “pay on entry a transfer fee of two shillings and sixpence for each share represented by the property so transferred.”

Then when we come to rule 27, which is the most important rule that we have to deal with, we find it there provided that “any member who has given any property in security to the society may on giving three months’ notice prior to the term of Martinmas or Whitsunday in any year, redeem the same by renouncing the shares representing the advance made thereon, and paying the amount of said advance under deduction of the instalments paid in respect of the same.” Now, what are “the instalments paid in respect of the same”? These words mean—and it seems to me can only mean—the payments which have been made from time to time by the member on his shares; they are treated by this rule as instalments paid by the member in respect of his advance.

There appears to me therefore to be no substantial distinction between the rules of this Society and the rules of the society in *Brownlie’s* case, and I think therefore that the determination in *Brownlie’s* case determines the present case also. In *Brownlie’s* case it was held that after a winding-up an advanced member could not take advantage of the rule enabling him to withdraw, because his right to act under that rule ceased by reason of the order for winding-up, but it was held that the winding-up order created a kind of compulsory withdrawal of all the members who were at that time advanced members of the society, and compelled them to repay the amount which was still due upon their advances, but did not substantially alter their position or their rights or render them at all different from what they would have been if they had been withdrawing under the rules.

Now, my Lords, I proceed to the special points which are raised in the case of each of the appellants who have prosecuted this appeal before your Lordships, and I think it will be found when the facts are examined that this case is really a stronger case than the case of *Brownlie v. Russell*, inasmuch as in the present case it appears to me that the parties had strictly a right to withdraw under the rules of this Society, and had put themselves in a position to withdraw prior to any petition for winding-up being presented to the Court.

The first appellant, Tosh, if he had continued to pay his instalments pursuant to the rules, would in June 1883 have completed his payments, and the subscriptions with the share of the profits would have been equal to the amount of the advance. In such a case the third alternative in rule 27 provides that “when the subscriptions, with the share of profits of any member who has received an advance, are equal to the amount of said advance, then the payments of said member in respect of said shares on which the advance has been made shall cease, and his connection with the Society in respect of the same shall terminate. In the event of any property being redeemed or completed as aforesaid” (it would be a case of completion), “the deed granted in security thereof shall be duly discharged by a receipt.”

Now, upon the 6th of December 1882 Tosh paid to the Society the amount of £8, 0s. 11d., which was accepted by them, and which covered all the payments that fell to be made by him under the rules down to the following June.

If he had paid in the ordinary way by payments spread over the intervals down to the 3d of June 1883, he would have completed his payments in the very terms of the portion of rule 27 which I have just read. What was there to prevent his so completing his payments, and receiving by virtue of rule 27 all that the rule entitled him to receive in that event? There was no petition for winding up the Society at that time. There was nothing that I can see to affect his rights. He had done precisely what the rule provided for, and I cannot in the least see why he was not entitled to the benefit which the rule in that case gave him. It is said that although the subscriptions, with the share of the profits which had been credited to him from time to time, and which stood to his credit, together with this £8, were equal to the amount of the advance, nevertheless, the Society having made losses subsequently, you must deduct or take away profits which had been credited to him—that they were not really profits. I cannot concur in that view at all. They were profits—they are found by the case to have been profits really made, and properly credited to the shareholder year by year, of which, if at the close of any of those years he had chosen to retire, he would have been entitled to take the benefit. Under those circumstances it appears to me that when the payment of £8, Os. 11d. was made, or, at all events in June 1883, the time by which it ought to have been made, Tosh ceased to be liable to make any further payments, because his connection with the Society in respect of his shares had terminated.

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The next case is that of Guthrie. On the 27th of April 1882 Guthrie gave notice of his intention to withdraw from the Society as regards his shares, which were not fully matured—that is to say, the forty in respect of which he had received advances. What was there to prevent his doing so under the first alternative of rule 27? I can see nothing. It is true that a few days before that, the Society had ceased to carry on any fresh business; but it is not suggested that there were any outside creditors of this Society at all; the only question which arises is as to the rights of the members *inter se*. What was there on the 27th of April 1882 to prevent Guthrie giving his notice and getting his property redeemed in the very terms of rule 27? I can see nothing. Rule 27 provides that a member wishing to withdraw must give "three months' notice prior to the term of Martinmas or Whitsunday in any year." The notice therefore was too late of course for Whitsunday 1882, and I think that the right to redeem only arose at Martinmas 1882, and that the account must be taken upon that basis.

I turn now to the remaining case, the case of Finlay. Finlay gave notice to withdraw on the 16th of May 1882. I can see no distinction between his case and that of Guthrie, and I think that he too was entitled to redeem in terms of the first part of rule 27 at Martinmas 1882.

That disposes of all the questions raised in this case with the exception of a point which was indeed raised by the case but was abandoned by the Solicitor-General in the course of his opening on behalf of the appellants, namely, the question whether Finlay was entitled to continue the payments of his subscriptions under the rules notwithstanding the winding-up, and to have the benefit of a share of the profits, he having ceased to be a member under the latter part of rule 27. That point having been abandoned—and I think wisely abandoned—it is unnecessary to say anything more upon it.

LORD BLACKBURN.—A special case was stated in the Court of Session which

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expressly states that there were no outside creditors. I only mention that to shew that no question arises here, any more than it did in *Brownlie's* case, as to what might be the effect with regard to outside creditors, as I may call them, of the concern. That special case, as stated, asked eight or nine questions of the Court of Session, as to three of which the answers in the interlocutor have been appealed from. The appeal is confined to those three queries, and we have to see whether the interlocutor was right as to the answers to them.

Now, the ground upon which Lord Shand, who delivered the opinion of the Court of Session, puts the matter is this, that where according to his reasoning (I am not pretending to quote his words) a party is entitled to get profits, there on the principle "*qui sentit commodum, sentire debet et onus*," he ought to share the loss, and that that applies in such a case as this. Against that there was the decision in *Brownlie's* case, which Lord Shand held was not applicable to the present case, because, as he erroneously supposed, in *Brownlie's* case the decision in this House went upon the ground that Russell had never got any stipulation for profits at all. That was a mistake, and when the case of *Brownlie* is looked at, it is seen that it was expressly said that the question was not to be decided on the general maxim that he who shares the profit ought to bear a share of the loss, but depended upon what was the effect of the contract contained in all the rules of such a society as this. Now, in *Brownlie's* case it was held that the contract was such that the party was entitled not to withdraw from being a member, because the winding-up prevented that, but to redeem in the manner which the contract between the parties, evidenced by the rules, shewed.

That being so, the main ground upon which Lord Shand and the Court of Session went is, I think, not tenable. I do not mean to say that if it were *res integra* there might not be a great deal to be said in support of the opinion which he delivered, but it was distinctly decided by the House of Lords that that principle did not apply to the case of such a society as this, and that being so, we must consider that as decided, and as a fixed matter no longer open to be examined into at all. It was, however, said in the argument that though that was so, yet the actual contract made in this case was not the same as in *Brownlie's* case, because the rules were not identical. There was also a point made that the Acts were different, but I think that I need not mention that, because it has been quite answered by what has been said by the noble and learned Lord, the Lord Chancellor, in his judgment just delivered. Then there is the fact, no doubt, that the bond which was delivered in *Brownlie's* case had a back-letter attached to it, but I think that that makes no real difference. The advance which was made, whether under a bond, according to the English form of doing it, without any back-letter, or under a bond with a back-letter, was equally an advance made under the terms of the contract, whatever it was, arising from the rules.

Then it is said that the rules in this particular case are not identical with those in *Brownlie's* case, and I think that they are not identical, and if any of them did materially differ, it might make a difference in the contract which we are to apply to the particular case. All that your Lordships have now to deal with, and all that I have to deal with, are those three cases which are brought before us. I have not thought it necessary to look at the others, and when we look at those three cases we find that there is really no difference in the effect of the contract which arose from the rules.

Tosh's is the first case. I need not go through it; the Lord Chancellor No. 2.
 stated the effect of what had been done, and I quite agree that the answer as
 respects Tosh's case, called the sixth party in the Court below, was a mistaken July 30, 1886.
 answer, and that the interlocutor ought to be varied in the manner proposed Tosh v. North
 by the Lord Chancellor. Then comes Guthrie's case, who was the seventh British Build-
 party, as he was called in the special case. There is a part only of the inter- ing Society.
 locutor as regards him which is appealed against, and I agree that that should
 be altered in the manner which the Lord Chancellor proposes. Then comes the
 last case, namely, that relating to Findlay, which is the subject of the eighth
 query. A part of what was there appealed against has been given up. The
 whole of what was there appealed against has not to be altered, but a part has
 to be altered, and accordingly I think that the interlocutor ought to be varied
 in the way proposed.

LORD FITZGERALD.—I concur in the reasoning of the Lord Chancellor and in
 the amendments of the interlocutor which he proposes. I am the only member
 of the house now present who took part in the decision of *Brownlie's* case. That
 case was not disposed of immediately after the hearing of the argument. There
 was some novelty in it, and time was taken for consideration, and even more
 than ordinary care was applied to it. From the beginning of the argument in
 the present appeal I have thought that it was governed in every part by the
 decision of your Lordships' House in *Brownlie v. Russell*.

LORD CHANCELLOR.—The order will be that the costs of both parties be paid
 by the liquidator out of the Society's estates.

INTERLOCUTOR appealed from varied by omitting the answer to query
 5 and substituting therefor the following words:—"In answer to
 query 5, find and declare that the sixth party is entitled to cease
 being a member of the Society, and to have his bond and disposi-
 tion in security discharged in terms of rule 27, without any further
 payment, and that he is not liable to bear a share of the loss sus-
 tained by the Society in proportion to the sum standing at his
 credit on his shares at 11th April 1882"; by omitting so much of
 the answer to query 6 as is appealed against, and substituting
 therefor the following words:—"So far as regards the other shares
 held by him in respect of which the advances mentioned in art.
 24 of the case were made, he is entitled in terms of art. 27 to a
 discharge of his bonds, and to cease to be a member of the Society,
 upon payment of the difference between the amount of his bonds,
 with interest thereon down to Martinmas 1882, on the one hand,
 and, on the other hand, the amount of the instalments paid in
 respect of the shares, with interest on the amount of the instal-
 ments from time to time paid at 5 per cent to Martinmas 1882,
 and that he does not fall to bear a share of the losses of the Society
 in proportion to the sum standing to his credit on his shares";
 and by omitting the answer to the eighth query and substituting
 the following:—"In answer to the eighth query, find and declare
 that the ninth party is entitled to have his bond discharged, and
 to cease to be a member of the Society, in terms of art. 27, upon
 payment of the difference between the amount of his bond with
 interest thereon down to Martinmas 1882, on the one hand, and,
 on the other hand, the amount of the instalments paid in respect
 of his shares, with interest on the amount of the instalments from
 time to time paid at 5 per cent to Martinmas 1882, and that he

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ing Society.

does not fall to bear a share of the losses of the Society in proportion to the sum standing to his credit on his shares, but that he is not entitled to complete his shares by paying up the instalments which remain due thereon, getting credit for all profits which have been allocated upon his shares, and upon such completion to have his bond discharged and cease to be a member.

"The costs of all parties to this appeal to be paid out of the estate of the respondent Society."

DAVIDSON, BURCH, & Co.—MACKENZIE & BLACK, W.S.—LINDO & Co.—
DAVID TURNBULL, W.S.

No. 3.

Nov. 12, 1886.
Lanarkshire
(Lower Ward)
Road Trustees
v. Kelvinside
Estate Trus-
tees.

THE COUNTY ROAD TRUSTEES OF THE COUNTY OF THE LOWER WARD OF
LANARK (Second Parties), Appellants.—*Sol.-Gen. Robertson, Q.C.*—
Horace Davey, Q.C.

KELVINSIDE ESTATE TRUSTEES (First Parties), Respondents.

Road—Roads and Bridges Act, 1878 (41 and 42 Vict. cap. 51), sec. 119—Maintenance of roads—Lighting.—*Held* (rev. judgment of Second Division) that sums raised by assessment under the Roads and Bridges Act, 1878, for "maintaining and repairing" roads, cannot be applied to light them.

Road—Transference of statutory obligations—Roads and Bridges Act, 1878 (41 and 42 Vict. c. 51), sec. 32.—*Held* (in rev. judgment of Second Division) that sec. 32 of the Roads and Bridges Act, 1878, in providing that county road trustees to whom a road is thereby transferred shall be liable in all the debts, liabilities, claims, and demands, in which the trustees of such road "are or were liable under any general or local Act then in force," does not continue and transfer to the county road trustees the statutory powers and duties conferred and imposed by such prior Acts upon the trustees from whom the road is transferred, and that county trustees were not entitled to spend money raised by assessment for the maintenance of a road in lighting the same, although the trustees from whom the road had been transferred were bound to do so under a local Act.

Ld. Chancellor
(Halsbury).
Lord Black-
burn.
Lord Watson.

(In the Court of Session, July 16, 1884, 11 R. 1097.)

In a special case presented to the Second Division the questions stated for the opinion of the Court were—"(1) Are the second parties bound to light the said Great Western Road? (2) Have the second parties power to expend funds raised by assessment under the powers of the Roads and Bridges Act, in lighting or contributing to light roads or parts of roads in localities where, from the extent of the traffic or other ordinary causes, such lighting may appear to them a proper precaution, with the view of avoiding the risk of accident, or otherwise desirable in the general interests of the public using the roads?"*

The Court answered both questions in the affirmative.

* Section 14 of the Great Western Road Act enacted,—"That it shall and may be lawful to and for the said trustees, and they are hereby authorised and empowered, to cause the said main line of road from Anniesland to St George's Road to be watched and lighted after sunset and during night, and to pay and defray the costs and charges thereof out of the tolls, rates, and duties, and other monies authorised to be levied and raised under and by virtue of this Act, on or for the said road herein authorised to be made."

Section 23 of the same Act enacted that the trustees under the Act "shall," *inter alia*, apply "the tolls to be levied as aforesaid towards the making, completing, and keeping in repair, and watching and lighting the said roads and bridges, and putting this Act into execution, and thereafter towards the payment of the interest of the sum or sums subscribed or to be subscribed, borrowed, and advanced under and by virtue of this and the said recited Act."

Section 32 of the Roads and Bridges (Scotland) Act enacted,—"From and after the commencement of the Act, the whole turnpike roads, statute-labour

The County Road Trustees of the county of the Lower Ward of Lanark, second parties, appealed. No. 3.

The trustees for the Kelvinside Estate, respondents, did not appear in the House of Lords.

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LORD CHANCELLOR.—In this case the learned Judges in the Court below attached a significance to the words “maintenance and repair” which it seems impossible to maintain. The words “maintenance and repair” have been in use both in English and Scottish statutes for a very considerable period, and I am not aware that any contention has ever been urged that “maintenance and repair” include the duty of lighting. Lighting and Watching Acts which have been passed from time to time for particular localities are of a totally different character, throwing upon the persons who are immediately concerned in the preservation of the localities where the lighting and watching are to be maintained the obligation of maintaining them. Upon the general question, therefore, I must say, with very great respect for the Court below, I am unable to follow them in their judgment that the maintenance of lights is part of the “maintenance” of the roads. “Maintenance and repair of a road” are words which explain themselves without any difficulty at all. I am totally unable to concur in the view that the “maintenance and repair of the roads” vested in the trustees any power or duty or obligation of maintaining lighting; nor have they authority, indeed, to expend money raised for the purposes of “maintenance and repair” upon purposes entirely alien to that duty, although it may be very convenient and proper and necessary in particular places that the roads under their charge should be lighted.

With respect to the second question, it seems to me that it is equally clear. A road was in existence with particular duties and particular privileges attached to the persons who were the guardians of that road. Then came the general Act which swept the guardianship away, and swept away the power of raising the rates by which the then guardians were empowered to perform those particular duties which were cast upon them, and it threw upon the general law the guardianship of the maintenance and repair of that road. Then came natural and appropriate words to protect such persons as might have entered into rela-

roads, highways, and bridges within each county respectively shall form one general trust, with such separate district management as shall be prescribed by the trustees as hereinbefore provided; and all the roads, bridges, lands, buildings, works, rights, interests, monies, property, and effects, rights of action, claims and demands, powers, immunities, and privileges whatever, except as hereinafter provided, vested in or belonging to the trustees of any such turnpike roads, statute-labour roads, highways, and bridges within the county, shall be, by virtue of this Act, transferred to or vested in the county road trustees appointed under this Act, who, subject to the qualifications hereinafter expressed, shall be liable in all the debts, liabilities, claims, and demands in which the trustees of such turnpike roads, statute-labour roads, highways, and bridges, are or were liable under any general or local Act then in force, except in so far as such debts, liabilities, claims, and demands may, under the provisions of this Act, be discharged, reduced, or extinguished.”

Section 119 of the Roads and Bridges Act enacted,—“All monies received by the trustees on account of assessments or penalties, or otherwise, for the application of which no special provision is made in this Act, shall be applied as follows,— . . . (2) In payment of the expense of maintaining and repairing the several highways.”

The second parties also referred to schedule C of the Act.

No. 3. tions with those guardians, giving those persons the same remedies against those whom I have described as the guardians of that road as they would have had but for the passing of that Act which so swept their powers and their duties away. But it seems to me to be a very violent construction of that Act to assume that the road trustees are, with reference to that particular road, to have any different duties or any different obligations from those which are cast upon them, with respect to the general roads of the country.

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tees.

I am therefore of opinion, and I so move your Lordships, that the judgment of the Court below should be reversed, and judgment for the appellants entered accordingly.

LORD BLACKBURN concurred.

LORD WATSON.—I am bound, with all respect to the learned Judges who constituted the Second Division upon the hearing of this cause, to say that in my opinion the answer to neither of these questions is attended with any difficulty. Both ought, in my opinion, to be answered in the negative. As regards the first of them, it appears to me that the learned Judges have misconstrued the 32d section of the Roads and Bridges (Scotland) Act, 1878. The object and effect of the provisions of that clause are simply this, to save all collateral contracts, engagements, and liabilities which have been properly and lawfully created by virtue of the powers of any Act by the trustees who administered it. The intention of the section was not to keep up the statutory obligations as continuing obligations, or the statutory powers as continuing powers. If I could come to the same conclusion as the learned Judges, which I am altogether unable to do, I should also be compelled to come to the conclusion that the power to exact tolls was likewise kept up and carried forward, because it is only from that source that there is any statutory warrant for defraying the cost of lighting and watching.

As to the second question, I entirely agree with your Lordships that it is impossible to hold that lighting is included in the "maintenance and repair" of a road according to any reasonable construction of those terms. I do not say whether or not they might have been altered and expanded if there had been something in the context of the statute to shew that the Legislature did intend that the trustees should also light the roads. In that case there might have been some ground for coming to the conclusion of the Court below. But there is not the slightest indication that such was the intention of the Legislature. On the contrary, the powers which they have conferred upon, and the duties which they have given to, the new trustees under the Act of 1878, are so minute as to exclude, in my humble opinion, the supposition that the granting of any such power was intended.

THE HOUSE reversed the interlocutor of the Second Division, and found that the questions in the special case, which the Court of Session answered in the affirmative, ought to be answered in the negative.

GRAHAMES, CURREY, & SPENS—MACKENZIE & BLACK, W.S.

No. 4. JOHN WILLIAM BURNS, Pursuer (Appellant).—*Sol.-Gen. Robertson, Q.C.—Rigby, Q.C.*

Feb. 14, 1887. MRS MARY ANN MARTIN, Defender (Respondent).—*Balfour, Q.C.—Rhind.*

Burns v.
Martin.

Lease—Lease to two persons and the survivor—Respective heirs bound conjunctly and severally.—In a lease in favour of two persons and the survivor the tenants bound "themselves and their respective heirs, executors, and suc-

cessors, all conjunctly and severally, renouncing the benefit of discussion, to pay " No. 4.
the rent to the landlord.

Held (in *rev.* judgment of Second Division) that on the death of one of the tenants his representatives became jointly and severally liable with the survivor for the rent till the termination of the lease. Feb. 14, 1887.
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Police Commissioners of Dundee v. Straton, 11 R. 586, *approved*.

(In the Court of Session, 17th July 1885, 12 R. 1343.)

The pursuer appealed.

Ld. Herschell.
Lord Watson.

LORD HERSCHELL.—My Lords, during the argument of this case there were present my Lord Blackburn, my noble and learned friend on my left (Lord Watson), and myself. Lord Blackburn is unable to be present and to take part on this occasion, and accordingly an intimation was given to the parties that if they desired it the case might be re-argued, although all those who heard the argument agreed as to the judgment which ought to be delivered. The parties have expressed no such desire, but have prayed for the judgment of your Lordships' House, and under these circumstances there seems to be no difficulty in its being pronounced.

In this case the respondent was sued, as executrix of her deceased husband Hugh Martin, for two half years' fixed rent under a mineral lease granted by the appellant to William Logan and Hugh Martin for thirty-one years from Martinmas 1882.

The sole question, as it appears to me, is, whether upon the true construction of the covenant for payment of rent contained in the lease, the legal representative of a deceased lessee became liable for the rent accruing after his death?

The lease was granted to William Logan and Hugh Martin "and the survivor of them, but expressly excluding assignees and subtenants, whether legal or conventional." The covenant is in these terms,—“The said William Logan and Hugh Martin bind and oblige themselves and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion, to pay to the said John William Burns, his heirs and successors, and to his or their factor or agent, the sum of £200 sterling yearly for each of the first five years of this lease, and the sum of £250 sterling yearly thereafter during the currency of this lease in name of fixed rent or tack-duty, . . . for the privilege of working and disposing of the fire-clay in manner herein mentioned”; or in the option of the lessor a royalty on the output of the fire-clay instead of the fixed rent.

There can be no doubt, in view of the terms of the grant, that the interest of Hugh Martin under the lease ceased on his death, and that the entire interest then vested in William Logan as the survivor.

It has been contended by the respondents that on the true construction of the covenant all liability on the part of Hugh Martin or his representatives terminated at the date of his death.

The majority of the Judges of the Second Division of the Court of Session were of opinion that this contention was well founded, though they rested their judgment on another ground, to which I shall presently refer.

I confess that I approach the construction of the covenant with every inclination to take the same view. I am fully alive to the force of the argument that it is not to be expected that the representatives of the deceased lessee should be made equally liable with the survivor to the payment of the rent seeing that the entire benefit passes to him.

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But, after all, the case must be determined by a careful scrutiny of the language used, and by giving to that language its natural grammatical meaning. It is not an impossible or inconceivable bargain that each of the lessees should agree that his estate should remain liable for the rent notwithstanding that the lease enured to the benefit of the survivor. If the covenant had been fairly open to either construction, I should certainly have yielded to the argument of the respondent; but upon the best consideration I can give to the matter I cannot avoid the conclusion that the plain natural meaning of the words of the covenant is that the representatives of Hugh Martin became liable for payment of the rent after his decease. It is unnecessary for me to state in detail the considerations which have led me to this conclusion, as I have had the advantage of perusing the opinion of my noble and learned friend (Lord Watson), and I concur entirely with the reasons he has expressed. I think that, ignorant as we must necessarily be of the surrounding circumstances which might have explained the bargain and shewn that it was reasonable, we should be quite as likely to do injustice as justice if we were to depart from the natural construction of the language employed by the parties, because we thought the result unreasonable and such as was probably not intended. The only safe rule in cases like the present is a strict adherence to the view that the parties intended that which is the natural meaning of the language they have used. As this case involves a question of Scotch conveyancing, it is a great satisfaction to me to find that my noble and learned friend (Lord Watson), who is so well versed in such matters, and also two out of the four learned Judges who have had to consider the case, have arrived at the same conclusion to which I have felt myself compelled.

Placing the construction which I have expressed upon the covenant, the whole case is, in my judgment, disposed of in favour of the appellant.

The Lord Justice-Clerk and Lord Young held that the appellant had put himself out of Court by the allegations contained in his third condescendence. That condescendence states that "the estates of William Logan were, on or about the 19th October 1883, sequestrated under the Bankruptcy Statutes, and thereupon the tenants' rights and liabilities in and under the said lease devolved wholly on the said Hugh Martin, who accordingly made payment to the pursuer of the fixed half year's rent due in terms thereof at the term of Martinmas 1883, and worked and manufactured the said fire-clay, and carried on the said business as alone interested therein, and in the subjects let by the said lease."

To this condescendence the answer was as follows:—"Admitted that W. Logan's estate was sequestrated on the 19th October 1883. Admitted that the Martinmas 1883 rent was paid by Mr Martin. *Quoad ultra* denied. The clause of the lease regarding bankruptcy is in these terms:—"It is hereby specially provided and declared that if the second parties, or either of them, or their foressaids, shall become bankrupt, or if sequestration shall be awarded against them or either of them, . . . this lease shall, in the option of the first party or his foressaids, become *ipso facto* void and null."

Upon the statement of the pursuer in his third condescendence, that on Logan's bankruptcy and sequestration the tenants' rights and liabilities under the lease devolved wholly on Hugh Martin, Lord Young observes that this necessarily implies that the pursuer as landlord deprived Logan and the trustee in his bankruptcy of all rights, and freed them from all liabilities under the lease, which he was entitled to do by reason of the bankruptcy and sequestration. He then proceeds,—“But if Logan and his trustees were thus deprived of all

rights, and freed of all liabilities as from the 19th of October 1883, Logan could not by his survivance become tenant on Martin's death three months after, in January 1884. It follows clearly, and indeed necessarily, that the defender cannot be liable or bound for rents due by Logan since Martin's death." No. 4.
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I am quite unable to concur in this reasoning. Even if the allegations in the condescendence had been admitted by the defender, I do not think that the conclusion arrived at by Lord Young would have followed. The allegation that on Logan's bankruptcy the tenant's right and liabilities under the lease devolved on Martin, I construe as stating the legal effect of the sequestration, and not as alleging any matter of fact, and when the terms of the lease are looked at, it is clear that the allegation was not well-founded. The only effect of the sequestration was to give an option to the lessor to make the lease void and null. It is clear that he did not avail himself of this option, and it is not alleged that he did. And I cannot see how an erroneous allegation of this description can alter the rights either of Logan or the pursuer. But the defender denied the allegation, and no doubt rightly denied it. Under these circumstances I am, with deference to the learned Judges who have taken a different view, at a loss to understand how the pursuer, if otherwise entitled to recover, could be deprived of that right by reason of an erroneous allegation, denied by the defender, the issue on which would therefore have to be found in favour of the defender, but if so found would establish no bar to the pursuer's claim.

I think that the judgment of the Court below should be reversed, and the interlocutor of the Lord Ordinary of the 12th of March 1885 restored, and that the respondent should pay the costs in the Court below, and of this appeal, and I move your Lordships accordingly.

LORD WATSON.—By a lease executed in February 1883 the appellant let the seams of fire-clay in part of his estate of Cumbernauld for thirty-one years from Martinmas 1882 to "William Logan and Hugh Martin, and the survivor of them," assignees and subtenants, whether legal or conventional, and also managers, being expressly excluded, except with the written consent of the lessor. The tenants are empowered to renounce the lease upon giving intimation by registered letter to the lessor six months previous to the term of Martinmas 1887, or previous to any term of Martinmas thereafter at which any subsequent consecutive period of five years shall expire. In the event of the tenants or either of them becoming bankrupt, or of their estates being sequestrated, it is provided that the lease shall, in the option of the lessor, become void and null.

William Logan's estates were sequestrated on the 19th of October 1883, and Hugh Martin died on the 5th of January 1884. The half year's fixed rent of £100 falling due at Martinmas 1883 was paid by Martin. The respondent is the sole accepting trustee and executrix under Hugh Martin's deed of settlement, and the present action was brought against her in that character by the appellant for payment of two half years' rents which became due at the terms of Whitsunday and Martinmas 1884.

It was assumed in the arguments addressed to your Lordships, and it does not appear to me to admit of doubt, that by the conception of the lease Logan and Martin are made joint tenants during their joint lives; that on the predecease of one of them the survivor becomes the sole tenant; and that on the survivor's decease the right of tenancy devolves upon his heir of line. Accordingly William Logan on the death of Martin became, and now is, sole tenant

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under the lease unless his right has been in some way determined. The appellant's case is, that Martin's heirs and executors, although they have no interests as tenants, remain liable for rent during the currency of the lease; whereas the respondent maintains that by the terms of the lease the liability of the predecessor's representatives is limited to rents which accrued during his lifetime.

The Lord Ordinary (Trayner) gave the appellant decree in terms of the conclusions of his summons, but the Second Division of the Court recalled his interlocutor, ordained the respondent to pay £30, 2s. 8d. sterling, being the proportion of fixed rent for the period between Martinmas 1883 and the date of Hugh Martin's death, and *quoad ultra* assolizied. Lord Rutherford Clark dissented from the judgment. The Lord Justice-Clerk and Lord Young, who constituted the majority of the Court, indicated their opinion that the heirs and executors of Hugh Martin were not liable for rents becoming due after his death, but they rested their decision upon the ground that the appellant had judicially admitted that the lease came to an end by the sequestration of Logan, and consequently that after the death of Martin there was no longer any tenant liable for rent.

The averments which the learned Judges treated as a judicial admission to the foregoing effect are in these terms,—“Thereupon” (*i.e.*, upon the sequestration of William Logan's estates) “the tenants' rights and liabilities devolved wholly on the said Hugh Martin, who accordingly made payment to the pursuer of the fixed half year's rent due in terms thereof at the term of Martinmas 1883, and worked and manufactured the said fire-clay and carried on the said business as alone interested therein, and in the subjects let by said lease.” That is plainly an erroneous statement of the law, because Logan's sequestration could not affect his position as tenant unless the appellant exercised his option of putting an end to the whole lease, which he admittedly never did. Even if the statement were accepted as correct, I do not think it could bear the construction which was put upon it by the majority of the Court. Its import appears to be, that on his sequestration Logan's interest in the lease came to an end, and that the whole rights and liabilities of tenants passed to Martin. If the interest of Logan had been thus extinguished, and the exclusive right to the lease had thereupon vested in Martin, his heir would have become the tenant on his death, and in that event the respondent did not dispute that his estate would have continued liable for the rent. But the respondent meets the statement with an explicit denial, and had it been as favourable to her case as the learned Judges thought it was, I venture to doubt whether the respondent would have been entitled, without an amendment of the record, to found upon a statement which she denies, as a judicial admission in her favour.

The clause of obligation for payment of rent is in these terms,—“The said William Logan and Hugh Martin bind and oblige themselves, and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion, to pay to the said John William Burns, his heirs and successors, and to his or their factor or agent, in his or their names, the sum of £200 sterling for each of the first five years of this lease, and the sum of £250 sterling thereafter during the currency of this lease, in name of fixed rent or tack-duty,” or in the option of the lessor, a royalty on the output of fire-clay instead of the fixed rent.

I think it was rightly argued for the respondent that according to the law of Scotland it must be presumed that an obligation to pay rent is only meant to

attach to those persons who are for the time being in right of the lease as tenants. In *Skene v. Greenhill*, May 20, 1825, 4 S. 25, a tenant who had expressly bound himself, "his heirs, executors, and successors," for payment of the rent, assigned the lease with the assent of the landlord, and it was held that the cedent and his representatives were under no obligation to pay rents becoming due after the assignee entered into possession. A tenant may, however, engage that he and his representatives shall remain bound along with his successors in the lease, and if he contracts in terms which, according to their just construction, imply that he has undertaken that responsibility to the lessor, the stipulation must receive effect. Had the obligation in *Skene v. Greenhill* been laid upon the tenant, and his heirs, executors, and successors, "all conjunctly and severally," I think the decision would have been different, because in that connection the words which I have added, "all conjunctly and severally," plainly import that the tenant and his representatives are to remain liable for rent along with persons succeeding to the lease as assignees. In the case of *The Police Commissioners of Dundee v. Straton*, February 24, 1884, 11 R. 586, an original fœnar bound and obliged "himself, and his heirs, executors, and successors, conjunctly and severally," for the prestations of the feu, and the First Division of the Court decided that, after the feu had been transmitted to a singular successor, the original vassal and his estate continued to be liable to the superior for these prestations. In my opinion the same words which in a feu-right are sufficient to imply that the original vassal and his representatives are to remain liable in perpetuity, notwithstanding their having ceased to possess any interest in the feu, must, when they occur in a lease, be equally effective to bind the original tenant and his representatives for the terms of its endurance although they have ceased to be tenants. It was suggested by the respondent's counsel that *The Police Commissioners of Dundee v. Straton* was not well decided, and ought to be re-considered; but I am unable to see that the Court could have arrived at any other decision in that case, unless they had refused to attribute their ordinary meaning to the words "conjunctly and severally." The presumption that liability for rent is confined to those having the tenants' interest is, however, so strong that if it be doubtful to what persons "conjunctly and severally" apply, those words must be read as exclusively applicable to the tenant for the time being and his representatives.

The present case seems to me to depend upon the application which ought to be given to the words "all conjunctly and severally, renouncing the benefit of discussion," as these occur in the clause of obligation for rent. Do they unite in one common obligation all the parties enumerated, or must they be read distributively, and as applying separately to the heirs, executors, and successors of Logan, and the heirs, executors, and successors of Martin? In the one view the representatives of Martin are liable for the rent as long as the lease endures, in the other they are not liable for rents becoming due after the death of Hugh Martin, unless the tenant is his heir or assignee.

In my opinion the words "renouncing the benefit of discussion" may be treated as surplusage, because persons who are bound conjunctly and severally cannot plead the *beneficium ordinis*. It was argued that the words, though in that sense superfluous, are nevertheless officious as indicating that a common obligation was only to attach to such heirs, executors, and successors as were subject *inter se* to the rule of discussion; and that inasmuch as the rule had no application between the representatives of Logan and the representatives of Martin,

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under the lease unless his right has been in some way determined. The appellant's case is, that Martin's heirs and executors, although they have no interests as tenants, remain liable for rent during the currency of the lease; whereas the respondent maintains that by the terms of the lease the liability of the predecessor's representatives is limited to rents which accrued during his lifetime.

The Lord Ordinary (Trayner) gave the appellant decree in terms of the conclusions of his summons, but the Second Division of the Court recalled his interlocutor, ordained the respondent to pay £30, 2s. 8d. sterling, being the proportion of fixed rent for the period between Martinmas 1883 and the date of Hugh Martin's death, and *quoad ultra* assoilzied. Lord Rutherford Clark dissented from the judgment. The Lord Justice-Clerk and Lord Young, who constituted the majority of the Court, indicated their opinion that the heirs and executors of Hugh Martin were not liable for rents becoming due after his death, but they rested their decision upon the ground that the appellant had judicially admitted that the lease came to an end by the sequestration of Logan, and consequently that after the death of Martin there was no longer any tenant liable for rent.

The averments which the learned Judges treated as a judicial admission to the foregoing effect are in these terms,—“Thereupon” (*i.e.*, upon the sequestration of William Logan's estates) “the tenants' rights and liabilities devolved wholly on the said Hugh Martin, who accordingly made payment to the pursuer of the fixed half year's rent due in terms thereof at the term of Martinmas 1883, and worked and manufactured the said fire-clay and carried on the said business as alone interested therein, and in the subjects let by said lease.” That is plainly an erroneous statement of the law, because Logan's sequestration could not affect his position as tenant unless the appellant exercised his option of putting an end to the whole lease, which he admittedly never did. Even if the statement were accepted as correct, I do not think it could bear the construction which was put upon it by the majority of the Court. Its import appears to be, that on his sequestration Logan's interest in the lease came to an end, and that the whole rights and liabilities of tenants passed to Martin. If the interest of Logan had been thus extinguished, and the exclusive right to the lease had thereupon vested in Martin, his heir would have become the tenant on his death, and in that event the respondent did not dispute that his estate would have continued liable for the rent. But the respondent meets the statement with an explicit denial, and had it been as favourable to her case as the learned Judges thought it was, I venture to doubt whether the respondent would have been entitled, without an amendment of the record, to found upon a statement which she denies, as a judicial admission in her favour.

The clause of obligation for payment of rent is in these terms,—“The said William Logan and Hugh Martin bind and oblige themselves, and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion, to pay to the said John William Burns, his heirs and successors, and to his or their factor or agent, in his or their names, the sum of £200 sterling for each of the first five years of this lease, and the sum of £250 sterling thereafter during the currency of this lease, in name of fixed rent or tack-duty,” or in the option of the lessor, a royalty on the output of fire-clay instead of the fixed rent.

I think it was rightly argued for the respondent that according to the law of Scotland it must be presumed that an obligation to pay rent is only meant to

attach to those persons who are for the time being in right of the lease as tenants. In *Skene v. Greenhill*, May 20, 1825, 4 S. 25, a tenant who had expressly bound himself, "his heirs, executors, and successors," for payment of the rent, assigned the lease with the assent of the landlord, and it was held that the cedent and his representatives were under no obligation to pay rents becoming due after the assignee entered into possession. A tenant may, however, engage that he and his representatives shall remain bound along with his successors in the lease, and if he contracts in terms which, according to their just construction, imply that he has undertaken that responsibility to the lessor, the stipulation must receive effect. Had the obligation in *Skene v. Greenhill* been laid upon the tenant, and his heirs, executors, and successors, "all conjunctly and severally," I think the decision would have been different, because in that connection the words which I have added, "all conjunctly and severally," plainly import that the tenant and his representatives are to remain liable for rent along with persons succeeding to the lease as assignees. In the case of *The Police Commissioners of Dundee v. Straton*, February 24, 1884, 11 R. 586, an original feuar bound and obliged "himself, and his heirs, executors, and successors, conjunctly and severally," for the prestations of the feu, and the First Division of the Court decided that, after the feu had been transmitted to a singular successor, the original vassal and his estate continued to be liable to the superior for these prestations. In my opinion the same words which in a feu-right are sufficient to imply that the original vassal and his representatives are to remain liable in perpetuity, notwithstanding their having ceased to possess any interest in the feu, must, when they occur in a lease, be equally effective to bind the original tenant and his representatives for the terms of its endurance although they have ceased to be tenants. It was suggested by the respondent's counsel that *The Police Commissioners of Dundee v. Straton* was not well decided, and ought to be re-considered; but I am unable to see that the Court could have arrived at any other decision in that case, unless they had refused to attribute their ordinary meaning to the words "conjunctly and severally." The presumption that liability for rent is confined to those having the tenants' interest is, however, so strong that if it be doubtful to what persons "conjunctly and severally" apply, those words must be read as exclusively applicable to the tenant for the time being and his representatives.

The present case seems to me to depend upon the application which ought to be given to the words "all conjunctly and severally, renouncing the benefit of discussion," as these occur in the clause of obligation for rent. Do they unite in one common obligation all the parties enumerated, or must they be read distributively, and as applying separately to the heirs, executors, and successors of Logan, and the heirs, executors, and successors of Martin? In the one view the representatives of Martin are liable for the rent as long as the lease endures, in the other they are not liable for rents becoming due after the death of Hugh Martin, unless the tenant is his heir or assignee.

In my opinion the words "renouncing the benefit of discussion" may be treated as surplusage, because persons who are bound conjunctly and severally cannot plead the *beneficium ordinis*. It was argued that the words, though in that sense superfluous, are nevertheless officious as indicating that a common obligation was only to attach to such heirs, executors, and successors as were subject *inter se* to the rule of discussion; and that inasmuch as the rule had no application between the representatives of Logan and the representatives of Martin,

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it must have been the intention of the parties to the lease to impose a separate conjunct obligation upon each class. That argument appeared to me to be completely met by the appellant's counsel, who pointed out that the rule as to discussion, if not excluded, obtains not only between heir and executor, but between an actual tenant and those persons who, having no interest as tenants, are bound along with him for rent, all such persons being mere cautioners in any question with the tenant.

I have been unable to resist the conclusion that by the terms of the clause of obligation each and all of the parties therein mentioned are made conjunctly and severally liable for rent, irrespective of their interests, during the subsistence of the lease. I agree with Lord Rutherford Clark and the Lord Ordinary in thinking that the meaning of the clause is really not doubtful, and that there is no such ambiguity in its language as to entitle the respondent to the benefit of the presumption that only William Logan, the tenant, and his representatives are to be responsible for future rents.

The only term in the clause which appears to me to be capable of suggesting a construction favourable to the respondent is the word "respective" upon which much stress was laid in the argument on her behalf. If the expression used had been "their heirs, executors, and successors," it was hardly contended that the respondent could have escaped from liability. But it was argued that the word "respective" is used to mark a separation between the two classes of representatives; and consequently that the clause ought to be read in the same way as if William Logan had bound himself and his heirs, executors, and successors, all conjunctly and severally, and Hugh Martin had in like manner bound himself and his heirs, executors, and successors, all conjunctly and severally. Logan and Martin begin however by binding "themselves" conjunctly and severally, and the word "respective" appears to me to be introduced, not for the purpose of separating the obligees into two classes, but for the purpose of indicating that the obligation common to both classes was imposed by each of them upon his own representatives, which was all that he had power to do. Then the introduction of the word "all" before "conjunctly and severally" makes it clear, in my opinion, that the two original tenants, and their heirs, executors, and successors, were each and every one of them to be equally liable for rent to the lessor so long as the lease endured.

Lord Young in giving judgment expressed an opinion that the appellant's abstaining from the exercise of his right to void the lease, and his retention of an undischarged bankrupt who was not in possession as his tenant would constitute an inequitable and unconscionable device for exacting rent from the respondent, who has no beneficial interest in the lease, and can obtain no consideration for the rent which she pays. None of the other Judges have expressed any opinion upon that point, but I think it right to say that I cannot agree with Lord Young. Martin may have made an improvident contract, but he and his representatives are not the less bound to perform the obligations which he undertook. The respondent, as representing him both in heritage and moveables, is liable for rent till the end of the lease, but it does not necessarily follow that she must continue to pay rent until the term of Martinmas 1913. It appears from the appellant's averments on record that Logan is not possessing as tenant under the lease, and is making no claim for possession. As against Logan the respondent has all the right of a cautioner, and in that position of matters Logan is bound either to relieve the respondent at once of the rents

which she may have to pay, or to exercise the power which the contract gives him of renouncing the lease at Martinmas 1887. If Logan when duly required refuses or delays to do one or other of these things, I do not think his wrongful failure to renounce would justify the appellant in exacting rent from the respondent after that term.

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I therefore concur in the judgment which has been moved by my noble and learned friend.

THE HOUSE reversed the decision of the Second Division, and restored that of the Lord Ordinary, with costs.

GRAHAMER, CURREY, & SPENS—J. & J. ROSS, W.S.—SMITH, FAWDON, & LOW—
R. PASLEY STEVENSON, S.S.C.

JAMES AULD, Pursuer (Appellant).—*Rhind—R. Wallace.*

THE GLASGOW WORKING-MEN'S PROVIDENT INVESTMENT BUILDING SOCIETY, Defenders (Respondents).—*Sir H. Davcy, Q.C.—Haldane.*

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Building Society—Unadvanced member—Withdrawal—Power of society to reduce sum at the credit of unadvanced members.—The rules of a building society provided that each member should be furnished with a pass-book in which all payments made by him should be entered; that any unadvanced or investing member might withdraw "the whole or any portion of the sum at his credit," twenty-eight days after having given notice of his intention to do so and after having left his pass-book at the office, such withdrawing member to be paid in rotation according to the priority of his notice; and that a general meeting of the members should be held annually in March or April, at which a report and statement of accounts, with a balance-sheet for the year ending 18th February preceding, should be submitted.

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At the annual general meeting of the society, held on 29th March 1882, the society approved of a report by the directors recommending that in consequence of the depreciation of the heritable property on the security of which the funds of the society were invested, a sum of 7s. 6d. per £1 should be deducted from the accounts of all shareholders and placed to a suspense account.

In a question between the society and an investing member, who, after the meeting, gave notice of withdrawal, *held (rev. judgment of Second Division)* that the rules of the society constituted a contract between the society and each member which the Society had no power to alter, and that the resolution of the society was in breach of the contract and *ultra vires*, and that the member who had given notice of withdrawal was entitled to receive payment of the sum standing at his credit at the date of the resolution, without deduction of any sum on account of the society's losses.

(In the Court of Session, 16th July 1885, 12 R. 1320.)

At a meeting of the directors of the Glasgow Working-Men's Provident Investment Building Society (a society incorporated under the Building Societies Act, 1874), held on 1st December 1881, a statement was read shewing that a large proportion of the unadvanced or investing members had applied for payment of the amount at their credit, and (as the minute of the meeting bore) the Society having been reduced in extent to nearly one-half, and it being thought unfair that those shareholders who remained in should bear the whole risk of loss, it was resolved to recommend to the shareholders to set aside a sum to meet any such risk, and thereby retain from shareholders withdrawing a contribution thereto, and with that view it was agreed to have the properties on which the Society had lent money valued by a neutral valuator.

Ld. Chancellor
(Halsbury).
Ld. Bramwell.
Ld. Herschell.
Lord Mac-
naghten.

Mr Binnie, the valuator chosen, reported that the total estimated depreciation in the value of the Society's security subjects was £8487, 10s. From this there was to be deducted £1592, 5s. 3d. at the credit of the reserve fund, and £389, 12s. at the credit of the profit and loss account;

No. 5. the net deficiency being thus £6505, 18s. 9d., to meet which the directors in their report to the Society "for the safety of the shareholders remaining in the Society, and as a prudent step of management," recommended "that a sum of 7s. 6d. per £1 be deducted from all shareholders' accounts (exclusive of sums paid in since 18th February 1881) and placed to a suspense account."

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At the annual general meeting of the Society, on 29th March 1882, the Society approved by a majority of the report of the directors.

On 8th May following James Auld, an investing member, intimated his withdrawal from the Society, and twenty-eight days thereafter (in terms of the rules) claimed £97, 2s. 8d., as being the amount standing at his credit as a member of the Society. The Society declined to pay £97, 2s. 8d., but offered £60, 14s. 2d., being £97, 2s. 8d. under deduction of the 7s. 6d. per £1 which the Society had resolved to deduct from the investing shareholders' accounts.

In consequence Auld, in May 1884, brought an action in the Sheriff Court of Lanarkshire against the Society for payment of £97, 2s. 8d.

The pursuer pleaded, *inter alia*, that the alleged resolution of 29th March 1882 was *ultra vires* and illegal.

The defenders pleaded ;—(2) The rules of the said Society containing no provision to meet the case of a depreciation of its assets, the resolution to reduce the amounts at the credit of the members by 7s. 6d. per pound was in the circumstances a necessary and proper resolution to be passed, with a view to distributing the loss the Society had sustained equitably amongst the members, in conformity with the general principles of the law of partnership. (3) The said resolution having been duly passed at a properly constituted meeting of the Society, is binding on all the members thereof.

A proof was allowed. The rules of the Society, in so far as founded on, are given below.* The pursuer held ten £10 shares of the Society. His

* Rule 3.—"The liability of any member of the Society in respect of any share upon which no advance has been made is limited to the amount actually paid or in arrear upon such share ; and in respect of any share upon which an advance has been made, shall be limited to the amount payable thereon under any bond or other security granted to the Society, or under these rules."

Rule 8.—"Each member shall be furnished with . . . a pass-book, in which all payments shall be entered and initialed by such person at the head office as may be authorised to receive the money ; and these entries so initialed shall be binding on the Society."

Rule 10.—"Withdrawal of members and payment of interest.—Any member holding a share or shares upon which no advance has been made, may withdraw the whole or any portion of the sum at his credit, twenty-eight days after he shall have given notice of his intention to do so, and left his pass-book at the office. On funds being realised, such members shall be paid in rotation according to the priority of their notices, and interest shall be allowed at the rate of four per cent per annum, or such other rate as may be fixed from time to time by the directors, from the last division of profits up to the date of such notice. On withdrawing in full, the pass-book shall be given up. . . ."

Rule 12.—"Payment of realised shares.—Members shall be entitled to receive payment of their shares when realised, as the funds of the Society permit, in rotation, according to the dates of their application therefor, provided no unpaid advance has been made thereon ; and the Society shall be entitled at any time after the shares have been realised to pay them off."

Rule 15.—"Every member, as the funds or arrangements of the Society permit, shall be entitled to an advance corresponding in amount to the ultimate value of the shares held by him, provided always" adequate security is offered, &c.

Rule 20.—"Members to whom advances have been allocated may continue

pass-book shewed £97, 2s. 8d. at his credit on 18th February 1881, and no sum in respect of the 7s. 6d. had been deducted in the pass-book when he left it at the office (in terms of Rule 10) on intimating his withdrawal. At the date of the action it bore that £36, 8s. 6d. had been deducted, leaving £60, 14s. 2d. at the pursuer's credit. The deduction was also made in the Society's ledger. These alterations were made, as explained by Mr Rennie, the secretary of the Society, a few days after the general meeting. The entries in the pass-book consisted of sums in name of the weekly instalments due by the pursuer, and of interest, which last was credited *pro tanto* as instalments. The balance-sheet of the Society for the year ending 18th February 1882 was not corrected so as to include the suspense account resolved to be created, the total amount paid up on their shares by the investing members appearing under the head of liabilities, without deduction. In the balance-sheet for the following year (ending 18th February 1883) a suspense account of £7817, 1s. 8d. was entered under the head of liabilities, the sums credited to the investing members being correspondingly reduced, while on the side of assets the total advances on heritable securities were stated at their full, and not at their depreciated, amount (as estimated). Some of the evidence was directed to shew the soundness of Mr Binnie's estimate. From a statement appended to the report for 18th February 1883 it appeared that he had overestimated the depreciation by £387. It was admitted that if the pursuer was entitled to payment in full, the Society were in a position to make such payment at the date when the action was raised.

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On 19th February 1885 the Sheriff-substitute (Lees) pronounced an interlocutor by which, after findings in fact, he found as matter of law that the resolution of 29th May 1882 was not habile to deprive the pursuer of his rights, as a shareholder of the Society, under the rules then in force, and therefore repelled the defences, and decerned against the defenders for payment to the pursuer of £97, 2s. 8d., with expenses.

On appeal the Second Division pronounced the following interlocutor:—
“Find in fact that the defenders, at their annual general meeting held on

to hold their shares, or the value thereof may be applied to the account of the advances.”

Rule 21.—“Advances shall be repayable by instalments in such number, not exceeding twenty-one, as may be arranged. . . . Every member to whom an advance has been made omitting to pay his subscription within one month after it falls due shall be charged at the rate of one penny per month for each payment on account of a £10 share,” &c.

Rule 44.—“General Meetings.—A general meeting of the members shall be held annually, in the month of March or April, for ordinary business, and a report and statement of accounts, with a balance-sheet for the year ending 18th February preceding, shall be submitted; such report and balance-sheet having been previously printed, and a copy sent to each member four days at least before the meeting. . . .”

Rule 45 contained certain regulations for the calling of special meetings.

Rule 49.—“Appropriation of surplus.—If, at the annual balances, a surplus profit remains after providing for expenses of management and interest on the accounts of investing members and depositors, such surplus shall be carried to the account of a general reserve or guarantee fund, which fund shall be available for the purpose of the Society at the discretion of the executive committee, and any surplus funds may be invested in accordance with the 25th section of the Building Societies Act, 1874.”*

* There was no other rule regarding profits. It was the practice of the Society to divide profits, if any, at the end of each year among the investing members proportionately to their capital.

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29th March 1882, approved of a report by the directors recommending that in consequence of the depreciation of the heritable property on the security of which the funds of the Society were invested, a sum of 7s. 6d. per pound should be deducted from the accounts of all the shareholders and placed to a suspense account, and that the defenders accordingly made a corresponding deduction from the sums standing in the books of the Society at the credit of the shareholders, thereby reducing the sum standing at the credit of the pursuer from £97, 2s. 8d. to £60, 14s. 2d., which sum the defenders are willing to pay: Find in law that the deduction was validly made: Therefore sustain the appeal: Recall the interlocutor of Sheriff-substitute appealed against: dismiss the action," &c.

The pursuer appealed.

LORD CHANCELLOR.—In this case I confess I am unable to share the doubts which appear to have existed in the minds of the learned Judges in the Court of Session.

This contract between the parties is a contract to be judged of by the ordinary rules, and the society or association which has made this contract with one of its members is precisely in the same contractual relation with its member as if it was with a stranger. The association itself is what it is. It is not a partnership at common law; it is not a joint stock company. Associations of this character have been under the consideration of your Lordships' House before.¹ The result of those simple propositions is this, that the pursuer here had a right to enforce the contract between himself and the association of which he was a member. If the alteration, against the will of one of the contracting parties, which is insisted on here as within the competency of the other, were valid and effectual, I do not really know why the association should not have made a rule preventing withdrawal altogether because it was inexpedient and contrary to their interests that anybody should withdraw, or a rule that if anybody did withdraw he should forfeit all interest whatsoever. The truth is, that when once it is ascertained that this is a contract which is to be kept between the parties, all the observations of the learned Judges, appropriate and reasonable enough if they were dealing with the relations between two copartners at common law, and that which should regulate the division of profits between them, become absolutely inappropriate and entirely beside the question when the consideration is whether or not a contract which has been made is to be kept.

I observed that Sir Horace Davey felt of course the pressure of the observation, and endeavoured so to construe the contract between the parties as to bring the respondents' contention within the language of the contract itself; and accordingly, instead of reading the rules of this association, which in truth constituted the contract between the parties, in their ordinary and natural sense, he ingeniously suggested that the words "the sums standing to the credit of the withdrawing member" meant not the sums as they actually do stand and as they have been actually ascertained and signed by the proper officer of the Society (which, according to the rules, is to be binding between the Society and its members), but that they meant that sum which, taking

¹ Russell v. Brownlie, March 9, 1883, 8 App. Cas. 235, 10 R. (H. L.) 19; Walton v. Edge, *in re* Blackburn Building Society, 10 App. Cas. 33; Tosh v. North British Building Society, July 30, 1886, 11 App. Cas. 489, 14 R. (H. L.) 6.

the true value of the assets and liabilities of the Society, should be the sum appropriated to the particular member. My Lords, it appears to me not only that that is not the language of the rule, but also that it is not the meaning and intent of the rule. The meaning and intent of the rule seem obvious enough, namely, that when once the sum subscribed by the member has been handed to the Society, with interest upon it according to the arrangements which have also been made, that sum shall be the ascertained sum which shall stand (and which in this case did properly stand) to the credit of the member in the books of the association.

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My Lords, I do not think it necessary to proceed to shew that if this alleged construction of the rule and the principle founded upon that construction were applicable it would be possible to turn a realised share, that is to say, a fully paid-up share, into one not fully paid up, by some resolution of the Society. I say that I do not think it necessary to consider that point, because after all it is only a more striking mode of illustrating the proposition that the Society can of its own motion and without the consent of both the contracting parties alter the contract between the parties. The cardinal vice which runs through the reasoning used to support such a proposition is, that it is within the competency of one of the contracting parties to alter the terms of the contract. My Lords, it appears to me that it is utterly unarguable and impossible to insist that any such power exists. A bargain is a bargain and must be kept. And for these reasons I move your Lordships that the interlocutors appealed from be reversed, and that the interlocutor of the Sheriff-substitute be restored, and that the respondents do pay to the appellant the costs both here and below.

LORD BRAMWELL.—I am entirely of the same opinion. The pursuer has entered into a bargain with others which gives him certain rights, and amongst them, this, that on giving notice he should be repaid whatever stands to his credit as soon as the Society is in funds to do so. That is the bargain he has entered into. A majority of those with whom he has made that bargain have thought fit to say that it shall not be performed, that it shall be set aside, and that in lieu of it another arrangement shall be made, that is to say on account of the probable poverty of the Society each member shall receive something less than two-thirds of what stands to his credit. Now there is nothing in the bargain that authorises them to do that. If there were, it would be a conditional bargain, and the bargain would be complied with, but there is nothing in it which authorises them to do it. There is no necessity which compels them to break their bargain, because if ever the time shall arrive when they have money enough to pay the pursuer his £97 they can do it.

That being the case, I protest I will not discuss whether the proposal is an equitable one or not. It seems to me so utterly wrong, when people have entered into a defined bargain, that it should be set aside upon some more or less fanciful notion of equity or right, that I will not discuss it. I will say, "Hold to your bargain." I suppose the proverb is as true in Scotland as it is in England, and true universally, that a bargain is a bargain, as the Lord Chancellor has said, and should be observed.

I really cannot but express a respectful surprise that the learned Judges of the Court of Session should have held otherwise, and I think it particularly mischievous that any notion of that sort should be countenanced nowadays when there is such a disposition, and such a foolish, stupid, disposition, on the part

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of people to think they can make better arrangements for those who have made their own, and that it is right to set aside a particular and distinct bargain that has been entered into.

LORD HERSCHELL.—I am entirely of the same opinion. I do not for a moment doubt that the resolution came to at a meeting of the members of this Society was arrived at in perfect good faith, and not in the slightest degree under the impression that they were altering the bargain between the parties. I have no doubt they were under the impression that the true constitution of a society of this description was such that the members of the society were so interested in the funds of the society as that a loss of any of the funds of the society properly fell to the lot of all. Notwithstanding that, I think they were entirely under a misapprehension with regard to what was the bargain and what is the nature and constitution of societies of this description. Nine of the shares, amounting in all to £90, had been realised long before this resolution was arrived at, and, as far as appears, many, if not all, of them before the losses occurred which led to the resolution of the Society. From the moment that each share was realised, an absolute right vested in the holder of that realised share to give notice to the Society and, when he had given notice, to be paid at once if there were funds and no other member had given notice, to be paid in rotation if other members had given notice. How anything that subsequently happened deprived him of that right, or turned a realised share into an unrealised share, or justified the Society in refusing to carry out their 12th rule, I am utterly at a loss to see; indeed, Sir Horace Davey admitted that this seemed to have been overlooked by the learned Judges in the Court below, and that he was not able to suggest how he could support the judgment as regards the realised shares, having in view the 12th rule. My Lords, I entertain no greater doubt as regards the other matter, the proportion of the shares unrealised, or if you like the whole £97 under the 10th rule. That gives a member a right in respect of the amount standing at his credit. The whole fallacy of the argument on the part of the respondents appears to me to rest in supposing that the amount standing at his credit does not mean, as it seems to me obviously to mean, the amount standing at his credit by reason of the moneys which he has paid, but that by some strange process of reasoning you are to come to the conclusion that the amount standing at his credit depends on the mode in which the Society has invested the funds out of which he is to be paid the amount standing at his credit. It seems to me that the two matters have nothing whatever to do with one another. The Society may have badly invested their funds, and therefore have a difficulty in obtaining the means of paying the amount standing at any member's credit; but that cannot alter the amount standing at his credit, or justify the Society in saying that what did stand at his credit no longer stands at his credit.

Upon these grounds, my Lords, I entirely concur in the judgment which has been proposed.

LORD MACNAGHTEN.—I entirely agree in the proposed judgment.

In societies of this sort the rules form the contract between the members and the society, and that contract can only be altered in the mode prescribed by the Act of Parliament. In this case the respondents have attempted to alter the contract in a manner which appears to me not to be justified or authorised by

anything in the Act of Parliament. I therefore entirely agree in the motion which has been made. No. 5.

INTERLOCUTORS appealed from reversed: Interlocutor of the Sheriff-substitute restored: Respondents to pay to the appellant the costs in the Court below and the costs of the appeal in this House.

ANDREW BEVERIDGE—W. OFFICER, S.S.C.—HARTLEY, ROSS, & ARDALE—
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COMMISSIONERS OF INLAND REVENUE, Appellants.—*Lord-Adv. Macdonald* No. 6.
—*Sir R. Webster*—*Sol.-Gen. Robertson*—*A. J. Young*.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Respondents.—
Balfour, Q.C.—*R. S. Wright*.

May 30, 1887.
Commissioners of Inland Revenue v. Glasgow and So.-Western Railway Co.

Stamp—*Stamp Act, 1870 (33 and 34 Vict. cap. 97, sec. 70)*—"Conveyance on sale" proceeding upon verdict of jury under *Lands Clauses Act, 1845*—*Sum* in name of compensation for loss of business.—In a compulsory sale under the *Lands Clauses Act, 1845*, a jury awarded the owners of the subjects, who were also the occupants, three specific sums—(1) for the value of land taken, (2) for the value of buildings, machinery, plant, &c., and (3) for compensation for loss of business previously carried on by them on the premises in question. The verdict of the jury was incorporated in the supervening conveyance of the subjects in question. *Held (rev. judgment of First Division)* that the *ad valorem* stamp which fell to be affixed to the deed in terms of the *Stamp Act, 1870 (33 and 34 Vict. cap. 97)*, fell to be assessed on the whole sum paid by the railway company, and not merely on the first and second items.

(In the Court of Session, January 22, 1886, 13 R. 480.)

The Commissioners of Inland Revenue appealed.¹

Ld. Chancellor (Halbury).
Lord Watson.
Ld. Fitzgerald.
Lord Macnaghten.

LORD CHANCELLOR.—My Lords, I cannot say that any doubt has been infused into my mind by the arguments which have been addressed to us by Mr Balfour and Mr Wright. The matter seems to me to be an exceedingly plain one. That which the railway company had, under the powers of the Act, power to do was to take land compulsorily from the owners, and the statute has provided the machinery by which the price at which it is to be taken should be ascertained. The parties may, if they please, agree, but if they do not agree the price is to be ascertained as between them, and two subjects-matter are dealt with by the statute—one the value of the property so taken, and the other, the question of severing the property so taken from the lands held therewith.

The 48th section of the statute is that which in truth we are at present construing, because this is a proceeding under the 48th section, and although the other sections of the statute may be quoted to throw light upon and to interpret the language of that section, that which your Lordships are considering at present is a proceeding under the 48th section. That section expressly provides,—
"Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict," and so on, and the latter part of the section refers to severance. The two things—and the only two things—which are within the ambit and contemplation of the statute are the value of

¹ *Appellants' Authorities*.—Potter v. Commissioners of Inland Revenue, 18 Jur. 778, L. R., 10 Ex. 147, 23 L. J. Ex. 345; Pile v. Pile, *Ex parte* Lambton, 1876, L. R., 3 Ch. D. 36. *Respondents' Authority*.—Hammersmith Railway Co. v. Brand, L. R., 4 E. & L. 218.

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the lands and such damages as may arise to other lands held therewith by reason of the particular land which is taken being taken from them.

Now, my Lords, that seems to me to be at the foundation of the whole argument. That was alone what the jury in this case had power to assess, because it is admitted that no question arises here upon the other part of the section—no question arises here about any damage from severance. It is admitted therefore impliedly that the only thing which the jury had here to assess was the value of the lands. My Lords, of course the word “value” is itself a relative term, and in ascertaining what is the value of the land it is extremely common—indeed it is inevitable—to go into a great number of circumstances by which that which is proper compensation to be paid for the transfer of one man’s property to another is to be ascertained. A whole nomenclature has been invented by gentlemen who devote themselves to the consideration of such questions, and sometimes I cannot help thinking that the language which they have employed, so familiar and common in respect of such subjects, is treated as though it were the language of the Legislature itself. We, however, must be guided by what the language of the Legislature is. Now, the language of the Legislature is this, that what the jury have to ascertain is the value of the land. In treating of that value, the value under the circumstances to the person who is compelled to sell (because the statute compels him to do so) may be naturally and properly and justly taken into account, and when such phrases as “damages for loss of business,” or “compensation for the goodwill” taken from the person, are used in a loose and general sense, they are not inaccurate for the purpose of giving verbal expression to what everybody understands as a matter of business, but in strictness the thing which is to be ascertained is the price to be paid for the land—the land with all the potentialities of it, with all the actual use of it by the person who holds it, is to be considered by those who have to assess the compensation. As Mr Balfour has pointed out, the language used in this narrative may not perhaps be strictly accurate. I am by no means certain that it is, but suppose that it is not—suppose that the jury or the conveyancer who drew this deed has in the narrative introduced a description of the different elements by which the gross sum is to be ascertained, and has inaccurately used phrases not altogether appropriate to the particular transaction which they describe—what does that come to? The thing which the railway company had to pay, and the thing which the owners of the land had to transfer by this compulsory process was, on the one hand, £52,658, 6s. 7d., including this £9499, 8s. 3d., and on the other hand, the lands and premises which were the subject-matter of the transaction. Under those circumstances, my Lords, it seems to me to be beyond all doubt that that which is to be paid as stamp-duty is the *ad valorem* stamp upon the transaction itself which conveyed from the one to the other that which, by the process of this Act of Parliament, is ascertained to be the value, and that is, under the express language of the 48th section, the value of the land. If it is the value of the land, it cannot be doubted that the *ad valorem* stamp must be upon that value. It appears to me, therefore, beyond all doubt that the judgment of the Court below ought to be reversed, and that your Lordships ought to affirm the original judgment of the Commissioners, and I so move your Lordships.

LORD WATSON.—My Lords, I am also of opinion that the judgment of the Court of Session in this case cannot be sustained. The learned Judges of the

majority appear to me to have fallen into error from assuming that the Lands Clauses Act authorises persons whose property is taken to claim, and compels railway companies to pay something in the nature of personal damage. That view is very distinctly expressed by Lord Mure; but it appears to me to be entirely inconsistent with the provisions of the Act. As I read these provisions the statute authorises in the first place compensation for land, or an interest in land. By "compensation" is meant an equivalent for that which the railway company take and acquire and which the proprietor gives up to them. Then in the second place, these provisions contemplate damages for injury occasioned to lands which are not taken by reason of the execution of the company's works upon the lands taken.

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In this case the jury, following the terms of the claim which was lodged by the landowner in answer to the notice to treat given by the railway company, have found the former entitled to £9500 for loss of business. I do not think that claim would be sustainable if the words in which it is described express the legal category to which the claim itself belongs. You cannot discover from the words which are used to describe the sum that it was claimed as compensation for an interest in land; but I entertain no doubt whatever that it was meant to be so, and that it was so treated by the jury. In assessing the value of the property, or in other words, the consideration which the railway company ought to pay for the land or interest in land which they take, it has become the practice of claimants to state the various items into which that price or consideration is capable of being resolved, and ask the jury to consider these separately.

When a proprietor, instead of letting his land to a tenant, occupies it himself for the purposes of trade, that is a special kind of occupancy which must be taken into account in estimating the value of the land; and the claim made here, which was affirmed by the jury to the extent of £9500, was obviously intended to cover the loss which Sommerville & Company sustained by reason of their having to give up the occupancy of the saw-mills which the railway company took for the purposes of their undertaking. Upon that footing it is an item of value which is rightly included in the price. In the view which the majority of the Court below seemed to have taken of it, it was an item which could not be made matter of charge against the railway company. The Lord President points out what is perfectly true, that occupancy may be severed from ownership. The owner may let to a tenant, and in that case the proprietor's claim would cover only the first two items in the finding of the jury. Upon the third item the railway company would in that case have to deal with the tenant and to satisfy his claim for loss of occupancy, which would be greater or less according to the duration of his lease. But then the learned Judge goes on to say this, comparing the case of a proprietor occupying his own premises for the purposes of trade with the case of his letting them to other traders—"Now, does it make any difference that the two characters of proprietor and tenant or occupier are combined in the same person, or does that circumstance of the combination of these two characters affect the nature of the compensation for loss of business which was awarded by the verdict of the jury? I think not." Upon that point I cannot come to the same conclusion as his Lordship. Occupancy is a right incidental to property; it passes with a disposition of property unless it has been severed from it by a lease, in which case the tenant's right becomes a burden upon that of the proprietor. The difference between the two cases—

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and to my mind the essential difference—is this, that in the one case the disposition of Sommerville & Company carries the whole right of occupancy from the date of entry specified in the deed; in the other case it would not carry any right of occupancy until the expiry of the tenant's lease, and therefore no such item as this could have been claimed by the owner had the currency of the lease been for a considerable period.

My Lords, it is argued that the sum of £9500 is not consideration for any right taken by the company or conveyed to the company by Sommerville & Company. If I am right in saying that it is a sum paid in respect of the company taking from them and becoming possessed of their exclusive right of occupancy, that is not so. The deed of conveyance in which the consideration is inserted gives the company the right of occupancy. So far as I know it is their only title to it, and if Sommerville & Company refused to give up possession the railway company's remedy would be in founding upon the deed of conveyance as giving them the right of occupancy; they have no other title, so far as I can see. In these circumstances I cannot doubt that they have got in return for that sum the very subject, the very interest in the estate, for which it was intended that compensation should be given.

Upon these grounds I have come to the conclusion that the judgment of the Court below ought to be reversed.

LORD FITZGERALD.—My Lords, for the reasons given by the noble and learned Lord (the Lord Chancellor), and by the noble and learned Lord opposite (Lord Watson), I am of opinion that the interlocutor of the 22d of January 1886, by which the Court of Exchequer in Scotland determined “that the sum of £9499, 8s. 3d. sterling is not to be reckoned part of the consideration for the sale on which the conveyance mentioned in the case was granted,” should be reversed, and that the determination of the Commissioners of Inland Revenue should be restored.

The conveyance in question is undoubtedly a conveyance on the sale of property whereby property was legally transferred to the railway company. What was the property so transferred? The lands in question,—the conveyance of the lands carrying by its very force the right to the immediate possession, and thus determining the occupation of the vendor. From the conveyance the £9499, 8s. 3d. seems to have been apportioned by the jury as “compensation for loss of business.” But how was that loss occasioned? The answer must necessarily be, by the determination on the conveyance of the vendor's right to the possession and occupation of the lands. The conveyance then appropriately goes on to say, “said three sums amounting in all to the sum of £52,658, 6s. 7d.” That sum—no matter how you may subdivide it, no matter how you deal with it—is the price to be paid by the railway company in one shape or other for the right to the lands and the immediate occupation, and in my judgment forms the consideration for the sale.

LORD MACNAGHTEN.—My Lords, I entirely agree. The Glasgow and South-Western Railway Company required to purchase and take for the purpose of their undertaking certain lands belonging to Messrs Sommerville & Company, who were saw-millers and timber-merchants. They were in occupation of those lands for the purposes of their trade. The railway company gave a notice to treat under the Lands Clauses Consolidation Act in the usual form. In answer to

that notice Messrs Sommerville & Company sent in their claim; it was a claim in respect of those lands. That was the only claim they could make in answer to the notice to treat. They divided their claim into three heads. That, my Lords, was a convenient mode for enabling the jury to ascertain what was the sum proper to be paid under the circumstances, but still the sum, however arrived at, was purchase money or compensation for the lands, and it was awarded as such—in fact, the jury had no power to award Messrs Sommerville a single farthing except as compensation in respect of the lands.

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Now, the Lands Clauses Act prohibits a railway company from entering upon any lands except by consent, until payment or deposit of the purchase money or compensation agreed or awarded to be paid. It seems to me impossible to contend that the consideration for the sale of the lands was anything less than the full amount of purchase money or compensation ascertained in accordance with the Act and required by the Act to be paid or deposited before entry.

JUDGMENT appealed from reversed: Determination of the Commissioners of Inland Revenue affirmed: Respondents to pay to appellants the costs of the appeal to this House and the costs below.

W. H. MELVILL and D. CROLE, Solicitors of Inland Revenue—
W. A. LOCH—JOHN CLERK BRODIE & SONS, W.S.

EDWARD CAIRD (Pursuer) Appellant.—*Sol.-Gen. Robertson, Q.C.*—
Sir H. Davey, Q.C.—*F. W. Clark.*

No. 7.

WILLIAM S. SIME (Defender), Respondent.—*Lorimer—MacClymont.*

June 18, 1887.
CaIRD v. SIME.

Literary property—Lectures in University—Publication.—*Held* (dis. Lord Fitzgerald) that a professor in a university is entitled to prevent by interdict the publication of lectures delivered by him in his ordinary university course, such delivery not being equivalent to publication of the lectures.

Process—Appeal from Sheriff Court.—Interlocutor—Judicature Act, 1825 (6 Geo. IV. c. 120), sec. 40—Findings in fact—Appeal to House of Lords.—In a petition in a Sheriff Court by a professor for interdict to prevent the defender publishing a book alleged to be in substance a reproduction of the pursuer's lectures, the case, on appeal to the Second Division, was referred to the whole Court, with the result that nine Judges were of the opinion that the book was in substance a reproduction of the lectures, three were of opinion that it was not, while the remaining Judge reserved his opinion on this point. On the question as to whether the pursuer, being a university professor, was entitled to the protection of an interdict, six Judges were of the opinion that he was, five that he was not, while the two remaining Judges gave no judgment on the question, holding that the book was not a reproduction of the lectures. The Second Division of the Court, before whom the appeal depended, thereupon pronounced judgment, finding that the lectures referred to on record were delivered by the pursuer as part of his course, and that the book complained of was published by the defender, having been compiled by a student who had attended the lectures and had taken notes in shorthand; they then found, "in conformity with the opinions of the majority of the whole Court, that such publication did not constitute an infringement of any legal right of property belonging to or otherwise vested in the pursuer," and refused the interdict. In an appeal, *held* that, in compliance with the 40th section of the Judicature Act, 1850, the Court ought to have inserted in the interlocutor a finding in fact, in conformity with the opinions of the majority of the Judges, that the book in question was a reproduction of the lectures, and that the case fell to be dealt with as if such finding had been inserted.

No. 7. (In the Court of Session, 23d October 1885, 13 R., p. 23.)

The pursuer appealed.

June 18, 1887.

Caird v. Sime.

Ld. Chancellor
(Halsbury).

Lord Watson.

Ld. Fitzgerald.

LORD CHANCELLOR.—In this case I have had much greater difficulty in dealing with the question of form than with the substantial question between the parties which it was intended to raise by this appeal. It is, I think, manifest that the interlocutor does not comply with the provisions of the Judicature Act of 1825, and I cannot but regret that the suggestion of Lord Rutherford Clark was not adopted, by which that which was fact would have been found as fact, and the question of law, which alone under that statute is open to your Lordships to review, would have been left to be determined. Nevertheless, although with some doubt, I have come to the conclusion that your Lordships may treat the questions of fact as having been determined, and the questions of law as sufficiently severed from those questions of fact to enable your Lordships to pronounce a final judgment between the parties.

The question which it was intended to raise was the legal right of the respondent to publish in the form of a pamphlet certain literary compositions of the appellant which were orally delivered to the students of the University of Glasgow attending his class. A majority of the Court has determined that the pamphlet in question is a reproduction of the appellant's literary composition, and I do not stop to discuss what some of their Lordships appear to have considered important, that in respect of certain particulars it was a blundering and unsuccessful reproduction of the appellant's work. I confess I am unable to understand what place such topics find in the argument. Assume an unlawful reproduction of an author's literary work; it does not become less an injury to the legal right because the reproducer has disfigured his reproduction with ignorant or foolish additions of his own. It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial that that proprietary right may still continue notwithstanding some kind of communication to others. The case of private letters, which though conveniently described by the word "private" involve publication of a certain kind to others than the author of them, is an illustration of a communication which does not permit the infringement of the proprietary right which would be involved in their unauthorised general publication. The doubt which I have entertained in the course of the argument has been whether the extent and degree of publication in the case now under debate was not a question of fact which should have been determined on the evidence before the Court, and which if it had been determined it would not have been open to your Lordships to review. But as I have said, I have come to the conclusion that in the form in which it has arisen it may be treated as a question of law, that is to say, whether in the agreed state of facts such a publication as is proved here must as a matter of law deprive the author of the literary composition in question of his proprietary right, and whether the fact that he is a Professor of Moral Philosophy teaching in his classroom by the literary composition which is now the subject of debate makes his delivery of that literary composition necessarily public to the whole world, so as to entitle anyone who heard it to republish it without the permission of its author.

Now, I have designedly used the phrase "literary composition" to avoid the ambiguity of the word "lecture," because I think the word "lecture" involves

an assumption which may give rise to error. If by it is signified a lecture delivered on behalf of the University, and, so to speak, as the lecture of the University itself—as the authorised exposition of the University teaching—I can well understand that by the nature of the thing, from the circumstances of its delivery and the object with which it was delivered, it would be impossible to say that the lecture was intended by those in whose behalf the Professor was lecturing, or by himself, to limit the right of communication to others. Whether that limitation of the right arises from implied contract or from the existing relation between the hearers and the author, it is intelligible that where a person speaks a speech to which all the world is invited either expressly or impliedly to listen, or preaches a sermon in a church the doors of which are thrown open to all mankind, the mode and manner of publication negative as it appears to me any limitation. But without using any phrase which by force of its ordinary meaning implies either a kind of publication or involves a limitation of the right of publication, what are the facts here as found by a majority of the Court? A teacher is in his class-room with his students. For the purpose of teaching them he was a composition of his own, in this case called “the Law of Moral Philosophy.” Suppose it had been exercises in grammar, arithmetic, or foreign language. The object and purpose is to teach the students, to enable them to become proficient in the various subjects of which the teacher is the professor. The student is entitled to avail himself of the teaching. The object is to make him a good grammarian, a good arithmetician, or a proficient in the particular language that is taught. But could it be contended that by reason of such communication to such students, each of them was entitled to publish the professor’s exercises, dialogues, dictionary, or the like? My Lords, it seems to me that it might be, and indeed there is some suggestion here that it is, contrary both to the spirit and meaning of what is called a lecture that students should be supplied with some mode of answering questions on the subject of their lectures without that process of mental digestion which is intended to form the substance of the teaching. Illustrations might be infinitely multiplied in which the whole purpose of a professor’s teaching might be rendered nugatory by the unauthorised production of his modes of teaching.

The ground on which I have been able to come to the conclusion that the particular form of literary composition, and the degree of communication which is established to a limited class, may be treated as a question of law is, that it appears to have been decided that notwithstanding the professor’s desire to prevent such reproduction, and contrary to his intention, the delivery of his lecture or of his composition to a limited class of students operates, as matter of law, to make his composition public and to prevent his enforcing any proprietary right.

I am not aware of any university regulation or any bargains with its professors which either expressly or impliedly enforces on the professors the making public of their literary compositions, of whatever class these compositions may be, and whether educational and intended for the use of their students or intended for mere general diffusion. I am disposed to think, although it does not become necessary to discuss it in the present case, that if a professor had entered into a specific bargain to make public the lectures which he was delivering to his students, but contrary to that bargain had enforced on his students the condition of secrecy, though the university which employed him on that express bargain might be at liberty to seek their remedy against him for a breach of his under-

No. 7. taking, it would not necessarily make public that which the lecturer himself had neither expressly nor impliedly communicated for general reproduction.

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My Lords, I doubt whether any of the cases which have been brought to your Lordships' attention do more than establish the two propositions which, as I have said, cannot now be in debate. The application of the principles laid down in these cases is what gives rise to the matter now in discussion. I do not think it very important to consider what was the ultimate result of Mr Abernethy's appeal to Lord Eldon, because the ground of Lord Eldon's decision as originally given seems not to have been affected if an arrangement between the parties, as seems probable, put an end to the litigation.

With respect to the Act 5 and 6 Will. IV. cap. 65, I am not prepared to say that I can obtain any light from its provisions. I had at one time an impression that there was something in the nature of a declaration by the Legislature that lectures delivered in a university or a public school or any public foundation were to be assumed to be so published as for the future to become public property, and if that were assumed to be the construction of the statute a serious question would arise as to what were lectures within the meaning of that statute. But I am now satisfied that the language of the statute has been adopted by the Legislature for the purpose of not interfering in any way with the law existing on the subject; possibly it may be that the difficulty of defining what should be a lecture may have occurred to the author of the statute, or the impolicy of affecting to lay down a rule, when many circumstances of convenience as to modes of instruction and so forth might be appropriately left to the university authorities, may have produced the legislation which in fact exists. At all events I can derive no assistance from a statute which professes to leave the law as it is without professing to give any hint of what it assumes the law to be.

I am therefore of opinion that the appellant ought to succeed, and I concur in the suggested form of judgment which has been prepared by my noble and learned friend Lord Watson, and I move your Lordships accordingly.

LORD WATSON.—This appeal is taken in two conjoined processes instituted in the Sheriff Court of Lanarkshire by the appellant, who is Professor of Moral Philosophy in the University of Glasgow, for the purpose of having the respondent, a bookseller in that city, interdicted from publishing or advertising for sale certain books or pamphlets entitled "Aids to the Study of Moral Philosophy," on the ground that these works are mere reproductions of the lectures delivered by the appellant to the students who attend his class in the University. In defence the respondent pleads, in the first place, that the publications sought to be interdicted are not substantially the same with the appellant's lectures, but represent the views of the person who compiled them, and are the result of his independent study and research, and in the second place, that the delivery of the appellant's lectures in the class-room of the University is equivalent to publication, and that he has consequently lost his right to prevent their publication in a printed form. These defences raise two issues, the first being a question of fact, which if the actions had originated in the Court of Session would have been appropriately tried before a jury, the second being a question of law.

Proof was led by both parties, and, thereafter, on 15th February 1884, the Sheriff-substitute granted perpetual interdict as craved, and ordained the respondent to deliver up to the appellant all copies of the publications complained of remaining in his hands or within his control. The learned Sheriff-substitute by

his interlocutor, of that date, found that "the said books or pamphlets are wholly or in substance reproductions, more or less correct, of the lectures in use to be delivered by the pursuer to his class of Moral Philosophy in the University of Glasgow," and he further found that "the said lectures are the property of the pursuer, and that the defender has not shewn that the pursuer has in any way lost his right of property therein, or that he has acquired from the pursuer, or in any other lawful way, a right to publish or reproduce said lectures." No. 7.
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The respondent appealed to the Second Division, who ordered the cause with minutes of debate to be laid before the whole Judges of the Court for their opinion. The result was that of the thirteen consulted Judges a majority of nine were of opinion that the respondent's publications are substantially a reproduction of the appellant's lectures. Six Judges (Lords Shand, Rutherford Clark, Adam, Fraser, Kinnear, and Trayner) held that the appellant has a right of property in his delivered lectures, whilst five Judges (the Lord President, the Lord Justice-Clerk, and Lords Mure, Lee, and M'Laren) came to the opposite conclusion. Lord Young, although he did express some views unfavourable to the appellant, distinctly intimated that he did not think it necessary to decide, and did not decide, the question, being of opinion that the appellant's right, assuming it to exist, must be limited to a right to protection "against any publication which may be reasonably held to anticipate or otherwise substantially or prejudicially interfere with a subsequent publication by himself," and that the publications complained of are not of that character. Lord Craighill expressed no opinion whatever upon the matter of right, holding that the view taken by the minority (of which his Lordship was one) upon the question of fact was a sufficient ground of judgment.

The case was advised on the 23d October 1885, when the Second Division pronounced the interlocutor which is now brought under review. It contains the following findings:—"Find that the pursuer is Professor of Moral Philosophy in the University of Glasgow, and that the lectures referred to in the record were delivered by him to his students as part of his ordinary course: Find that the defender, who is a bookseller in Glasgow, published the work now complained of: Find that this work was compiled by a student who had attended the classes taught by the pursuer, and who had taken notes in shorthand of the pursuer's lectures." These are in all respects proper findings, although they set forth facts which were not seriously disputed. The important part of the interlocutor follows:—"Find, in conformity with the opinions of the majority of the whole Court, that such publication did not constitute an infringement of any legal right of property or otherwise belonging to or vested in the pursuer; therefore sustain the appeal," &c.

The last finding of the interlocutor does not comply with the requirements of 6 Geo. IV., c. 120, s. 40, and is beset with ambiguity. It suggests either that a majority of the Court held that there was no infringement, or that a majority were of opinion that there was no right capable of being infringed; but, in point of fact, there was not a majority in favour of either of these propositions. Lord Rutherford Clark protested against the terms of the interlocutor as not being in accordance with the provisions of the Judicature Act of 1825; but he was overruled by the other Judges of the Division, whose reasons for the course they followed I am at a loss to understand. Apparently they meant to find that, on some ground or other, a majority of the whole Judges were of opinion that interdict should not be granted, such majority being obtained by combining two

No. 7. minorities. It may be doubtful whether Lord Craighill's opinion upon the question of fact should have been taken into account in deciding the case, seeing June 13, 1887. Caird v. Sims. that it had been negatived by a large majority; but, in the present state of the case, it is unnecessary for your Lordships to consider that matter. Whether judgment was given for or against the appellant, it was the statutory duty of the Court to insert a finding of fact in their interlocutor, expressing the opinion of the majority of the consulted Judges upon the question of infringement, for the guidance of this House. Your Lordships are, by the terms of the statute, precluded from reviewing the interlocutor of the 23d of October 1885, except in so far as it "depends on or is affected by matter of law," and the only question which can be competently raised and decided in this appeal is that which relates to the existence of the appellant's alleged right of property in his lectures. It would have been idle to entertain that question if the Court below had come to the conclusion that, assuming such a right to exist, the respondent's publications did not constitute an invasion of it. Fortunately, in the present case, the conclusion of the majority of the whole Court upon the question of fact is beyond dispute; and the ministerial duty of the Second Division to give effect to that conclusion by a finding in their judgment is equally plain. In these circumstances, your Lordships did not think it expedient or necessary to subject the parties to the delay and expense which would have been occasioned by remitting the cause, in order to have the interlocutor put into proper shape, and permitted them to be heard, on the merits of the appeal, as if the interlocutor had contained an express finding to the effect that the publications complained of are in substance a reproduction of the appellant's lectures.

The author of a lecture on moral philosophy, or of any other original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public. Since the case of *Jefferys v. Boosey*,¹ was decided by this House in the year 1854, it must be taken as settled law that, upon such communication being made to the public, whether orally or by the circulation of written or printed copies of the work, the author's right of property ceases to exist. Copyright, which is the exclusive privilege of multiplying copies after publication, is the creature of statute, and with that right we have nothing to do in the present case. The only question which we have to decide is, whether the oral delivery of the appellant's lectures to the students attending his class is, in law, equivalent to communication to the public.

The author's right of property in his unpublished work being undoubted, it has also been settled that he may communicate it to others under such limitations as will not interfere with the continuance of the right. "He has," as was said by Lord Brougham in *Jefferys v. Boosey*,² "the undisputed right to his manuscript; he may withhold or he may communicate it, and communicating it he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation." He cannot print and sell without publishing his work, but he may legitimately impose restrictions which will prevent its publication, whether the communication be made by giving copies for private perusal or by recitation before a select audience. In the latter case the retention of the author's right

¹ 4 H. L. C. 815.

² 4 H. L. C. at p. 962.

depends upon its being either matter of contract or an implied condition, that the audience are admitted for the purpose of receiving instruction or amusement, and not in order that they may take a full note of what they hear, and publish it for their own profit, and for the information of the public at large. Upon that principle it was decided in *Macklin v. Richardson*,¹ that the fact of a play having been acted for several years in a public theatre with permission of the author did not imply an abandonment of his right, and that he was therefore entitled to restrain its publication from notes taken by a shorthand writer who had paid for admission to the theatre. On the other hand I do not doubt that a lecturer who addresses himself to the public generally without distinction of persons or selection or restriction of his hearers has, as the Lord President observes in this case, “abandoned his ideas and words to the use of the public at large, or in other words has himself published them.”

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The main argument addressed to your Lordships for the respondent was to the effect that a professorship in a Scotch university being *munus publicum*, and the occupant of the office being under an obligation to receive into his class all comers having the requisite qualification, his lectures are really addressed to the public, and at all events that there is no room for inferring that the students are taught under an implied condition that they shall not print and publish his lectures either for their own profit or otherwise. I do not think it can be disputed that, as stated by Lord Shand, this is the first occasion in the history of the Scottish universities on which any such right as that now claimed has been asserted. If the claim be well founded there can be no copyright in a lecture which has been once delivered in the class-room. Yet it is the fact that professors and their representatives have been in frequent use to publish lectures which had been annually delivered for years before such publication, and have enjoyed, without objection or challenge, the privilege of copyright. That has been notably the case with our great academical teachers of moral and mental philosophy, from Dr Thomas Reid, who was appointed to the chair now held by the appellant in 1763, to the late Sir William Hamilton. I concede that, although such may have been the prevalent understanding in Scotland as to the professor's right, this is not a case in which it can be said that *communis error facit jus*; but I agree with Lord Shand's observation that, in these circumstances, effect ought not to be given to the respondent's argument unless he can make it clear “in principle or authority that the law gives him the right he claims.”

In the Court below there was a good deal of discussion as to the practical result of deciding this case one way or another. I am afraid that I do not estimate so highly as some of the learned Judges the advantage of having the professor's lectures printed and subjected to the criticism of public opinion. The capable critics are a small and by no means unanimous section of the community; and I doubt whether the governing body of the University or the professor would derive any assistance from their strictures; whilst experience has shewn that the public who are interested in it are not ignorant of the character of University teaching. An original thinker and able teacher very soon attracts a large class and *vice versa*. I certainly do not appreciate the advantage to the public of furnishing (which is the professed object of the respondent) the appellant's students with a “crib”—an aid to knowledge forbidden in well regulated educational institutions, which, as the Lord Chancellor has already

¹ Amb. 694.

No. 7. pointed out, supersedes the necessity of intellectual effort and neutralises the benefit of the professor's tuition. There appeared to me to be some force in the suggestion of the appellant's counsel, that if it be now held for the first time that delivery of his lectures is publication, the professor may in future (contrary to his present practice) hesitate to communicate his best and most original thoughts to his class, before they have been matured and given to the world by himself. But I do not think these considerations, however important they may be in themselves, are decisive of the present question.

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As to the position of students attending the appellant's class, it is sufficient to say here that they must be members by matriculation of the University, and they must also be enrolled as members of his class for the session, upon payment of the prescribed fee. A member of the public, as such, has no right to be present at his lectures; and the public has no right to interfere with or control his teaching. By sec. 5 of the Universities (Scotland) Act of 1858, the duty of superintending and regulating the teaching and discipline of the University is committed to the *Senatus Academicus* (which is a body consisting of the principal and whole professors of the University) subject to the control and review of the University Court.

The leading, if not the only case having a close analogy to the present is *Abernethy v. Hutchinson*,¹ decided by the Lord Chancellor (Lord Eldon) in the year 1825. It is true that in that case there were features which do not occur here. It appeared upon the affidavits made by Mr Abernethy in support of his application for an injunction against the publication of his lectures at St Bartholomew's Hospital, that it was no part of his duty as one of the surgeons of the hospital to deliver these lectures, which were not in any way open or accessible to the public, and were not attended by any person save by his permission. At the first hearing Lord Eldon entertained some doubt whether there could be satisfactory evidence of the substantial identity of the publication sought to be restrained with the plaintiff's lectures, seeing that these had not been written out at full length, but were delivered orally from notes, and his Lordship also desiderated evidence of the way in which the defendants obtained possession of the matter which they had printed. The motion for an injunction was accordingly delayed, the learned Judge observing,—“In the meantime Mr Abernethy may, if he thinks proper, produce his MSS., and on the other hand, the defendants will judge for themselves whether they will or not—and I do not require it of them, because I have no right—inform me of the way in which they became possessed of the means of publishing this work.” Upon the first of these points his Lordship was satisfied by the production of the notes from which the lectures had been delivered, with an explanatory affidavit. The defendants did not respond to the invitation addressed to them, and his Lordship, in the absence of direct evidence, came to the conclusion that they must have obtained the lectures from some person who had attended them, or in some other way in which the Court could not approve. Accordingly a perpetual injunction was granted, on the ground that all persons who attended these lectures were under an implied contract not to publish what they heard, although they might take it down for their own instruction and use.

I may here observe that, in the course of the argument for the respondent, Mr MacClymont brought under your Lordships' notice the fact that the record

¹ 3 L. J. (Ch.) 209; 1 Hall and Twells, 28.

in *Abernethy v. Hutchinson*¹ shews that the injunction was dissolved by the Lord Chancellor within a few months after its issue, upon a motion by the defendants, and without hearing parties. We were told that no trace had been found of the affidavit on which the motion was made, so that the recall of the injunction may have been the result of an arrangement between the parties, and at all events it cannot detract from the weight of Lord Eldon's deliberate judgment *causa cognita*.

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In my opinion the reasoning upon which Lord Eldon's judgment is based applies strictly to the case of a professor in a Scotch university. The principle which pervades the whole of that reasoning is, that where the persons present at a lecture are not the general public, but a limited class of the public, selected and admitted for the sole and special purpose of receiving individual instruction, they may make any use they can of the lecture, to the extent of taking it down in shorthand for their own information and improvement, but cannot publish it. If that be the real character of the relation between the lecturer and those whom he addresses, it is immaterial whether they are selected by himself or by others, so long as it is matter of express stipulation, or of reasonable implication, that the duty which he undertakes is limited to giving personal instruction to the individuals composing his audience. Some of the learned Judges in the Court below seem to have been of opinion that the present case cannot be brought within the principle of *Abernethy v. Hutchinson*¹ because there is nothing in the nature of a contract between the professor and his students, and therefore there can be no implied contract that they shall not publish. That may be so; but what Lord Eldon held was, that the restriction of the hearers' right to use the lectures arose from the relation established by contract between them and Mr Abernethy. In that case, the restriction necessarily became an implied term of the contract; but the condition itself is the legal consequence of the relation in which the parties stand to each other, and must receive effect, whenever a similar relation exists, whether it be established by contract or in any other way.

I do not think that students of moral philosophy in the University of Glasgow, or in any other Scotch university, either are, or can with propriety be said to represent the general public; of course they are, each and all of them, members of the public; but they do not attend the professor's lectures in that capacity. They must be members of the University, and they must further comply with its regulations and make payment to the professor of the usual fee, in return for which they receive from him a ticket or certificate of their enrolment as students for the session; and, without observing these preliminaries, they would have no right to enter his class-room during the lecture hour. The relation of the professor to his students is simply that of teacher and pupil; his duty is, not to address the public at large, but to instruct his students; and their right is to profit by his instruction, but not to report or publish his lectures. It appears to me that the learned Judges whose opinions are adverse to the appellant have attributed undue weight to the circumstance that the appellant's office is *munus publicum*. That it is so is an undoubted fact; but, according to my apprehension, the question which your Lordships have to decide depends, not upon that fact, but upon the duty which the appellant's office requires him to fulfil. The nature of the duty incumbent upon a professor in an English

¹ 3 L. J. (Ch.) O. S. 209; 1 Hall and Twells, 28.

No. 7. University is thus described by Lord Eldon, in *Abernethy v. Hutchinson*:¹

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"Now if a professor be appointed, he is appointed for the purpose of giving information to all his students who attend him, and it is his duty to do that; but I have never yet heard that anybody could publish his lectures." So far as I know, there is no difference whatever between the position of a Scotch and that of an English University professor, so far as regards their relations to the students whom they teach; and no point of difference has been suggested, either in the Court below or by the respondent's counsel. The fact of his being a public official lays the appellant under an obligation to the State as well as to those who pay for their instruction, to teach efficiently, and to the best of his abilities; it does not affect the nature of his obligation, and cannot alter the relation between him and his students.

That Lord Eldon held the lectures of a university professor to be within the rule laid down and given effect to by him in *Abernethy v. Hutchinson*¹ is beyond question, because he expressly refers to the case of such a professor as an illustration of the legal principles upon which he gave judgment for Mr Abernethy. None of the learned Judges who are of opinion that the doctrine of *Abernethy v. Hutchinson*¹ is inapplicable to this case advert to that part of his Lordship's judgment, with the single exception of Lord M'Laren, who states, in my opinion correctly, that Lord Eldon "very distinctly and emphatically identifies the case of Mr Abernethy with that of the lectures of Blackstone, originally delivered by that great lawyer in the University of Oxford, in which he held the appointment of Vinerian Professor of Law." Lord M'Laren suggests, however, that there are no means of knowing whether the attention of the Lord Chancellor "had been drawn to the distinction which might be taken between public and private lectures, a distinction on which the main argument of the defender is founded." I cannot, for many reasons, concur in Lord M'Laren's suggestion. Lord Eldon, in the passage referred to, was distinguishing between lectures public in this sense, that they are communicated *urbi et orbi* by the mere act of delivery, and lectures which are private, inasmuch as the author does not by their delivery communicate his ideas and language to the public at large, or part with his common law right of property. It was not the habit of Lord Eldon to overlook such obvious differences as did exist between the position of Mr Abernethy and that of Sir William Blackstone; it is manifest that his Lordship was clearly of opinion that these differences could not disturb the application of the same principles of law to both cases alike. In that opinion I entirely concur.

The observations of Lord Eldon assume that Sir William Blackstone would not have had copyright in the text of his Commentaries if the lectures delivered by him as Vinerian Professor were held to have been thereby published. The accuracy of that assumption is controverted by my noble and learned friend Lord Fitzgerald. Never having seen the lectures, I can only say for myself that in the preface to the first edition of the Commentaries, published in 1765, the learned author states that "the following sheets contain the substance of a course of lectures on the laws of England which were read by the author in the University of Oxford." Lord Eldon heard and took notes of the lectures, and was no doubt familiar with the Commentaries; and he was therefore in a position to judge (which I am not), and was perfectly capable of judging whether the two works were substantially the same. If they were, the statute of Anne

¹ 3 L. J. (Ch.) O. S. 209; 1 Hall and Twells, 28.

could give the author no copyright in the original text, although he might acquire the copyright of new matter added to subsequent editions of the Commentaries.

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In regard to the Act 5 and 6 Will. IV. c. 65, I adopt the opinion of the great majority of the learned Judges, which is in accordance with the view taken by Mr Justice Kay in the recent case of *Nicols v. Pitman*.¹ The effect of the statute is to secure their right of property to authors of lectures, and to persons to whom the right has been sold or conveyed, notwithstanding delivery, upon their compliance with certain preliminaries; and their right is protected from invasion by forfeitures and penalties. Its provisions are not confined to cases in which the right would have been protected at common law, but extend to many cases in which, according to that law, delivery would have been equivalent to publication. But, by sec. 5, lectures delivered in a university, or a public school, or in any public foundation, are excepted from the operation of the Act, and it is declared "that the law relating thereto shall remain the same as if this Act had not been passed." I cannot gather from the terms of that exception and declaration any indication of an intention on the part of the legislature to express their understanding of the existing law with respect to lectures in these institutions. There may be lectures delivered within the walls of such institutions which do by their delivery become public property, just as there may be others which do not. Whether they belong to one or other of these classes is a question which must be decided irrespective of the provisions of the statute.

I am accordingly of opinion that the appellant is entitled to have the judgment of the Second Division, in so far as adverse to him, reversed, and to have the interlocutor of the Sheriff-substitute restored. (His Lordship then read the form of order, as given below.)

LORD FITZGERALD.—My Lords, the question we have to determine on this appeal seems to me to be one of pure law. I agree with my noble and learned friend (Lord Watson) that we must read the interlocutor of the Second Division as if it contained an express finding that the publications complained of are in substance a reproduction of the appellant's lectures.

It was not contested that by the common law of Scotland, as well as by the common law of England, every author has a right of property in his compositions so long as they remain "unpublished," and that a private lecturer may lawfully impose an express condition on persons allowed to hear his lecture, that they shall not publish what they hear, and that such a condition may also be lawfully implied from the circumstances. In such cases the common law protects the author's right of property and forbids infringement. On the other hand, a private lecturer may deliver his lecture under such circumstances as indicate his intention to give his words to the public at large. In the latter case, the lecturer has technically published his lecture, and has abandoned the protection which the common law would otherwise afford. We have now, however, to deal with a case very different from that of any private lecturer.

The facts, as to which there is no dispute, are that the pursuer fills the chair of Moral Philosophy in the University of Glasgow. It is not necessary to investigate the history of that university, as its status is now in substance similar to that of the other universities of Scotland. They are all ancient public endowed corporations established by public authority for the special purpose of

¹ 26 Ch. D. 374.

No. 7. public instruction in theology, law, medicine, and all the arts. In that instruction the public at large has a deep and direct interest. For an outline of the University, and the office of its professors, and their functions and duties, I refer to the eloquent judgment of the Lord President. In point of modern regulation and government they all come under the provisions of the imperial statute 21 and 22 Vict. c. 83, which is a statute "for the advancement of religion and learning, and to make provision for the better government and discipline of the universities of Scotland." The University of Glasgow has under that Act a chancellor; a *Senatus Academicus* "to superintend and regulate, *inter alia*, the teaching and discipline of the university"; a university Court to control the decisions of the *Senatus Academicus*, and to enforce due attention on the part of the professors to regulations as to the mode of teaching and other duties imposed on them, and to fix and regulate the fees from time to time in the several classes; it has also a university council, and in order to produce uniformity in the several universities the statute constitutes a general body of commissioners with legislative powers, for a limited period, to make statutes and ordinances, such as in their opinion would be conducive to the well-being of the universities, the advancement of learning, the course of study, and the manner of examination, &c. The statute also gives to those commissioners an important power, namely to recommend grants of public money for certain purposes, and amongst others, "for increasing the salaries presently attached to existing professorships."

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The pursuer was a professor in the University of Glasgow, nominated to his chair by the Court of the University, remunerated partly by salary paid out of the University revenues, or out of moneys voted by Parliament, and partly by class fees which, however, equally formed part of the University revenue, though allocated for the time being to him. His obligation and his duty were to teach the nation through its youth, according to the regulations laid down by the governing body of the University. It does not appear what those regulations were, nor is it alleged that there were any restrictions or conditions imposed on the students of the class, or other auditors, by that governing body, as to the use to be made of the professor's lectures when delivered. I assume too, as the contrary does not appear, that the pursuer was left free to teach by lectures if he thought fit. He did teach by the instrumentality of reading lectures. The broad question for our consideration is whether that reading of his lectures to those assembled in the lecture-room is a publication to the nation.

After much anxious consideration, I have come to the conclusion that the delivery of the lectures was a publication to the public at large, and that being such, the pursuer has abandoned to the public the exclusive rights which he otherwise had, and the protection which the common law would otherwise have afforded him. I have struggled against this conclusion, as I am conscious how superior my noble and learned friends are to me in knowledge and judgment, but I have been unable to agree with them, and am compelled, on the other hand, to accept the broad and vigorous reasoning of the Lord President and Lords Young and M'Laren.

It was urged in your Lordships' House in argument, that a decision in favour of the respondent would operate unjustly on the professor as depriving him of emoluments which he might otherwise derive from the publication and sale of his lectures, by himself or his representatives, for all time; but this seems an exaggerated, and, to some extent, an imaginary apprehension. There is no power, save that of the University, to interfere with the professor in publishing his

lectures for sale, and the public would probably prefer the publication issued with the stamp of his authority, and containing his emendations and additions. This is, however, a consideration which we cannot enter upon. Again, it was urged that the professorial practice of repeating the same lecture session after session, in like manner as a minister repeats his sermon, would be interfered with. If this was so, it would seem to be a desirable result.

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The Sheriff in his note to the interlocutor of the 23d of November 1883, says, *inter alia*, on this point,—“The professor's thoughts as expressed that year must be the same as those to be similarly expressed the next year.” This would seem to assimilate the professor's duty to the cuckoo cry of repetition. I rather think that this eminent professor would repudiate such a suggestion, and tell us that the lecturer should remember that,—“Beneath this starry arch naught resteth or is still,”—and that his duty is to watch over and criticise new modes of thought, new works, the march of intellect, and those discoveries which,—“Make old knowledge pale before the new.” Even in pure mathematics there may be alterations and additions, and ethical science is not free from the inexorable law of mutability.

Lord Young in the reasons for his judgment says:—“Now, I have to observe that neither the common law of property nor the statute law of copyright applies to teaching in a public university. It is obviously expedient in the public interest that such teaching should be public, and open to public comment and criticism. This accordingly, I apprehend, is the reason why lectures in public universities are excepted from the provisions of the Act of 1835.” My Lords, I concur with the learned Lord (Lord Young) in opinion that it is essential to the public safety that university teaching should be exposed to comment, to searching criticism, and to the full blaze of public opinion. How can this be attained if the contention of the pursuer is well founded? If the lecturer can prevent all other publication of his lectures than that which takes place in his classroom, the nation may be left in Cimmerian darkness as to the teachings of its youth in its great universities. Unless there be full and complete publicity, criticism would be impracticable, and a mere empty sound.

Lord Young, in the passage just quoted, touches on another subject, namely, the Act of 1835, to which, perhaps, sufficient attention has not been given.

The bill which became the Act of 1835 (5 and 6 Will. IV. c. 65) was introduced into this House about ten years after Lord Eldon had given his decision on the injunction motion in *Abernethy v. Hutchinson*,¹ and it is not improbable that the difficulties supposed to exist in consequence of Lord Eldon's reasons led to the bill. It is a bill entitled “For preventing the publication of lectures without consent.” The preamble is obviously taken from the Copyright Act, 8 Anne, c. 19, and the 1st section is large enough to apply to and embrace all lectures wheresoever delivered; sec. 2 prohibits under certain penalties the publication of any lecture in any newspaper without the license of the author; and sec. 3 provides that no person allowed for fee or reward or otherwise to be present at a lecture delivered in any place shall be deemed to have leave to print or copy or publish such lecture. The bill as introduced in this House, seems to have passed without debate, but in the Commons it met with considerable opposition on the broad ground that if it was intended to shield public lectures from public

¹ 3 L. J. (Ch.) 209; 1 Hall and Twells, 28.

No. 7. inspection it ought not to receive the sanction of Parliament. In the course of the discussion, attention was specially directed to *Abernethy v. Hutchinson*,¹ June 13, 1837. which was probably misunderstood. It ended in a compromise, by which words were added at the end of clause 5, providing that the Act should not extend "to any lecture delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of, or according to any gift, endowment, or foundation, and that the law relating thereto shall remain the same as if this Act had not been passed."

In *Millar v. Taylor*,² it is reported that "Mr Murphy, counsel for the defendant, strongly contended from the amendments made in the Commons on the Statute of 8 Anne, and from the change of title, that Parliament intended to take away or to declare that there was no property at the common law," but to this Willes, J., answered, that "the sense and meaning of an Act must be collected from what it says when passed into law, and not from the history of the changes it underwent in the House where it took its rise. The history is not known to the other House or to the Sovereign." The rule so aptly expressed has always been enforced in this House. But, strangely enough, Willes, J., does, shortly afterwards in the same judgment, seem to offend against his own rule. He uses language which I quote as not inapplicable to the statute before us. His language is this :—"The preamble is infinitely stronger in the original bill as it was brought into the House and referred to the committee. But to go into the history of the changes the bill underwent in the House of Commons, it certainly went to the committee as a bill to secure the undoubted property of copies for ever. It is plain that objections arose in the committee to the generality of the proposition, which ended in securing the property of copies for a term without prejudice to either side of the question upon the general proposition as to the right."

Now, looking at the 5 and 6 Will. 4, we may at least say that objection was taken in the Commons to the generality of the proposed measure, and the proviso was there added at the end of the 5th clause. The statute seems at once in its first clause to recognise the property of the lecturer in his lecture, and to confer on him the sole right and liberty of printing and publishing such lecture, even though he may have delivered the same under such a state of circumstances as would have otherwise amounted to an abandonment of his words and thoughts to the public. "Leave of the author," and "consent of the author" would probably be interpreted as meaning express leave or consent, such as would confer a title on the licensee, and sec. 4 seems to support that view. There is difficulty of construction in every part of this short statute, but especially in sec. 5. I am unable to read the concluding proviso of sec. 5 save as indicating a statutable declaration that lectures delivered in a university, which is necessarily a public institution, become thereby public property for the purposes of publication and public criticism. As to the concluding sentence, "that the law relating thereto shall remain the same as if this Act had not passed," the words seem to me to have no real force. The reservation is of such common law right, if any, as existed before the Act. The Statute does not interfere with or abridge any common law right, but leaves it as it was. In my judgment the only common law right the university lecturer has is a right of property in his

¹ 1825, 3 L. J. (Ch.) 209 ; 1 Hall and Twells, 28.

² 1769, 4 Burr. 2332.

lecture when composed, and before its public delivery in the university. There seems to have been no decision whatever on the subject of lectures delivered in a public university prior to the passing of that Act. I am unable to accept *Abernethy v. Hutchinson*¹ as final or satisfactory on the propositions, if any, which it is supposed to decide. It arose on motion only, supported by the affidavit of the plaintiff; there never was a plenary hearing of the cause. Lord Eldon treats as a pure question of law, which he would not decide, "property in sentiments or language not deposited on paper." He then goes into implied contract, or breach of trust, which is wholly inapplicable to the case before us, and it is observable that his strictures are principally, if not wholly, directed against printing for profit. He adopts, in substance, the proposition of Aston, J., in *Miller v. Taylor*,² that "he has no right to publish for profit the identical work." On the first hearing of the motion, Lord Eldon refused the injunction, but gave leave to renew it "on the ground of breach of contract or breach of trust."

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The bill having been amended, and the amendment having been supported by affidavit, the motion was renewed on the ground of "contract" only; and Lord Eldon's decision of the motion is expressed in these words:—"He was clearly of opinion that whatever else might be done with it, the lecture could not be published for profit." That is the whole decision of Lord Eldon. Lord Eldon makes a passing observation (which has been alluded to already by my noble and learned friend, Lord Watson), which requires attention. He says:—"Nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years, if there had been such a right as that. We used to take notes at his lectures; at Sir Robert Chambers' lectures also the students used to take notes; but it was never understood that those lectures could be published."

These observations of Lord Eldon are rather of a negative character, and are somewhat loose, but are undoubtedly valuable as shewing that Lord Eldon had in his mind the case of the university professor. But what do they amount to? I am at this moment unaware whether Sir William Blackstone's lectures were ever published as lectures, or that anyone asserted a right to do so, or was prevented from doing so. When Lord Eldon speaks of Blackstone's copyright for twenty years he is obviously referring, not to his lectures as such, but to Blackstone's Commentaries. The Commentaries, which were founded on the lectures, revised, corrected, and enlarged, with notes, were first published in 1765. Nine editions were published in the lifetime of Sir William Blackstone, all revised and added to by the learned author. He prepared also a tenth edition, which was not published until after his death in 1780. He had an undoubted copyright in "The Commentaries" under the Statute of Anne.

Finding a statement in the debate in the House of Commons on the bill of 1835, that the *Abernethy* suit had been abandoned, your Lordships made some inquiry, with the result that the injunction had been dissolved, but under what circumstances we have been unable to ascertain. I cannot think that *Abernethy v. Hutchinson*¹ is entitled to the great weight that has been attributed to it, and it seems to me to state no principle which ought to guide us in the present case. The public lecturer at a university has no authority of his own to impose

¹ 1825, 3 L. J. (Ch.) 209; 1 Hall and Twells, 28.

² 1769, 4 Burr. 2332.

No. 7. conditions on his pupils or those entitled to attend his lectures ; nor can it be truly said that he could create a trust in his own favour. It is not necessary to consider what the university might do in the exercise of its plenary powers, "for the advancement of religion and learning, and improving and regulating the course of study therein."

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My Lords, in the legal view which I have adopted it is not necessary for me to consider the weighty authorities to which we have been referred ; some of them rather obscured by the extreme length of the judicial reasons. My opinion is that a public lecture delivered publicly at a university by one of its professors in the performance of the public duty he has undertaken becomes by the act of delivery published to the nation, and may be likened to a gift from the university or the professor to the nation.

In the course which the case is now about to take my opinion becomes worthless. I am bound to assume that I am wrong in point of law. Your Lordships' judgment settles the law finally, and in yielding a willing obedience I have, at least, the palliation for mistake in law that I have erred in company with the Lord President, the Lord Justice-Clerk, and four other able and eminent Scotch Judges.

I have only to add that on looking at the debate in the House of Commons¹ I find it stated there by a person who had, or at least ought to have had, the most full and accurate knowledge on the subject, namely, the late Mr Wakley, who was member for Finsbury, and was one of the editors of the *Lancet*, against which paper the *Abernethy* case had been instituted, that the suit had been abandoned by the professor in consequence of its having been found that he held the position of a public professor.

INTERLOCUTOR of the Second Division of the Court of Session appealed from, dated the 23d of October 1885, reversed, with the exception of the first three findings of fact, and in respect of these findings, and also in respect that it was admitted by the parties at the bar, and that the cause was heard upon the footing that, according to the opinions of the majority of the consulted Judges, the works complained of are in substance a reproduction of the appellant's lectures, It is declared that the delivery of the said lectures by the appellant to his students, as part of his ordinary course, was not equivalent to publication thereof, and that the appellant is entitled notwithstanding such delivery to restrain all other persons from publishing the said lectures without his consent, and subject to this declaration, that the cause be remitted to the Second Division of the Court of Session with directions to affirm the interlocutor of the Sheriff-substitute dated the 15th of February 1884, and to find the appellant entitled to the expenses of process incurred by him in the Court of Session : And it is further ordered that the respondent do pay to the appellant his costs of the appeal to this House.

W. A. LOCH—W. & J. BURNES, W.S.—PEACE & Co.—JOHN LATTI, S.S.C.

¹ Hansard, vol. xxx. 3d series, 953.

LORD ADVOCATE (Defender), Appellant.—*Lord-Adv. Macdonald—
Sol.-Gen. Robertson.*

No. 8.

NORTH BRITISH RAILWAY COMPANY (Defenders), Appellants.—
Balfour, Q.C.—Asher, Q.C.

Aug. 1, 1887.
Young v.
North British
Railway Co.

ROBERT WILLIAM YOUNG (Pursuer), Respondent.—*Davey, Q.C.—
C. J. Guthrie.*

Property—Foreshore—Possession—Prescription.—A proprietor, with titles dating from 1804, flowing from a subject-superior, which described his property as “bounded on the south by the sea,” brought a declarator of property in the seashore *ex adverso* of his lands against the Crown. As he could not recover his immediate superior’s titles, he founded on his own possession on his own titles. He proved that one of his predecessors under the subject-superior had built a retaining wall whereby a considerable portion of the foreshore was reclaimed, that he and they had for more than the prescriptive period been in use to cart drift sea-ware (no ware grew on the shore) in large quantities from the shore for manure, that they had occasionally taken stones or gravel from the shore for various purposes, and that they had built and used a private bathing-house on the shore. The Crown in defence proved that a large quantity of stones had been taken (by fishermen in their boats) from that part of the coast to build a public breakwater, but it was not shewn that any considerable quantity had been taken from the part of the foreshore claimed by the pursuer, or that he or his authors knew what was being done. The Crown further proved that members of the public had taken sea-ware from the foreshore claimed by the pursuer, in creels or in barrows (but they never did so in carts, having only a right of access by foot to that part of the shore); and that they had also taken whelks, mussels, and other shellfish, and shot gulls on the foreshore.

Held (aff. judgment of Second Division) that the pursuer had established a case of prescriptive possession, and was entitled to decree of declarator accordingly.

(In the Court of Session 8th December 1885, 13 R. 314.)

The Lord Advocate and the North British Railway Company appealed.

Ld. Chancellor
(Halsbury).
Lord Watson.
Ld. Fitzgerald.
Lord Mac-
naghten.

LORD WATSON.—My Lords, the respondent and his predecessors in title have been infeft since 1809 in the lands of Colinswell, lying on the north shore of the Firth of Forth, under a charter from a subject-superior, dated 5th and 7th November 1804, in which, as well as in their successive infeftments, the subjects are described as a park or enclosure consisting of 22 acres and 3 roods Scots measure, with the pertinents, bounded on the south by “the sea.” The measurement applies exclusively to the park or enclosure; the boundary includes not only the park or enclosure but “the pertinents,” an expression which may aptly include the *solum* of the shore between high and low water-marks. I can therefore see no reason to doubt that the learned Judges of the Second Division, in holding that his title gives or purports to give to the respondent a right *per expressum* to the foreshore *ex adverso* of his land, followed the settled rule of the law of Scotland, which was thus expressed by Lord Glenlee in *Campbell v. Brown*, Nov. 18, 1813, F.C.—“When a landholder is bounded by the sea it is true he has a bounding charter. But it is a boundary moveable and fluctuating *sua natura*, and when the sea recedes he must be entitled still to preserve it as his boundary. The shore is indeed still *publici juris*, but when the sea goes back the shore advances, and the proprietor is entitled to follow the water to the point to which it may naturally retire or be artificially embanked.”

In any question with the superior who granted the charter of 1804 and his

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successors the respondent and his predecessors have all along had a preferable right to the foreshore, but the charter cannot avail him in a question with the Crown unless he can shew that his superior had a right to the foreshore derived from the Crown. No evidence has been produced of the superior's title, and the charter of 1804 must consequently be taken to have proceeded *a non habente potestatem*. But notwithstanding the defect of the superior's title the Act 1617, cap. 12, gives the respondent a valid right against the Crown if he can prove that he and his predecessors have, by virtue of their infeftments, had continuous possession of the foreshore without lawful interruption for the period of forty years, which have been reduced to twenty years by section 34 of the Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. c. 94).

The only substantial question raised by this appeal is whether the respondent has proved in point of fact that the foreshore in question has been possessed by the proprietors of Colinswell for the prescriptive period by virtue of their heritable infeftments. Counsel for the appellants did not dispute that the respondent's title affords a good basis of prescription; but they maintained that although his title is capable of being explained by possession so as to include the right of foreshore it does not expressly give him that right. The only material distinction in a question like the present between an express title from a subject-superior and a title not express but susceptible of explanation appears to me to consist in this, that there are certain acts of possession in relation to the foreshore which might in the latter case be attributed to a mere servitude (and would therefore be consistent with the property remaining in the Crown), but which must in the case of an express title be ascribed *prima facie* to a right of property in the subject.

It is, in my opinion, practically impossible to lay down any precise rule in regard to the character and amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances. The beneficial enjoyment of which the foreshore admits, consistently with the rights of navigation and of the general public, is an exceedingly variable quantity. I think it may be safely affirmed that in cases where the seashore admits of an appreciable and reasonable amount of beneficial possession consistently with these rights the riparian proprietor must be held to have had possession within the meaning of the Act 1617, c. 12, if he has had all the beneficial uses of the foreshore which would naturally have been enjoyed by the direct grantee of the Crown. In estimating the character and extent of his possession it must always be kept in view that possession of the foreshore in its natural state can never be, in the strict sense of term, exclusive. The proprietor cannot exclude the public from it at any time, and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject.

Upon the question of fact raised by the evidence in this case I have come to the same conclusion with the Second Division of the Court, and the reasons by which I have been influenced are very clearly stated in the judgment of Lord Young. I think the appropriation of part of the seashore since 1827, and the exclusive exercise of the right of taking drift sea-ware by the respondent and his predecessors, constitute such possession as might have been expected if they had been the grantees of the Crown, and are therefore, taken *per se*, sufficient to fortify the respondent's title against the claim now made by the Crown.

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It was strongly urged by counsel for the appellants that the taking of drift sea-ware is not in itself a sufficiently definite act of possession, and that at all events it ought to be referred to a right of servitude, and not to a right of property in the riparian proprietor. I do not doubt that the right of taking such ware may, as they contended, be the subject of a proper servitude, a circumstance which is conclusive of its being incidental to and part of the property of the foreshore. Why the right ought to be ascribed to servitude, when exercised by a proprietor in virtue of a public easement which professedly gives him the property of the foreshore, I confess that I have been unable to understand. With regard to the relative importance of taking loose ware and the cutting of growing tangle as acts evidencing proprietary right, I can only say that, in my opinion, it depends not so much upon attachment or non-attachment to the foreshore as upon the beneficial character of the right. I should certainly consider the exclusive taking of a valuable annual supply of loose ware to be at least as emphatic an assertion of his right of property by one having an express title to the foreshore as his taking from it a yearly crop of growing tangle of less value. In the present case it is proved that the drift ware taken by the proprietors of Colinswell and their tenants in their right is of considerable annual value, especially when the extent of the property is taken into account. The only difficulty which I have felt in considering this case has been in regard to what is sometimes referred to as *contraria possessio*, but is better described as concurrent possession by members of the public who have no grant or licence from the Crown. I attach not the slightest weight to the fact that some old women carried off sea-ware in creels for the purpose of manuring their gardens, which were not upon the lands of Colinswell. The removal of clay and stones from the foreshore, which is proved to have taken place at three several periods, is a very different matter. These were in no proper sense the acts of the Crown, but acts of that description, although done without title, tend to derogate from the possession of the riparian proprietor, and if carried far enough will deprive his possession of that exclusive character which is necessary in order to establish a prescriptive right. After careful consideration of the evidence bearing upon these acts, I am satisfied that they were neither of such extent nor of such duration in point of time as to affect the quality of the possession had by the respondent and his predecessors. It seems to be proved that these encroachments by the public (for in my view they were acts of encroachment) were not known to the proprietors of Colinswell, but I do not think the respondent would have benefited by their ignorance if the acts had been more marked in character or longer continued.

I am accordingly of opinion that in these appeals the judgment of the Court below ought to be affirmed with costs, and I move accordingly.

LORD FITZGERALD.—My Lords, we are bound to determine this appeal by the light of Scotch law deduced from Scotch judicial decisions to which we have been referred, and now so well settled as not to be questioned. There seems to have been no difference of opinion between the Lord Ordinary and the Judges of the Second Division that if the feu-charter of 1804 had been a royal gift expressed in the same terms it would, as interpreted by Scotch law, have been sufficient to pass to William Young of Burntisland the exclusive rights which the pursuer now claims.

The grant of 1804 is not a crown grant, nor was it made by one who was

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shown to have derived from the Crown, but on the interpretation of its terms, and especially in the use of the expression "pertinents" (which is of very potent and comprehensive meaning, and sufficient by Scotch law to pass every subject in connection with the land which usually goes to the vassal as accessory to the subject expressly granted), it would, as between the parties to that instrument, have passed to the grantee the seashore *ex adverso* the land actually granted. The grant not being from the Crown, or from one being a grantee of the Crown, though possibly from the evidence it would be practicable to infer a grant from the Crown, it seems admitted on all sides that the *onus* is cast upon the pursuer to shew that he has had for twenty years at least continuously and as of right that quiet and peaceable possession without lawful interruption which under the Act of 1617 now protects him from being disquieted by the Crown or any other pretending right.

By possession is meant possession of that character of which the thing is capable. The difference between the Lord Ordinary and the Second Division was one of fact, and I have—but not without some difficulty—adopted the view of the facts and the inferences to be deduced from them propounded by my noble and learned friend.

If the appeal had related to similar rights either in England or in Ireland I would have hesitated much before reaching a conclusion favourable to the pursuer.

LORD MACNAGHTEN.—My Lords, I have had the advantage of reading the opinion of my noble and learned friend opposite (Lord Watson), and I entirely agree with it.

LORD CHANCELLOR.—My Lords, I also have had the advantage of reading the judgment of my noble and learned friend (Lord Watson), and I entirely concur in the judgment which he has delivered, and the grounds upon which he has founded it.

INTERLOCUTOR appealed from affirmed, and appeals dismissed, with costs.

WALTER MURTON—DONALD BEITH, W.S.—W. A. LOCH—MILLAR, ROBSON, & INNES, S.S.C.
 —GRAHAMES, CURREY, & SPENS—COWAN & DALMAHOY, W.S.

CASES

DECIDED IN

THE COURT OF JUSTICIARY,

1886-87.

HER MAJESTY'S ADVOCATE.—*Lord-Adv. Macdonald—M'Kechnie, A.-D.* No. 1.
ALEXANDER M'LEAN AND OTHERS.—*Rhind—Orr—A. S. D. Thomson.*

Oct. 18, 1886.
Her Majesty's
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M'Lean.

Mobbing and Rioting—Deforcement—Relevancy—Service of note of suspension and interdict.—An indictment charging the panels with mobbing and rioting and deforcement, in setting forth the *modus* which was applicable to both of the crimes charged, stated that the messenger-at-arms alleged to have been deforced had been instructed to serve a copy of a note of suspension and interdict and relative interlocutor upon a large number of persons, against whom the prayer of the note was directed, and that the interlocutor was in these terms, "To see and answer within fourteen days : Reserving as to interdict in the meantime"—(with no order for intimation or service). The indictment further bore that the messenger having for the purpose of serving a copy of the note on each of the persons concerned proceeded to the farm of A and there having served copies on certain persons, and having thereafter proceeded towards B for the purpose of serving the remaining copies, a mob at or near A assembled for the purpose of preventing him from fulfilling his duty of serving these copies, and by threats and acts of violence deforced the officer. The panels were charged with forming part of the mob. Objections to the relevancy of the indictment—on the grounds (1) that the duty in which the messenger was said to be engaged when deforced was the service of a copy of the note of suspension and interdict and not of the note itself ; (2) that the interlocutor founded on was not a legal warrant, as it contained no express order for intimation ; and (3) that the deforcement was alleged to have taken place not when the officer was actually engaged in serving, but after he had served his writs at A and before he reached B, where the remainder were to be served—*repelled*.

ALEXANDER M'LEAN, Colin Henderson, Hector M'Donald, John Sinclair, George William Campbell, John M'Fadyen, Gilbert M'Donald, and Donald M'Kinnon, inhabitants of the island of Tiree, were charged with mobbing and rioting, and also with deforcing an officer of the law in the execution of his duty. The indictment set forth that the Duke of Argyll, proprietor of the island, having presented a note of suspension and interdict praying the Court to interdict the persons named in the schedule annexed to the indictment from committing various acts of trespass and intrusion on the lands and houses of the farm of Greenhill or Grianal, "upon which note of suspension and interdict the Honourable Lord Trayner (Ordinary), officiating on the Bills in the Court of Session, pronounced, on or about the 17th day of July 1886, an interlocutor in the following or similar terms, *videlicet* :—'Edinburgh, 17th July 1886.—To

HIGH COURT.
Lord Mure.
Justiciary
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see and answer within fourteen days: Reserving as to interdict in the meantime.—JOHN TRAYNER'; and George Nicolson, messenger-at-arms, now or lately residing in or near Haddington Place, Edinburgh, having been instructed by or on behalf of the said Duke of Argyll to serve a copy of the said note of suspension and interdict and relative interlocutor upon the persons whose names, designations, and places of abode are respectively set forth in the said schedule as aforesaid, or some of them, and the said George Nicolson, in pursuance of the said instructions, and in execution of his duty as a messenger-at-arms, and having in his possession a copy of the said note of suspension and interdict and of the said interlocutor, which copy interlocutor was duly certified as a true and correct copy in common form by the Clerk to the Bills in the Court of Session, and which certified copy interlocutor was his warrant in the premises, and the said George Nicolson having, for the purpose of serving upon each of the said persons last above referred to, a copy of the said note of suspension and interdict and relative interlocutor, on or about the 21st day of July 1886, proceeded along with an assistant, and accompanied by an escort of police, to the farm of Balephuill, in the said island of Tiree, parish of Tiree and county aforesaid, and having there served copies of the said writ or writs upon the following persons, whose names, designations, and places of abode are respectively set forth in the said schedule as aforesaid, *videlicet*:—John Kennedy, Alexander M'Kinnon, Alexander M'Lean, Neil Sinclair, and Malcolm Brown, and thereafter having proceeded towards the farm of Barrapoll, in the said island of Tiree and county aforesaid, along with the said assistant, and accompanied by the said escort of police, for the purpose of serving the remaining copies of the said writ or writs, or some of them, a mob or great number of riotous and evil-disposed persons did, time last above libelled, at or near the farm of Balephuill aforesaid, and at a part thereof, which is sixty yards or some other short distance from the dwelling-house then and now or lately occupied by John M'Lean, a crofter, then and now or lately residing there, all in the said parish of Tiree, and county aforesaid, wickedly and feloniously, assemble in a riotous and tumultuous manner, and in breach of the public peace, and to the alarm of the lieges, for the unlawful purpose of intimidating and obstructing the said George Nicolson, by threats, force, and violence, and preventing or endeavouring to prevent him from fulfilling his duty of serving the copies of the said writ or writs upon the persons whose names are mentioned as aforesaid in the said schedule, other than those persons last above named, or for some other unlawful purpose to the prosecutor unknown, and the said mob or great number of riotous and evil-disposed persons, acting in concert and together for the unlawful purpose aforesaid, did then and there conduct themselves in a violent, riotous, and tumultuous manner, in breach and to the disturbance of the public peace and to the terror and alarm of the lieges, and did in a masterful manner surround, and did use violent and threatening language towards, the said George Nicolson, and did use violent and threatening language towards Charles M'Fadyen, labourer, and Malcolm M'Phee, labourer, both now or lately residing at Scarinish, in the said island of Tiree and county aforesaid, who were then and there present, each in charge of a horse and gig, one of which was hired by the said George Nicolson to aid him in the discharge of his duty aforesaid, and the other by Colin MacKay, now or lately chief constable of the county of Argyll, and now or lately residing in or near Lochgilphead, in the said county, to aid him in escorting the said George Nicolson in the discharge of his duty aforesaid, and did surround the said horses and gigs, and threaten to break the said gigs into pieces and throw them over a cliff.

and did violently seize and take possession of the said horses, and turn them and the said gigs round, and did, in a violent, peremptory, and masterful manner, order the said Charles M'Fadyen and the said Malcolm M'Phee to take their instant departure with the said horses and gigs, and did shout and brandish sticks or other weapons, and did thereby so alarm the said Charles M'Fadyen and the said Malcolm M'Phee that they drove off rapidly and left the said George Nicolson, and the said mob or great number of riotous and evil-disposed persons did behave otherwise in a turbulent and violent manner, and all this, or part thereof, the said mob or great number of riotous and evil-disposed persons did for the purpose of overawing, intimidating, and obstructing the said George Nicolson in the performance of his duty aforesaid, and preventing or endeavouring to prevent him from fulfilling the same, or for some other purpose to the prosecutor unknown, well knowing, or having reason to know, that the said George Nicolson was an officer of the law then acting in the execution of his duty as such, and the said George Nicolson was by the threats and violence of the said mob, or great number of riotous and evil-disposed persons, obstructed and prevented from executing his duty aforesaid, and was deforced, and you, the said Alexander M'Lean, Colin Henderson, Hector M'Donald, John Sinclair, George William Campbell, John M'Fadyen, Gilbert M'Donald, and Donald M'Kinnon did, all and each or one or more of you, form part of the said mob, or great number of riotous and evil-disposed persons, and were actively engaged with, and did aid and abet, the said mob, or great number of riotous and evil-disposed persons in the commission of the foresaid unlawful acts, and the said George Nicolson was thus deforced by you the said Alexander M'Lean, Colin Henderson, Hector M'Donald, John Sinclair, George William Campbell, John M'Fadyen, Gilbert M'Donald, and Donald M'Kinnon, or one or more of you acting in concert as aforesaid."

The panels objected to the relevancy of the indictment on the following grounds ;—(1) The duty of the messenger-at-arms, as set forth in the indictment, was to serve a copy of the note of suspension and interdict. Serving a copy of the note was an act having no legal significance, and was not a duty which only an officer of the law could discharge. The duty alleged ought to have been the service of the note itself. Deforcement could only take place when the officer is executing his duty. (2) The interlocutor of Lord Trayner contained no warrant for intimation or service, which is usual and indispensable, and there could be no deforcement without it. (3) No deforcement could have taken place at the *locus* libelled, for it appeared from the indictment that the messenger had finished the service of writs at Balephuill, and was on his way to Barrapoll. Deforcement must take place while the officer was in the act of performing his official duty, or *in actu proximo*. There could be no deforcement of an officer while *in transitu*.¹ (4) There was no sufficient specification of how the officer was prevented from performing his duty. The threats and acts of violence alleged were not sufficiently set forth, and further did not necessarily infer the crimes charged.

Argued for the Lord Advocate ;—(1) Service of the note consisted in service of a certified copy, and not of the writ itself. That was according to the universal practice of the Court. (2) The interlocutor bore "to see and answer," and no person could see the writ unless it were served on him. (3) It was quite true that an officer could not be deforced before he had taken any steps to do his duty, but in this case the

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¹ Hume, i. 387-8; Alison, i. 493; Macdonald's Criminal Law, 2d. ed. 214.

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messenger had received some forty writs for service on a like number of persons, who were all alleged to have committed one wrong, and must have acted in concert, and who lived near one another. He had begun the execution of his duty, and had served a number of these writs, and was on his way to the next contiguous place where he was to serve others. It was of no consequence that he might sometimes have a mile or two to go to the next house. (4) The specification of threats and violence was quite sufficient, and amounted to the crimes charged.

LORD MURE.—I do not think that any of these objections is well founded. The point raised in the first is as to the messenger not having sufficient warrant to do what he did, inasmuch as he is not said to have had the principal note of suspension delivered to him for service. Now, section 6 of the Statute 1 and 2 Vict. c. 86, uses the words "note of suspension," and not copy of note, when speaking of service, and there is no doubt that what was handed to him by the Duke of Argyll's agent was a copy of the note of suspension, and not the note itself. It is quite clear from the Act of Sederunt of 1838, which was passed under the power given by the Act 1 and 2 Vict. c. 86, that what is to be served is not the principal writ, which lies in the Bill-Chamber. But while the statute says nothing about a copy being served it directs the note to be served "in common form," and the only way in which service of a note of suspension can be made "in common form" is by means of a certified copy of it, which is expressly directed by the first section of the Act of Sederunt to be "prepared for service," being put into the hands of the messenger to be served in the usual way; and it is admitted that what is alleged to have been here done, viz., giving the messenger a certified copy of the note of suspension, is the invariable practice, and was according to the usual form of serving a note of suspension. The next objection is that Lord Trayner's interlocutor does not contain the words "and to be intimidated." But these words are not a statutory requisite, and the words "to see and answer within fourteen days," in my opinion, clearly imply that there should be service of the note, and the messenger when he received the certified copy of that interlocutor was bound to proceed to serve the note in the usual way. On the other two points there is no difficulty. The deforcement said to have taken place at Balephuill occurred within sixty yards or other short distance of that place, where the messenger had served some writs, and when he was in the middle of discharging his duty, and was proceeding to Barrapoll to serve writs there, and the specification of the *modus* of the deforcement seems to me quite sufficient. Whether it is proved or not will be for the jury to decide.

THE COURT found the libel relevant.

After evidence had been led the jury found all the panels guilty libelled, but strongly recommended them to the leniency of the Court. The Court sentenced the five panels first mentioned in the indictment to six months' imprisonment, and the remaining panels to four months' imprisonment.

CROWN AGENT—WILLIAM OFFICER, S.S.C.—Agents.

JAMES WALLACE THOM, Appellant.—*J. C. Thomson.*
THE CALEDONIAN RAILWAY COMPANY, Respondents.—*Balfour—*
R. Johnstone.

No. 2.

Nov. 12, 1886.
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 way Co.

Oppression—Bye-law of railway company—Travelling without proper ticket.

—A bye-law of a railway company provided that “any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings.” *Held* that the bye-law was only applicable to cases where an attempt was made to cheat the company, and that it was oppressive to prosecute for the penalty when there was no such attempt.

B and C left Aberdeen by train for Edinburgh on Sunday. B had an unused half of a return ticket which was still available for some months. C took a single ticket, only available for the day of issue, and not transferable. On their arrival at Perth they alighted from the train, and missed it, apparently accidentally, on its leaving for Edinburgh. There was no other train to Edinburgh on that day. They resumed their journey on the evening of next day. On arriving at Larbert Station, where tickets are checked, B shewed C's ticket as his own. The ticket inspector objected to C's ticket as being only available for the previous day, and required payment of the fare from Stirling (the last station) to Larbert. B refused to pay or to give his name and address, and was handed to the police, and convicted of an offence against the bye-law. Conviction *quashed* on the ground that this was a case of oppressive application of the bye-law.

Process—Appeal—Competency—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62), sec. 3, subsec. (1)—Lodging of bond of caution.

—In a case under the Summary Prosecutions Appeals (Scotland) Act, 1875, it was stated that the bond of caution required by the Act only reached the Sheriff-clerk's office by post on the morning after the statutory period of three days had expired. The Sheriff-substitute stated the case, leaving the question of the competency open as one of the questions of law for the opinion of the Court. The appellant's counsel opened the case on the merits without any objection on the part of the respondents to the competency of the appeal. *Held* that the facts in regard to the lodging of the bond of caution and the relative question of law were not competently part of the case, and that in the circumstances the Court would not entertain the objection to the competency of the appeal.

Opinion (per Lord Young) that if a bond of caution had not been timeously lodged owing to mishap not attributable to the fault of the appellant, the Court might give relief against the mishap.

JAMES WALLACE THOM, confectioner, Great Hamilton Street, Glasgow, was charged at the instance of the Caledonian Railway Company, before the Sheriff of Stirling, Dumbarton, and Clackmannan, at Falkirk, with having contravened the following bye-law of the Company:—“Any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings.”

High Court.
 Lord Justice-
 Clerk.
 Lord Young.
 Ld. Craighill.
 Justiciary
 Clerk.

Thom pleaded not guilty, and at the adjourned diet, on 22d June 1886, after evidence had been led, the Railway Company asked for a conviction only on the charge of violating the bye-laws of the Company by using or attempting to use a ticket on a day for which it was not available. He was convicted on this charge, and sentenced to pay a fine of 10s., and expenses, and failing payment, to five days' imprisonment. He appealed, and craved a case, which was accordingly stated for him by the Sheriff-substitute (Bell). The following were the material facts stated in the case:—“It was proved that the ticket libelled, bearing date 13th June 1886, was paid for at Aberdeen by the witness Dunbar, the appellant's

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Nov. 12, 1886.
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manager, and that the appellant was in possession of a return half of a ticket, which he had paid for at Edinburgh on 9th June, and which was available for six months. The appellant and Dunbar travelled from Aberdeen in the same compartment, and arrived at Perth by the train due there at 3.45 p.m. on the 13th June (Sunday). They, having left the carriage for some purpose, missed the train to Edinburgh (apparently accidentally). They then went to Dundee for the night, returned to Perth next day, and on the 14th June (Monday) came by train from Perth to Larbert *via* Stirling by the 7.20 p.m. train. At Larbert Station the appellant exhibited the said single ticket libelled to the railway officials, as that in respect of which he was travelling. Said single ticket bore marks of having been checked three times, presumably at Aberdeen and Perth. On being told by the officials that the ticket was not available for that day, the 14th June, and being required to pay the fare from Stirling to Larbert, he refused to do so, maintained that the ticket was still available, refused to give his name and address, and was accordingly taken into custody.

"At the first diet, on 15th June, the appellant pleaded 'not guilty,' and in addition to his defence that the bye-law founded on was not legal, and was practically inoperative, he alleged that he had received sanction from some railway official at Perth, whose name he could not give, to use the said ticket upon the 14th June—the day after it was issued. These grounds of defence were repeated at the adjourned diet of trial on the 22d June, but no evidence was adduced in support of the allegation of sanction having been given, except that of the witness Dunbar, the appellant's manager, who admittedly had been affected by liquor at Perth and on arriving at Larbert; and four of the railway officials at Perth Station negatived the allegation."

It did not appear why the appellant and Dunbar had exchanged tickets, but the Sheriff-substitute stated in the case that "having in view the manœuvring by the appellant in adopting the single ticket libelled on as his own at Larbert Station, and his refusal to give his name and address, a penalty of 10s. with the alternative of five days' imprisonment was imposed, instead of dismissing him with an admonition, which might otherwise have been considered an adequate punishment."

At the close of the case the following statement occurred,—“It is proper to state that the Sheriff-clerk had doubts as to the competency of receiving the bond of caution, which, with the requisite attestation, only reached the Sheriff-clerk's office by post, on the morning of 26th June, the day after the statutory period of three days had expired. But the Sheriff-substitute, while entertaining serious doubts whether the bond of caution had been timeously lodged, has thought it right to state a case, as asked by the appellant, leaving the question of competency open for the decision of the superior Court.”

The questions of law argued before the Court were—“(1) Was it competent for the Sheriff-clerk to receive the statutory bond of caution, when not lodged within three days after sentence, and which, having been sent by post, was not received by the Sheriff-clerk until after expiry of three days? (3) Whether the appellant under the provisions of the bye-laws above quoted was guilty of a contravention of the said bye-law in using or attempting to use on 14th June the railway ticket issued on the 13th June?”

The appellant argued;—In the present case there had been an oppressive use of the bye-law by the Railway Company. It was only applicable to cases where there had been an attempt to defraud the Company. The appellant was under the innocent mistake, if it was a mistake, that he

could finish the journey on the following day, if accidentally prevented from completing it on the day the ticket was issued. The bye-law, which depended on sections 101 and 102 of the Railways Clauses Consolidation (Scotland) Act, 1845, would be illegal if there were no room under it for innocent mistake. The appellant's counsel closed his argument on the merits without any objection having been stated by the respondents to the competency of the appeal. In reply to the objection to the competency, he argued that the due lodging of the bond of caution was a matter for the Sheriff to dispose of before granting a case. In regard to giving notice of the appeal, it had been held sufficient that such notice should be posted within three days.¹

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The respondents then argued;—The appeal was incompetent, as the bond of caution had not been lodged within the statutory period of three days—(Summary Prosecutions Appeals Act, 1875, section 3, subsection 1*). The lodging of the bond of caution was a condition precedent to the stating of a case. The bond must be in the hands of the clerk, and there was no reference to posting as in subsection 5,† which was in marked contrast. The cases under that subsection had no bearing. On the merits they argued;—There had been no oppressive use of the bye-law, as the appellant had refused either to pay the fare demanded or to give his name and address. Had he done the latter he would have been protected from detention under the Railways Clauses Act, 1845, sec. 146.‡ The Sheriff-substitute was of opinion that there had been “manœuvring” in regard to the ticket, which was a fact not open to review.

Lord Young.—This appeal is brought under the Summary Prosecutions Appeals Act, 1875, which in certain cases, and, indeed, in almost all cases of summary convictions, allows an appeal to this Court on questions of law upon a case stated. The appellant complains of errors in law in a conviction obtained against him by the respondents before the Sheriff-substitute of Stirlingshire at Falkirk. The case sets out the facts and the legal questions on which the appeal is brought, and on which our judgment is desired. The case ought

¹ Charleson v. Duffes, June 10, 1881, 4 Coup. 470, 8 R. (Just. Ca.) 34.

* 38 and 39 Vict. c. 62, sec. 3, provides, subsec. 1,—“The appellant shall not be entitled to have a case stated and delivered to him unless within the said three days he shall (1) lodge in the hands of the Clerk of Court a bond with a sufficient cautioner for answering and abiding by the judgment of the superior Court in the appeal and paying the costs, should any be awarded by that Court, or otherwise, in the discretion of the inferior Judge, shall consign in the hands of the Clerk of Court such sum as may be fixed by the inferior Judge to meet the penalty awarded, if any, and the said costs of the superior Court.”

† Subsection 5 provides,—“The appellant shall, within three days after receiving the case, give notice of appeal in writing, together with a copy of the case to the respondent, and shall within the same time transmit the case by post to, or cause it to be lodged with one of the clerks of the superior Court, together with a certificate under the hand of himself or of his law-agent of intimation as herein required having been made to the respondent.”

‡ 8 and 9 Vict. c. 33, sec. 146.—“It shall be lawful for any officer or agent of the company, and all persons called by him to his assistance, to seize and detain any person who shall be found committing any offence against the provisions of this or the special Act, or any Act incorporated therewith, and whose name and residence shall be unknown to such officer or agent, and convey him with all convenient dispatch before the Sheriff or a Justice without any warrant or other authority than this or the special Act, and such Sheriff or Justice shall proceed with all convenient dispatch in the matter of the complaint against such offender.”

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to set out the facts upon which the judgment appealed against proceeds, and nothing else. I was therefore struck with this statement in the case before us, that "the Sheriff-clerk had doubts as to the competency of receiving the bond of caution, which, with the requisite attestation, only reached the Sheriff-clerk's office by post on the morning of 26th June, the day after the statutory period of three days had expired." That is not a fact having any relation whatever to the judgment appealed against. The facts to be set forth in the case are the facts which the inferior Judge or magistrate held proved, and on which he pronounced the judgment of condemnation or acquittal appealed against. This fact, assuming it to be a fact, is not within a case stated under the Act of Parliament, nor is the question whether or not the bond of caution was lodged in time. It is quite a proper question for a respondent to raise, in the first place before the Sheriff as a reason in his view why no case should be granted, or if the Sheriff repel his objection, as a reason why we are not to consider the case. In short, it is an objection to the competency of the appeal. I stated that I had noticed and was struck by this statement, but when the appellant's counsel was permitted to open the case on the merits without any statement whatever on the part of the respondents that they objected to the competency of the appeal, I assumed that any objection was departed from. I think it would be a course in the highest degree inconvenient to allow a case to be argued on the merits, and then have it stated that there was no appeal that we could hear. I assumed, therefore, that the technical objection was abandoned. There is no substance in it, taking the statement of the Sheriff-clerk that the bond of caution which would have been all right on the evening of one day did not reach him till the morning of the following day. Even if that be the fact, I cannot help thinking there must be—under supposable and not unlikely circumstances—some power in this Court to give relief against a mishap for which the party may be in no wise to blame. The bond may have been posted at such a time that in ordinary course it should have been delivered before closing hours of the third day, and if by accident the delivery was postponed I cannot help thinking there must be some dispensing power in this Court to grant relief against a mishap of that sort. But in the present circumstances I am not disposed to receive the objection at this stage and to require the facts to be gone into. There is no authority for taking the statements in the case for that purpose. I am not disposed to stretch anything in order to receive the objection, and therefore I should be of opinion that the objection to the competency should not be sustained.

In reference to the merits, the whole facts are such that one has a feeling of regret that proceedings should have been taken which were somewhat cruel and harsh, and that this case should ever have been brought. Two friends start from Aberdeen to Edinburgh, the one with a return ticket, which was available not only for that day, but which had still to run for some months, so that that ticket was all right. The other takes a single ticket from Aberdeen to Edinburgh. They missed accidentally the train from Perth to Edinburgh, which was the last train on Sunday night; therefore they were obliged to break their journey. It was stated to us, but it was a mere incidental detail, that, having no friends to stay with in Perth, they went on to Dundee, for which place they could catch a train, remaining there over night. They return to Perth the following day. The one ticket is all right, but the single ticket is said not to be available, and probably that may be so in the sense that it was in the power of the railway

officials to refuse to receive it. I should think the ticket collectors would be instructed and authorised to pass the ticket in such circumstances. I should be surprised if it were not so. I cannot commend, as at all likely to command the approbation of the public, the demand for a second fare, the railway company having already received the fare in full. When a passenger presents his ticket at Perth the ticket collector or examiner takes it, presumably examines it, and passes it by checking it off. The appellant could not have got to Larbert without some official examining the ticket in ordinary circumstances. But when he comes to Larbert the tickets are examined again. The ticket collector objects to the single ticket, and says, "This was issued in Aberdeen yesterday, and is not available for to-day. I will thank you for 8d." The appellant says, "It was passed at Perth. I believe it to be a perfectly good ticket." His name and address are demanded, but he will not submit to what he considers an imposition, and being a little haughty on the subject, and refusing to give his name and address, he is handed over to the police. I am surprised, and almost distressed, that the officials at Larbert should have acted so, and still more that the superior officers of the company should have given countenance to such conduct. He gives his name and address after he is handed over to the police, and nevertheless, for the matter of 8d., and without a suspicion of roguery in the matter, he is detained for fourteen hours.

I cannot think that any bye-law would sanction such a proceeding—that is, any bye-law if properly read and construed. The bye-law in question may be very proper if read and applied only to rogues—to people trying to cheat—but this was not a case of that kind at all. It had no aspect of a case of that sort. I am therefore of opinion that upon these facts, and on a proper construction of the bye-law, which is applicable only to persons who intend to cheat, and to evade payment of their fare in a tricky and dishonest manner, that this conviction is not well founded.

The LORD JUSTICE-CLERK and LORD CRAIGHILL concurred, both as to the competency and on the merits.

THE COURT reversed the determination of the inferior Judge, ordained the respondents to repay to the appellant the amount of the fine and of the expenses paid by him in the Sheriff Court, and found the appellant entitled to expenses in both Courts, modified at fourteen guineas.

STURROCK & GRAHAM, W.S.—HOPE, MANN, & KIRK, W.S.—Agents.

ALFRED EVANS FLETCHER, Appellant.—*Balfour*—C. S. Dickson.
THE EGLINTON CHEMICAL COMPANY, LIMITED, Respondents.—
D.-F. Mackintosh—H. Johnston.

No. 3.

Nov. 13, 1886.
Fletcher v.
Eglinton
Chemical Co.
Limited.

Jurisdiction—*Sheriff—Alkali, &c. Works Regulations Act, 1881 (44 and 45 Vict. cap. 37)*—*Summary Jurisdiction (Scotland) Acts, 1864 and 1881*.—The Alkali, &c. Works Regulations Act, 1881, imposes fines for certain contraventions, and enacts that "every such fine shall be recovered by action in the County Court having jurisdiction in the district in which the offence is alleged to have been committed." The action is to be brought by an inspector, and "for the purposes of such action the fine shall be deemed to be a debt due to such inspector." In Scotland the Sheriff Court is the County Court for the purposes of the Act,

No. 3. "and may sentence the offender to imprisonment for any period not exceeding six months unless the fine and costs be previously paid, and any decision or sentence of such Sheriff or Sheriff-substitute is subject to review and appeal according to law." *Held* that proceedings for recovering the fines imposed by the statute fall within the Sheriff's criminal jurisdiction, and are competently brought by way of complaint under the Summary Jurisdiction Acts, 1864 and 1881.

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Fletcher v.
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Complaint—Fine or imprisonment—Limited Company—Relevancy.—A statute making regulations for alkali works enacted that contraveners should be liable to certain fines, and failing payment of fines and costs, to imprisonment.

A complaint against a limited company set forth that the company had contravened the statute in a certain way, "whereby the company" had been liable to a fine and to imprisonment in the event of the fine and costs not being paid, and prayed the Court to convict the company of the contravention, and to adjudge it "to suffer the penalties provided" by the Act.

Objection to the relevancy of the complaint, on the ground that the company was not liable to imprisonment, *repelled*.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

ALFRED EVANS FLETCHER, chief inspector, appointed under the Alkali Works Regulation Act, 1881 (44 and 45 Vict. c. 37), with the sanction of Her Majesty's Secretary for Scotland, being the central authority under the said Act, presented a complaint to the Sheriff of Ayrshire, at Ayr, under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, charging "the Eglinton Chemical Company, Limited, manufacturing chemists, Chemical Works, Irvine, . . . with having been guilty of an offence against section 3 of the Act, there having been, on or about said date, escaping from said work into the atmosphere in each cubic foot of air, smoke or chimney gases, one grain and ninety-eight parts of a grain or thereby of muriatic acid, whereby the said Eglinton Chemical Company, Limited, is liable to a fine not exceeding £50, and to the costs of this proceeding, and to imprisonment for any period not exceeding six months, unless the said fine and costs be previously paid."

The complaint prayed the Sheriff to convict the Company of the contravention, and to "adjudge the said Eglinton Chemical Company, Limited, to suffer the penalties provided by the said Alkali, &c., Works Regulation Act, 1881, as the same may be modified or affected by the said Summary Jurisdiction (Scotland) Act, 1881."

The respondents objected to the relevancy of the complaint, and the Sheriff-substitute (Paterson) sustained the objection and dismissed the complaint. The nature of the objection appears from the note to the interlocutor of the Sheriff-substitute, which was as follows;—"The petition sets forth that, in respect of the contravention charged, 'the said Eglinton Chemical Company, Limited, is liable to a fine not exceeding £50, and to the costs of this proceeding, and to imprisonment for any period not exceeding six months, unless the said fine and costs be previously paid,' and prays the 'Court to adjudge the said Eglinton Chemical Company, Limited, to suffer the penalties provided by the said Alkali Works Regulation Act, 1881, as the same may be modified or affected by the said Summary Jurisdiction (Scotland) Act, 1881.'

"Whether the statutory provision empowering the Sheriff to imprison on failure of payment of the fine and costs is to be regarded as providing an alternative punishment, or merely a mode of recovering or enforcing payment of the fine and costs, it is inapplicable to the case of a limited company."

The complainer craved a case.

The question of law for the opinion of the Court was, whether the complaint ought to have been sustained or dismissed, on the ground stated in the judgment of the Sheriff-substitute.

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The respondents objected to the competency of the appeal, and of the whole proceedings in the Sheriff Court. They argued;—The case should have been brought in ordinary form in the civil Court and not under the Summary Jurisdiction Acts, 1864 and 1881, which applied only to criminal proceedings. The charge was of a contravention of section 3 of the Alkali Works Regulation Act, 1881 (44 and 45 Vict. c. 37),* with a view to recover the fine imposed by that section. But section 22 provided that such a fine was to be recovered by action in the County Court, and was to be deemed to be a debt due to the inspector. The evidence might be recorded, and a party aggrieved either in point of law or on the merits might appeal on a case stated, and the Court of Appeal might draw inferences from the facts stated, as a jury might on the evidence. All the rules relating to ordinary actions and appeals were to apply to this action for a fine. In Scotland the Sheriff Court was to be the County Court, and the Sheriffs' decision was to be subject to review and appeal according to law. The effect of sustaining this proceeding under the Summary Jurisdiction Acts would be to cut off a right of appeal both from the Sheriff-substitute to the Sheriff, and also from the Sheriff Court to the Court of Session and House of Lords, and indeed all right of appeal except on points of law on a case stated. Similar questions were tried by civil proceedings under

* 44 and 45 Vict. c. 37, sec. 3, provides,—“ . . . The owner of any alkali work which is carried on in contravention of this section shall be liable to a fine not exceeding in the case of the first offence £50, and in the case of every subsequent offence £100.”

Section 22 provides,—“The following regulations are hereby enacted with respect to the recovery of fines for offences other than offences against a special rule.

“Every such fine shall be recovered by action in the County Court having jurisdiction in the district in which the offence is alleged to have been committed.

“The action shall be brought with the sanction of the central authority, by the chief inspector, or by such other inspector as the local government board may in any particular case direct within three months after the commission of the offence, and for the purposes of such action the fine shall be deemed to be a debt due to such inspector. . . . The Court may on the application of either party appoint a person to take down in writing the evidence of the witnesses. . . . If either party in any action under this Act feels aggrieved by the decision of the Court in point of law, or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice.

“The appeal shall be in the form of a special case to be agreed on by both parties, or their solicitors, and if they cannot agree, to be settled by the Judge of the County Court on the application of the parties or their solicitors.

“The Court of Appeal may draw any inference from the facts stated in the case that a jury might draw from facts stated by witnesses.

“Subject to the provisions of this section, all the enactments, rules, and orders, relating to proceedings in actions in County Courts, and to enforcing judgments in County Courts, and appeals from decisions of the County Court Judges, and to the condition of such appeals, and to the power of the High Court of Justice, or any Division or Judge thereof on such appeals shall apply to an action for a fine under this Act, and to an appeal from such action in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the Court. . . . In Scotland, the Court of the Sheriff or Sheriff-substitute of the county in which the offence is committed shall be the County Court for the purposes of this Act and may award costs to either party, and may sentence the offender to imprisonment for any period not exceeding six months, unless the fine and costs be previously paid; and any decision or sentence of such Sheriff or Sheriff-substitute shall be subject to review and appeal according to law.”

No. 3. the Rivers Pollution Prevention Act, 1876 (39 and 40 Vict. cap. 75).¹

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The Sheriff-substitute's ground of judgment was also sound. The complaint set forth that this company had incurred the penalties of fine, and failing payment imprisonment, not merely that the statute had imposed them. Both penalties were asked or neither. If the prayer were granted there might be an attempt to imprison the corporators.

Argued for the appellants;—The Sheriff-substitute's ground of judgment was that the complaint set forth all the statutory penalties, and that one of these, viz., imprisonment, was inapplicable to a limited company. But objections might have been taken had the complaint not set out all the penalties.² A complaint did not need to specify the mode of punishment which was most suitable, but only the choice of modes open to the Judge. The Sheriff, if he convicted, need not award imprisonment failing payment of the fine. Under the Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), schedule K, he could grant warrant of poinding and sale. It had been held competent to proceed against a company under the Summary Jurisdiction Acts.³ As to the objection that the proceedings should have been taken for recovery of the fine as a civil debt, and not under the Summary Jurisdiction Acts, the expressions relied on by the respondents were taken from portions of section 22 applicable only to England. Scotland was specially provided for, and the power given to the Sheriff to imprison for a fixed period, failing payment of the fine, according to a well-established rule (recognised in the Summary Procedure Act, 1864, section 28), brought the matter within the Sheriff's criminal jurisdiction. No right of appeal could be affected by the proceedings being in the form of the Summary Jurisdiction Acts.⁴

LORD JUSTICE-CLERK.—Two questions have been argued here ; and the first, a preliminary question, is, whether we are competent to try the question which was intended to be raised in the inferior Court under the Summary Procedure Act. It is maintained that this is a civil debt under the Alkali Works Regulation Act, and that therefore the Summary Procedure Act with its penalties, and the review which we are in the habit of exercising under that statute, are not within the provisions of the Act. I have come to a very clear conclusion that there is no foundation for that argument, and that we should be stretching the words of the Alkali Act, which are founded on, and which refer to the English procedure, in a way which would not be consistent with the other provisions of that statute. The explanation of any apparent difficulty is, that the County Courts in England were thought to be a handy and convenient tribunal to try questions under this Act, which was an important Act for the community ; and as the offences under it were to be punishable by fine and imprisonment, it was thought desirable to make the fines so-called civil debts in the person of the inspector, and recoverable before the County Court, which is a Court of civil jurisdiction. Now, what might be a convenient procedure in England in these circumstances was anything but convenient under the complete system of procedure which we have in regard to penalties in Scotland ; and the question is, whether the words of the statute are so stringent as to exclude that convenient procedure which we

¹ Magistrates of Portobello v. Magistrates of Edinburgh, Nov. 9, 1882, 10 R. 130.

² Thomson v. Wardlaw, Jan. 23, 1865, 5 Irv. 45.

³ Glasgow City and District Railway Co. v. Hutchison's Trustees, March 20, 1884, 5 Coup. 420, 11 R. (Just. Ca.) 43.

⁴ Halliday v. Bathgate, June 1, 1867, 5 Irv. 382.

have in all prosecutions under this statute. I think all difficulty in that matter is removed by the provision of the 22d section—"Any decision or sentence of each Sheriff or Sheriff-substitute shall be subject to review and appeal, according to law." There is no doubt the real meaning of these words leaves it entirely open in Scotland to proceed according to the ordinary forms applicable to the substance of the matter. Now, the substance of the matter is a penalty which has been incurred by a contravention of the provisions of this Act. Such penalties are recoverable every day under the Summary Procedure Act. I am quite clear that it was not intended to exclude the application of it by the terms of this Act. I do not go further into it, for I feel no doubt of the conclusion I have come to.

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As to the other question argued, the Sheriff in this case has found that the complaint is irrelevant, because he says it is directed against a copartnery, and it concludes not only for payment of the statutory fine, but, failing payment, for imprisonment; and he says that according to the law of Scotland a company or copartnery cannot be imprisoned. Of course the conclusion for imprisonment against this company is a legal fiction. That is perfectly true; but there has been no attempt here to imprison. There is a conclusion for imprisonment in the complaint. The Sheriff finds that not only irrelevant in itself, but that it makes the whole procedure irrelevant. I do not think so. If the Sheriff had convicted under the complaint, he would not have proceeded to imprison. The £50 would have been paid. Whether paid or not, there are other remedies open for recovering the penalty; and I think it entirely premature to raise this question. I do not go farther into the matter, which has been very ably argued before us, but my opinion is that the complaint is relevant.

LORD YOUNG and LORD CRAIGHILL concurred.

THE COURT pronounced this interlocutor:—"Sustain the appeal; recall the judgment of the Sheriff-substitute, and remit to him to proceed: Find the appellant entitled to expenses," &c.

SOLICITOR OF BOARD OF TRADE—J. Y. GUTHRIE, S.S.C.—Agents.

WILLIAM DICKSON, Appellant.—*Lyell*.

No. 4.

THOMAS LINTON (Public Prosecutor, Police Court, Edinburgh), Respondent.
J. C. Thomson—Boyd.

Nov. 19, 1886.
Dickson v.
Linton.

Public-house—Hotel certificate—Bona fide traveller (25 and 26 Vict. cap. 35), *schedule (A) No. 1.*—Circumstances which were held sufficient to justify a hotel-keeper in regarding certain persons to whom he sold refreshments on a Sunday as *bona fide* travellers.

WILLIAM DICKSON, hotel-keeper, Grassmarket, Edinburgh, who held a hotel license for premises there, known as the "Beehive," was convicted in the Police Court, Edinburgh, of breach of his certificate, in so far as upon the 8th day of August 1886, that day being Sunday, he "did open his licensed house in Grassmarket aforesaid, for the sale of exciseable liquors, and did sell exciseable liquors—*videlicet*, whisky and ale, or one or other of them therein, or on the premises belonging thereto, to Thomas Hatton and to Cecilia Stenison or Hatton, both residing in Stewart Terrace, Edinburgh, or to one or other of them, they not being lodgers in the said licensed house, nor travellers."

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
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Dickson craved a case, which was stated by the Sheriff-substitute

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(Sym). It set forth as the facts proved:—"On the Sunday libelled, the appellant's wife supplied whisky and ale to Thomas Hatton, a skinner, and his wife, and that is the contravention charged.

"Hatton and his wife had been living, from the time of their marriage, on 25th June 1886, in Stewart Terrace, Gorgie Road, Edinburgh, with a relative of Mrs Hatton; but on the night previous to the Sunday libelled they slept at the house at Saughton Tanworks which Hatton occupied before his marriage, Mrs Hatton's relative having died in the house at Stewart Terrace.

"They returned to Stewart Terrace on the Sunday morning.

"The name 'Saughton' is given to several houses, all within a short distance to the west of the city boundary, and the furthest point known as 'Saughton' from the 'Beehive' is between two and three miles, Saughton Tanwork being nearer still, and Stewart Terrace, which is within the city boundary, nearer than that.

"On the Sunday libelled Hatton and his wife went out, with the intention expressed at the time, of taking a walk, because Mrs Hatton was 'moping' in the house, in consequence of the death of the relative with whom they had lived, and also of getting some drink for Hatton at the 'Beehive,' he having failed to get drink in the vicinity of Saughton.

"In the course of their walk, and before returning to Stewart Terrace, they went to the 'Beehive.' They were asked by the appellant's wife, before the door was opened, whence they came, and they replied 'Saughton,' and were then admitted; and Hatton wrote his name and 'Saughton' in a book, kept by the appellant in order that persons who use the house on Sunday may put their names in it.

"They were then supplied with the whisky and ale libelled, and on leaving were seen by the police, who, being suspicious of a contravention, questioned them, and then entered the hotel with them, and were shewn the book above-mentioned.

"Thereafter they followed them to the house in Stewart Terrace."

The Judge held that the Hattons were not "travellers" in the sense of the certificate; convicted the appellant of a contravention of his certificate; and, it being a first offence, fined him £3 sterling.

The question of law for the opinion of the High Court of Justiciary was,—“Whether the facts proved are sufficient to warrant the conviction appealed against?”

The appellant argued;—The Hattons had gone out for a long walk, not merely for the purpose of getting drink. They had come on that day from Saughton, which was over two miles from the "Beehive," and had made a circuit on the way. The case fell within the principle recognised in previous decisions.¹ Further, the parties were unknown to the inn-keeper, who was in perfect good faith.

The respondent argued;—The Judge in the Police Court had held that the Hattons were not travellers in the sense of the certificate. That was a matter for him to determine on the evidence, and was not open to review of this Court. *Johnston v. Laing*¹ was in point. At least it was only in very extreme cases that this Court would interfere.² If the Hattons were not travellers, it did not matter whether the appellant thought so. He took the risk of that.³

LORD JUSTICE-CLERK.—In questions like this, there are sometimes cases where

¹ *Peplow v. Richardson*, Feb. 5, 1869, L. R., 4 C. P. 168; *Johnston v. Laing*, March 25, 1876, 3 Coup. 250.

² *Brunton v. Bremner*, Feb. 6, 1878, 4 Coup. 1, 5 R. (Just. Ca.) 20.

³ *O'Donnell v. Linton*, Nov. 1, 1864, 3 Macph. 6.

the person accused is not morally guilty, and where he did not intend to commit an offence at all. It is necessary that some strictness should be observed in giving effect to the provisions of the statute. Were it not so it would be evaded. On the whole matter here I am of opinion that this case is not made out. I think the Sheriff-substitute has rather misapplied the provisions of the statute in holding that in the circumstances in which these persons received refreshments they were not *bona fide* travellers, and that he has brought them into a category which their characters did not warrant. No doubt the journey which they took was not a long one. But they had left their house in the morning, and travelled two or three miles, had stopped to get refreshments on the way, and called at this public-house, and told in answer to the question of the appellant's wife where they came from, and then had refreshments from the keeper of the house. I am not disposed to visit the publican with penalties in this case. He, *bona fide*, believed that they were *bona fide* travellers. I think the sentence should be set aside.

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Lord YOUNG.—I am entirely of the same opinion. I am averse to interfere with the judgment of the Sheriff-substitute in a case of this kind, but I think it a strong case for setting aside the conviction rather than a weak one. I am not absolutely sure that I know all the facts, but so far as they are presented in the statement of the Sheriff-substitute, I think this prosecution ought never to have been instituted. In the most favourable view, it is being far too strict to mark transgression. This man and his wife first had been a long walk. They had this very slight refreshment. They are seen by the police going out of the public-house, and they, being suspicious, question them, and then enter the hotel and are shewn the entry in the book in regard to the place they came from. These people presented the appearance of travellers, and the innkeeper acted *bona fide* in taking their statement.

Lord CRAIGHILL.—I have come to the same conclusion. In setting aside the decision of the magistrate, I do not think we are doing anything but giving a fair and reasonable construction to the statute said to be contravened. I think the innkeeper acted in perfect good faith. It is plain that his wife believed that these people came from Saughton; and, if so, that they were, in a reasonable sense, *bona fide* travellers. I think the persons who got the refreshments have also acted in good faith, otherwise if they had not thought that Saughton was far enough away to entitle them to get refreshment they would not have said that they came from Saughton. They shew that they had no desire except to tell the truth. It would require a very strong case to support the conviction.

THE COURT sustained the appeal, and reversed the determination of the inferior Judge.

HORNE & LYEALL, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

No. 5.

Nov. 20, 1886.
Macbeath v.
Fraser.

THOMAS MACBEATH, Appellant.—*Watt*.
WILLIAM SUTHERLAND FRASER (Procurator-Fiscal, Dornoch),
Respondent.—*Wallace*.

Sentence—Amendment of incompetent sentence—Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. c. 62), sec. 3.—A Sheriff sitting in the Summary Court sentenced a person to pay a fine of £1, 1s., and ordained him to find caution to the amount of £10 for twelve months. In an appeal, *held (dis. Lord Craighill)* that it was competent for the Court to amend the sentence to the effect of restricting the period of caution to six months.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

THOMAS MACBEATH was convicted (along with others) under a summary complaint in the Sheriff Court, Dornoch, of breach of the peace and malicious mischief, aggravated by previous convictions of breach of the peace. He was sentenced to pay a fine of one guinea, and failing payment, to fourteen days' imprisonment, and was ordered to find caution for £10 for a period of twelve months. Macbeath appealed.¹

It was admitted that the latter part of the sentence was incompetent, the Sheriff not having power in a summary trial to order caution for a period exceeding six months (9 Geo. IV. c. 29, sec. 19, and Summary Jurisdiction Acts, 1864 and 1881). No argument was submitted as to the competency of restricting the period of caution to six months.

LORD YOUNG.—I think we do not need any answer here. It is admitted that the period for which the appellant was ordered to find caution is in excess of the Sheriff's power, the rule of law being that sitting in the Summary Court the Sheriff cannot order caution for a longer period than six months, and having ordered caution for twelve months it is conceded that that was in excess of his power, and that to that extent the conviction should be set aside. But in other respects it appears to me, on the appellant's own statement, that the conviction is quite right—(His Lordship then dealt with the relevancy of the complaint). I think we should reduce the period of caution to six months. The Sheriff proceeded on the view that having convicted two panels, and sentenced each to be fined a guinea, he would order the one to find caution for six months, which was within his power, and the other, in respect of his previous conviction, to twelve months. That is in excess of his power. I propose, as being quite reasonable, and in accordance with legal principle, that we should cut down the sentence only so far as it is in excess of the Sheriff's power rather than let the appellant off without any caution at all.

That is my *prima facie* impression, and I should propose that we should reduce the period to the statutory period of six months.

LORD CRAIGHILL.—I agree in everything except as to reducing the period of caution to six months in place of twelve months. There can be no doubt whatever that twelve months was illegal. But I confess I have very great difficulty as to whether we can substitute one punishment for another. We do not make sentences, but we determine whether sentences are or are not according to law.

LORD JUSTICE-CLERK.—I entirely agree in the proposed judgment. I have no doubt on the last point. There is nothing to compel us to do what is contrary to the justice of the case. Here the only valid objection to the sentence is that the period of twelve months is beyond the power of the Sheriff.

¹ M'Guire v. Fairbairn, Nov. 9, 1881, 4 Coup. 536, 9 R. (Just. Ca.) 4; Farquharson v. Guthrie, July 15, 1884, 11 R. (Just. Ca.) 55.

I cannot conceive, with the jurisdiction which we have here, that we have no power to do as Lord Young proposes. It would be quite a different thing were there no separable portion of the conviction.

No. 5.

Nov. 20, 1886.
Macbeath v.
Fraser.

LORD YOUNG.—I would refer your Lordships to sec. 3 of the Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. c. 62), the Act under which this case is brought. Subsection 9 provides,—“The Superior Court shall have power to affirm, reverse, or amend the determination in respect of which the case has been stated, or to remit the matter to the inferior Judge, with the opinion of the Court thereon, or to make such other order in relation to the matter and the costs of the appeal as they shall see fit.”

THE COURT “sustained the appeal, to the effect of restricting the period for which the appellant should find caution to the period of six months, reversed to that extent the determination of the inferior Judge, and *quoad ultra* dismissed the appeal.”

WILLIAM OFFICER, S.S.C.—CROWN AGENT—Agents.

SAMUEL MACDOUGALL AND OTHERS, Appellants.—*A. S. D. Thomson.*
JOHN CAMPBELL MACLULLICH (Procurator-Fiscal of Argyllshire),
Respondent.—*M'Kechnie.*

No. 6.

Feb. 18, 1887.
Macdougall v.
MacLulich.

Procedure—Appeal—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62).—An appellant is not entitled to raise on the facts stated in a case under the Summary Prosecutions Appeals Act, 1875, any question of law to which he has not specially directed the attention of the inferior Judge in requiring the case to be stated.

Proof—Declaration of accused.—A declaration taken on a charge of assault and mobbing and rioting and breach of the peace held to be competent evidence against the accused in a trial for breach of the peace only.

SAMUEL MACDOUGALL, Archibald Mackay, Donald Mackay, and Donald Clark were tried under the Summary Jurisdiction Acts, 1864 and 1881 before the Sheriff-substitute (Campion) of Argyllshire, at *Inveraray*, on two charges of breach of the peace. They were all convicted of the first charge, and the two former also of the second charge. They craved a case for appeal. In the case the Sheriff-substitute stated in considerable detail the facts proved before him, and the case concluded thus,—“The appellants’ agent objected to the declarations of the accused being read, as the declarations were taken on a charge of assault and mobbing and rioting, and breach of the peace. I repelled the objection, as the charges on which the accused were apprehended and examined related to the same facts as those for which they were on trial before me, although the crime was differently named; and they had been charged in the warrant on which they were examined with the crime of breach of the public peace, for which they were tried before me.”

High Court.
Lord Young.
Ld. Craighill.
Lord M'Laren.
Justiciary
Clerk.

“On the whole evidence, I found it proved that the appellants Samuel Macdougall and Archibald Mackay were present at the times and places libelled, and therefore guilty of breach of the peace as libelled; and that the appellants Donald Mackay and Donald Clark were, as regards the first offence charged, present at the time and place libelled, and guilty of such offence, but otherwise not guilty; and I convicted them all accordingly.”

The questions of law for the Court of Appeal were,—(1) Whether, in admitting the evidence objected to, the Sheriff-substitute’s ruling was sound in law? (2) Whether, on the facts held to have been proved, he was legally warranted in convicting the appellants?

The appellants argued;—There was no overt act proved against any of

No. 6.

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Maccullich.

the appellants except Archibald Mackay, and it was clear on the case that the Sheriff-substitute thought that mere presence in a crowd implied breach of the peace on the part of all present. [LORD YOUNG.—Was this point stated to the Sheriff? I should suggest to Sheriffs to decline to state a case unless the alleged error in point of law is stated to them.] The Sheriff's attention did not seem to have been called to this when the case was stated. Further, the declarations should not have been admitted. There was a tendency to mislead the accused by examining them on more serious charges than that on which they were otherwise tried.

Counsel for the respondent was not called on.

LORD YOUNG.—This is an appeal under the Act of Parliament upon a question of law on a case stated. In such an appeal we cannot interfere with the Sheriff-substitute's judgment except on a question of law stated to us. I qualify that with the observation that where any legal objection occurs on exhibition of the proceedings as to the relevancy of the complaint or the legality of the conviction we can set it aside as illegal on any such ground manifest on the face of the proceedings, for the statute enables us to pronounce any order that we think just. But our attention is confined to the question of law to be considered on the case. I have already stated my own opinion that where a party is dissatisfied with a conviction or an acquittal, and imputes it to error in point of law on the part of the magistrate, his course is to state the error in point of law, and ask for a case to raise the question, and the case ought to be directed, and, if necessary, strictly confined to such facts as are suitable and necessary to raise the legal question, or questions if more than one. Therefore, with reference to the question stated, not in the case but by the appellants' counsel, whether a party could be convicted for having been present, though innocently present, on such an occasion as this forming the subject of the charge here, I must decline to allow this error to be imputed to the Sheriff-substitute. I do not suppose for a moment that the Sheriff-substitute imagined that if he could characterise the presence of the accused as accidental or otherwise innocent that he would have thought of convicting anyone whose presence he could so characterise. Whether a man was present in sympathy with the rioters on any occasion of riot is a question of fact, and is sometimes a question of some difficulty for the jury or the Judge. How he came into the crowd, how long he remained, what he said, though he was not taking any active part, indeed everything may be taken into account in considering whether his presence was innocent or the reverse. Sometimes people are present out of mere idle curiosity, sometimes with some laudable purpose. All that is a question of fact to be determined on considering the whole circumstances, and I think we cannot here allow the error to be imputed to the Sheriff-substitute, that the quality of the presence was of no importance if the accused were present in point of fact. In reference, then, to the question whether on the facts stated the Sheriff-substitute was legally warranted in convicting, while there are cases where we were satisfied that an exhaustive statement of the facts was made to us in order to determine whether the conviction was legal or not, I do not think the facts are here stated in such a way. I do not think the case was stated with that view, and it was candidly stated to us by counsel that no such question as that now raised was put to the Sheriff-substitute.

The legal question is whether in admitting the declarations the Sheriff-substitute was wrong in point of law. These parties were apprehended and precogni-

tions taken, including a full examination before a magistrate on these facts, though the technical term "mobbing and rioting" was the word employed. The precognitions, the preliminary examination, and the commitment would have been exactly the same whatever name had been used to characterise the facts. The name is of no matter of consequence in the preliminary investigation. Our system requires the indictment to be carefully considered afterwards, and even on revision. I am of opinion that we must answer in the affirmative that the Sheriff was right.

No. 6.

Feb. 18, 1887.
Macdougall v.
MacLulich.

LORD CRAIGHILL and LORD M'LAREN concurred.

THE COURT dismissed the appeal.

WILLIAM OFFICER, S.S.C.—CROWN AGENT—Agents.

WILLIAM MACKENZIE (Clerk to the Conon District Fishery Board),
Appellant.—*D.-F. Mackintosh—Macfarlane.*

No. 7.

GEORGE PITCAITHLEY AND OTHERS, Respondents.—*C. S. Dickson.*

Feb. 18, 1887.
Mackenzie v.
Pitcaithley.

Salmon Fisheries Act, 1868 (31 and 32 Vict. c. 123), sec. 15, subsec. 4—Interpretation of bye-law, schedule E—Size of mesh.

THE SALMON FISHERIES (SCOTLAND) ACT, 1868 (31 and 32 Vict. c. 123), sec. 15, subsec. 4, imposes penalties on every person "who fishes for or aids in fishing for salmon with a net having a mesh contrary to any bye-law." The bye-law in schedule (E) of the statute provides "that no net shall be used for the capture of salmon, the meshes whereof shall be under one inch and three quarters in extension from knot to knot, measured on each side of the square, or seven inches measured round each mesh when wet." The Conon District Fishery Board charged George Pitcaithley and other salmon-fishers before the Sheriff of Ross, Cromarty, and Sutherland, with a contravention of the bye-law. The Sheriff-substitute (Hill) found them not guilty. In a case for appeal taken by the Fishery Board he stated in regard to the nets used by the accused that each side of a mesh measured one inch and three quarters from the centre of one knot to the centre of the next knot, but that a ball, which was admittedly seven inches in circumference, could not be passed through the meshes. The question of law for the opinion of the Court was whether the inch and three quarters should be got by measuring from the centre of one knot to the centre of another, or from the side of one knot to the nearest side of the next knot.

The Court remitted to Mr James Leslie, C.E., the only survivor of the Salmon Fishery Commissioners who had framed the bye-law. Mr Leslie stated that "The intention of the original Scotch Salmon Fishery Commissioners in framing the bye-law as to the meshes of nets was that they should be not less than $1\frac{1}{2}$ inches centre to centre of knots, or $3\frac{1}{2}$ inches, if drawn diagonally from knot to knot, between centres, which makes seven inches all round," and pointed out that "if the measure of the mesh be taken from between the near side of the knots that would make the square of the mesh considerably more than $1\frac{1}{2}$ inches, viz., by the difference between the diameter of a knot and the diameter of the twine; and, second, that it would make the round of the mesh considerably greater than seven inches, viz., by one quarter of the circumference of a knot less one diameter of the twine for each corner, or one whole circumference of the knot less four diameters of the twine."

THE COURT having considered the report, stated their opinion that the judgment must be in accordance with it, and dismissed the appeal.

JOHN C. BRODIE & SONS, W.S.—J. & J. GALLETT, S.S.C.—Agents.

No. 8.

ANDREW JACK, Appellant.—*Rhind*.
WILLIAM NAIRNE, Respondent.—*G. W. Burnet*.

Feb. 18, 1887.

Jack v.
Nairne.

Poaching—Day Trespass Act (2 and 3 Will. IV. c. 68)—Ground Game Act, 1880 (43 and 44 Vict. c. 47)—Farm-servant killing rabbits under authority from his master.—Held that rabbits not being game at common law, a farm-servant snaring rabbits under verbal authority from his master on his master's farm cannot be convicted of trespass in pursuit of conies under the Day Trespass Act (2 and 3 Will. IV. c. 68), and that the provisions of the Ground Game Act, 1880 (43 and 44 Vict. c. 47), sec. 1, subsec. 1, requiring written authority from the occupier to kill ground game, did not apply.

HIGH COURT.
Lord Young.
Ld. Craighill.
Lord M'Laren.
Justiciary
Clerk.

ANDREW JACK, farm-servant, Bowbridge, in the parish of Collace, was charged before the Sheriff of Perth at the instance of William Nairne of Dunsinane of having been guilty of an offence under the 1st section of the Day Trespass Act (2 and 3 Will. IV. cap. 68), "by entering or being upon the complainer's land of Bowbridge, in the parish of Collace and county of Perth, without the leave of the complainer, in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies."

Proof was led to the effect that Jack, a yearly servant of the agricultural tenant, and resident on the farm, was found setting snares for rabbits. Evidence was led for him to the effect that he had verbal authority from his master to kill rabbits.

The agricultural tenant produced his lease containing the following clause:—"Reserving also (subject to the provisions of the Ground Game Act, 1880), the whole game on the lands, with the sole and exclusive right, by himself or others to whom he may give permission, to hunt, shoot, and take the same; declaring that for any damage done by the game, or in the exercise of the powers so reserved, the tenant shall be entitled to compensation for injury done to his crops, in the event of such damage exceeding £7 annually, but the tenant shall not be entitled to compensation for injury done by hares and rabbits."

Jack was convicted of the offence charged.

He craved a case for appeal, in which the Sheriff-substitute (Grahame), after setting forth the above facts, stated,—“It was held, without determining whether generally, and where there is no such reservation as in this case, the tenant's right at common law to kill and take rabbits still remained, that the said clause in the lease reserves to the landlord the rabbits on the land.”

The questions of law were:—“(1) Whether, looking to the clause in the lease, and to the provisions in the Ground Game Act, there is in said lease, in respect of the phrase, ‘the whole game on the lands,’ a valid reservation to the landlord of the rabbits on the land, so far as to restrict the tenant's rights to kill or to take the same under the provisions of the Ground Game Act, and specially to the condition set forth in these provisions which requires the authority given to be in writing? (2) Whether the agricultural tenant and the appellant, his servant, resident on his farm, were not at common law, notwithstanding the lease and the terms of provisions of the Ground Game Act, entitled to kill the rabbits? And (3) Whether the complaint was or was not relevant, and whether the appellant did or did not commit a trespass within the meaning of the Act 2 and 3 William IV., chapter 68.”

Argued for the appellant;—It was clear that the tenant had right under his lease to kill rabbits, the game alone being reserved to the landlord. As the appellant had verbal authority from his master, he had been guilty of no trespass under the Act. It would have made no difference

had the master's lease reserved the right to rabbits, as the appellant was not bound to know that, and was justified in obeying his instructions.¹

No. 8.

Feb. 18, 1887.

Jack v.

Nairne.

Argued for the respondent;—The effect of the words used in the lease was to reserve to the landlord everything except the statutory right of the tenant under the Ground Game Act, 1880 (43 and 44 Vict. cap. 47). "Game" means game in terms of the statute, which by definition includes in "ground game" hares and rabbits (section 8). If so, the tenant could only give authority in writing to kill rabbits (section 1, subsec. 1). Further, the statute superseded the common law right of a tenant to kill rabbits on his farm, and substituted the more extensive right of killing both hares and rabbits, but subject to the limitations expressed, and, *inter alia*, to the limitation of requiring a servant to be authorised in writing. The case of *Calder* was inconsistent with the more recent case of *James*.²

LORD YOUNG.—This is a clear case. I do not doubt that every argument has been stated that could have been stated. The facts of the case are in a nutshell. A farmer employs his servant to snare rabbits. The landlord's gamekeeper finds him snaring rabbits, and thereupon, on a complaint which charges him with trespassing on land in pursuit of "game, or of deer, roe, woodcock, snipes, quails, landrails, wild ducks, or conies," he is convicted, and the statutory penalty imposed. I should like to remark in passing that it is somewhat ridiculous to charge him with being in pursuit of "deer, roe, woodcock," &c., winding up with "conies"—and the conviction echoes all that. I hope the remarks so frequently made about bundles of alternatives will be attended to, and where the charge is made of being on land in pursuit of rabbits and no more is intended, that no more will be stated. But the question is whether there was any trespass under the Act. I am of opinion, upon the previous decisions and the clear rule of common law, of which these are illustrative, that the appellant was not trespassing in pursuit of game. It is the rule that the tenant of every farm is entitled to kill by snaring or otherwise the rabbits thereon, unless he has otherwise contracted. It is also clear that a contract with respect to game only does not apply to rabbits, which are not game, and therefore the tenant in a lease whereby the whole game is reserved to the landlord is notwithstanding entitled to kill rabbits on the farm. The argument stated is that that is all changed by the Ground Game Act, 1880, which implies an alteration of the common law right of the tenant in this respect, substituting for what he previously had at common law the statutory right to kill both hares and rabbits on certain terms and conditions. I am of opinion that it does not interfere at all with common law rights, and think that perfectly clear. There are certain conditions attached to the right given by the statute (section 1), "provided that the right conferred on the occupier by this section shall be subject to the following limitations." That has nothing to do with the right previously existing at common law; and here there is no right conferred by the section except in addition to the common law, and that is subject to any condition under which it is given. But the right at common law to kill rabbits remains altogether unaffected by the statute. It is said that here by the lease the game was reserved, and that the word "game," as used,

¹ *Calder v. Robertson*, Nov. 6, 1878, 6 R., Just. Ca. p. 3, 4 Coup. 131.

² *James v. Earl of Fife*, Jan. 28, 1880, 7 R., Just. Ca. p. 9, 4 Coup. 321.

No. 8. includes rabbits. I think this is clearly not so. I think that is sufficient for the disposal of the case. But the case referred to shews that even this is immaterial, and that on the simple footing that if a farmer tell his servant to go and snare rabbits, or trap rats, or any other kind of vermin, the servant is not required to see a copy of the lease in order that he may know whether he is in safety to obey the order. We held that even where there is a reservation of rabbits in the lease the master's order is a sufficient defence to a servant to go and snare rabbits, and that he is not a trespasser under the Day Trespass Act because of any clause in the master's lease. I have no hesitation in arriving at the conclusion that the conviction is wrong in law, and should be quashed, with expenses.

Feb. 18, 1887.
Jack v.
Nairne.

LORD CRAIGHILL and LORD M'LAREN concurred.

THE COURT quashed the conviction.

BEGG & BRUCE LOW, S.S.C.—G. B. SMITH & DONALD, S.S.C.—Agents.

No. 9.

HENRY CLYNE, Appellant.—*MacLennan*.

PETER KEITH (Procurator-Fiscal of Thurso Burgh Court), Respondent.—

Mar. 18, 1887.
Clynev. Keith.

J. A. Reid.

Theft—Customer carrying off goods on credit against will of seller.—A shopkeeper refused to sell certain goods to one of his customers, unless the customer paid for the goods before delivery. To this the customer agreed, but after the shopkeeper had weighed the goods the customer, who was under the influence of drink, took violent possession of them, and carried them off without payment of the price, 3s., notwithstanding the remonstrances of the shopkeeper. The customer was convicted of theft of the goods. Conviction *quashed*.

HIGH COURT.
Lord Young.
Ld. Craighill.
Ld. M'Laren.
Justiciary
Clerk.

ON 19th January 1887, Henry Clyne, farmer, Weydale, Thurso, was tried in the Burgh Court of Thurso, at the instance of the procurator-fiscal, on a complaint charging him with theft, in so far as on 31st December 1886, he did from within or near the shop or premises in Olrig Street, Thurso, occupied by Thomas Murray, meal-dealer, "wickedly and feloniously steal and theftuously away take two stones weight or thereby of oilcake, the property and in the lawful possession of the said Thomas Murray, and which oilcake does not exceed the sum of 5s. sterling in value."

The Magistrates, in respect of the evidence adduced, found Clyne guilty of the crime charged, and fined him 10s., with the alternative of seven days' imprisonment.

Clyne took a case. The following were the facts stated:—Clyne had formerly been supplied by Murray with goods on credit, the price of which was at the date of the trial unpaid. Clyne called at Murray's shop on 31st December 1886, at about six o'clock evening, and asked Murray to supply him with a bag of oilcake on credit, which Murray refused to do. Clyne then asked Murray to supply him with four stones weight of oilcake, which he also refused to do, and distinctly informed Clyne that he would not supply him with any oilcake, unless he paid cash for it before delivery, as Clyne was already too deeply indebted to him. Clyne thereupon asked Murray to weigh two stones of oilcake for him, and said he would pay for it before delivery. Murray instructed his shop assistant, Margaret Tait, to weigh two stones of oilcake, but not to give it to Clyne until he had paid for it. She weighed two stones of oilcake, the price of which was 3s. sterling. After she had done so, and as she was proceeding

to lay it on the shop counter until Clyne should pay for it, he snatched it out of her arms, and went out of the shop with it to his cart, which was on the street opposite the shop; he then returned to the shop and took a 1s. out of his pocket, which however he did not offer to Murray. Murray called to Clyne to return the oilcake, when Clyne, who had been drinking, became very violent and abusive to him, refused either to pay for the oilcake or to return it, and repeatedly attempted to assault Murray. Murray sent a man named Falconer after Clyne to get possession of the oilcake, when Clyne threatened to split Falconer's skull with the oilcake. He refused to give up the oilcake, and drove away with it. Murray then sent for the police, who proceeded to a hotel, where they found Clyne, and charged him with the theft of the oilcake. He became violent and assaulted one of the police, who after having charged him with the theft of the oilcake, took possession of it out of his cart, which was standing on the street in front of the hotel.

No. 9.
Mar. 18, 1887.
Clyne v. Keith.

The question of law was:—"Whether, in the circumstances stated, the appellant is guilty of the crime of theft?"

LORD YOUNG.—I venture to think that the procurator-fiscal ought to have hesitated before prosecuting this case, and that if he had considered the matter fully he would have declined to prosecute. I do not think that theft is committed wherever the man takes the property of another and makes use of it. It may be a dangerous thing to do, but it may occur in many circumstances where it is not theft. The appellant here was tipsy. That is his excuse. It is a miserable excuse no doubt, and he acted in an altogether rude and unbecoming way, in insisting violently on taking credit for 3s., having only 1s. in his pocket. But I confess that I do not sympathise with the prosecutor who charged him with theft, nor with the magistrates who convicted him as a thief, and I should therefore propose that we should remove that stigma from his character by quashing the conviction. At the same time I should venture to suggest that we should express our disapprobation of his drunken condition and unbecoming conduct by refusing him his expenses.

LORD CRAIGHILL and LORD M'LAREN concurred.

THE COURT quashed the conviction, but found no expenses due.

WILLIAM GUNN, S.S.C.—PHILIP, LANG, & TRAIL, S.S.C.—Agents.

PETER CLELLAND, Appellant.—*J. C. Thomson—C. S. Dickson.*
A. SINCLAIR AND ANOTHER (Procurators Fiscal of the River-Bailie Court of Glasgow), Respondents.—*Sol.-Gen. Robertson—Ure.*

No. 10.
Mar. 18, 1887.
Clelland v. Sinclair.

Culpable, reckless, and negligent steering—Collision—Indictment—Specification.—The masters of two steamers which had been in collision in the Clyde were charged in the River-Bailie Court of Glasgow on a single complaint with "culpable negligence and reckless conduct in navigating, directing, managing, or steering steam vessels, whereby a collision took place, and the lives of the lieges were endangered, actors or actor, or art and part, in so far as," at a time and place libelled, the accused "did both and each, or one or other of them, while said vessels were approaching each other, so culpably, negligently, and recklessly navigate, direct, manage, or steer" their vessels "as to bring or cause or permit them to come into violent collision with each other, whereby" the vessels were damaged and the lives of lieges endangered. The charge was found proven against one of the accused, who was fined £3, but against the other

No. 10. it was found not proven. Conviction *quashed* on the ground that the libel was irrelevant for want of specification of the fault said to have been committed.

Mar. 18, 1887.
Clelland v.
Sinclair.

Observed that if the prosecutor intended to prove that both the masters were guilty of the offence libelled, he ought to have charged them on separate complaints.

Observations on the inexpediency of trying important questions in the River-Bailie Court of Glasgow.

HIGH COURT.
Lord Young.
Ld. Craighill.
Lord M'Laren.
Justiciary
Clerk.

PETER CLELLAND, a licensed pilot, and Duncan M'Tavish, master of No. 4 Hopper Barge, were charged in the Court of the Bailie of the River and Firth of Clyde at the instance of the procurators fiscal of that Court with having been guilty of "culpable negligence and reckless conduct in navigating, directing, managing, or steering steam vessels, whereby a collision took place, and the lives of the lieges were endangered, actors or actor, or art and part, in so far as on Thursday, the 21st day of October 1886, or on one or other of the days of said month, while the said Peter Clelland was in charge or command of the screw steamer 'Horatio,' then sailing down the Firth of Clyde, and the said Duncan M'Tavish was in charge or command of the said 'Hopper Barge,' then sailing up the said Firth of Clyde, and both vessels having met in or near Cartsdyke Bay at Greenock, in said Firth of Clyde, the said Peter M'Clelland and Duncan M'Tavish did both, and each or one or other of them, while said vessels were approaching each other, so culpably, negligently, and recklessly navigate, direct, manage, or steer said vessels, 'Horatio' and 'No. 4 Hopper Barge,' as to bring or cause or permit them to come into violent collision with each other, whereby both vessels were damaged, and the lives of lieges at the time on board both vessels, or one or more of them, were endangered."

The prayer of the complaint was:—"May it therefore please your Honour, on the said Peter Clelland and Duncan M'Tavish complained upon appearing or being brought before you, in virtue of the powers contained in 'The Clyde Navigation Consolidation Act, 1858,' to answer to this libel, to fine and amerciate each in a penalty not exceeding £5, and failing payment, to grant warrant to commit the said Peter Clelland and Duncan M'Tavish to the prison of Glasgow, therein to remain for a period not exceeding sixty days, unless said penalty shall be sooner paid."

An objection to the relevancy on the ground of want of specification was repelled. The accused then pleaded Not guilty.

The Bailie, after evidence, found the charge proven against Clelland, and fined him £3, 3s., but found the charge against M'Tavish not proven, and dismissed him from the bar.

Clelland took a case. The case stated,—"On 21st October last the screw steamer 'Horatio' was sailing down the Firth of Clyde to sea in charge of the appellant as pilot, and 'No. 4 Hopper Barge' was sailing up bound for Port-Glasgow. At Cartsdyke Bay aforesaid the vessels came into collision, the port-bow of the 'Hopper Barge' striking the 'Horatio' midships on the port-side, whereby three plates of said vessel about a foot above the water-line were bent and broken, the engineer's room was burst in, and the port-side of the bridge deck, which was of wood, was broken; one-half of the anchor stock of the 'Hopper Barge' was carried away. . . . I held it proved that 'No. 4 Hopper Barge' was proceeding up the river, keeping closely to her own side of the channel, that the 'Horatio' was sailing down the Firth of Clyde in charge of the appellant, and that the appellant culpably, negligently, and recklessly took the wrong side of the channel with said vessel 'Horatio' when at a considerable distance from said 'Hopper Barge,' and while the vessels were approaching each other, and continued to keep said vessel 'Horatio'

on her wrong side of the channel, and so close to the shore as to render it doubtful whether said 'Hopper Barge' could pass with safety on her proper side of the channel, and caused the collision, and that the lives of those on board both vessels were endangered." No. 10.
—
Mar. 18, 1887.
Clelland v.
Sinclair.

The questions of law were:—“(1) Whether the complaint sufficiently specified wherein the culpability of the appellant consisted? (2) Whether on the evidence the appellant was rightly convicted?”

Argued for the appellant;—The complaint was irrelevant for want of specification. All that was libelled was that a collision took place. But the procurator-fiscal was not entitled thus to say, “Let us have an investigation and find out who is to blame.” There should be some statement of the specific fault to be proved.¹ There was nothing in the Clyde Acts to take complaints in the River-Bailie's Court out of the ordinary rules of pleading. The offence charged might be committed in a variety of ways; what the appellant really had been convicted of was the offence of being on the wrong side of the river, which never could have been discovered from the complaint. Even a civil action would require to be more specific.

Argued for the Procurator-Fiscal;—There was here sufficient specification. The complaint was according to the practice in the River-Bailie's Court, but even in the Supreme Court such indictments had been found relevant.² It might be true that in these cases one of the colliding vessels was at anchor, but that was immaterial.

At advising,—

LORD YOUNG.—We have considered this case with some care. For myself, I must own that on reading the complaint I was a little surprised that, if seriously intended, it should have been brought before the Court of the Bailie of the river Clyde. The offence charged is a common law offence, that of so culpably, negligently, and recklessly navigating, directing, managing, or steering two vessels as to bring or cause or permit them to come into violent collision with each other, whereby both vessels were damaged, and the lives of lieges at the time on board endangered. Now, that is on the face of it a very serious offence, such as has repeatedly been tried in the Court of Justiciary both on Circuit and at the High Court. Where life is lost in consequence of culpable negligence and reckless conduct in navigating steam vessels, that is culpable homicide, and may be culpable homicide of a high order however it may have been caused, whether by the vessel running ashore, or on to a rock, or into another vessel; and we have had cases where negligence of a merely negative character has met with serious punishment. But this is a case before the Bailie of the river Clyde, and it concludes for a fine of £5. I should have thought, but I do not give any opinion on the point, which was not argued, that if the offence charged here was seriously meant, and the parties were to be punished accordingly, the Court of the Bailie of the river Clyde was hardly the tribunal to try such a question, and £5 hardly an adequate penalty. But passing from that, and assuming, but without expressing any opinion, that that is a Court in which such an offence may competently and with propriety be tried, I

¹ H. M. Advocate v. M'Alister, Nov. 20, 1837, 1 Swin. 587; H. M. Advocate v. M'Lean, Sept. 21, 1842, 1 Broun, 416; H. M. Advocate v. Henderson, Aug. 29, 1850, John Shaw, 394.

² H. M. Advocate v. Messon, April 29, 1841, 2 Swin. 548; H. M. Advocate v. Macpherson, Sept. 24, 1861, 4 Irv. 85.

No. 10. go on to consider the only question which was argued before us, and which awaits our decision—Whether the complaint here is relevantly stated?

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It was objected to the relevancy of this complaint that it is not stated wherein the *culpa* of either the one or the other of the accused persons consisted, and that that ought to have been set forth specifically. It was answered that it is according to usage in indictments in this Court merely to charge culpable, negligent, and reckless steering, whereby the vessel ran upon a rock, or against another vessel which was at anchor, and it was said that that is an authority for a libel in the terms we have here. I do not think so. There can be no culpable, reckless, and negligent steering on the part of a rock or the shore or a ship at anchor; if there is any culpable, reckless, and negligent steering at all, it must be on the part of those who were in charge of the vessel which ran against these obstacles. I can quite understand it to be a relevant complaint to charge the culpable and reckless steering of a vessel on to a rock or the shore or into another vessel at anchor; but when the prosecutor directs his complaint against those who were in charge of two vessels coming in opposite directions, and says that each of the accused in the same way steered culpably and recklessly so that they came into collision, I think that that is quite another matter. The other vessel—take either of them—is according to the prosecution being culpably and recklessly steered. The practical result really is that if two vessels, running in different directions, come into collision, and the prosecutor, as the result of inquiry, thinks that both were being culpably and recklessly steered, he should try those in charge separately. I cannot approve of the course that was taken here of putting both into one libel, and saying they were both alike culpable and reckless. It is plain that it was not intended to libel that they ran into each other intentionally. No sane man would have brought two persons who had done that before a Glasgow bailie, with a complaint concluding for £5 of a maximum fine. What the prosecutor in effect says is,—“There is fault somewhere, and I will put you both into the indictment, and so find out where the fault lay.”

It was explained to us by Mr Dickson that ship captains and pilots are seriously annoyed and injured by these petty prosecutions in the River-Bailie Court. Apparently if the captain of a sea-going steamer is bringing his vessel up the Clyde and she comes into collision with another vessel, both he and the captain or pilot of the other vessel may be tried before the River-Bailie Court. I do not think that that is at all reasonable, and I can well believe that the captains of sea-going steamers should shrink from a trial of their case in the River-Bailie Court. Their reputation and character as seamen are involved far beyond a £5 fine, and I think that in fairness to them the circumstances of such cases should be submitted to a tribunal better fitted to judge of them. Still less do I think it fitting—and that is sufficient for the decision of the present case—that both parties should be brought into Court before the bailie with the statement that both had been guilty of culpable and reckless steering, and so to find out in the course of the trial which is to blame. In this case the bailie came to be of opinion that one of the accused was entirely blameless, because he had kept to his own side of the river, and that the other person was to blame, because he had taken the wrong side. I assume that the bailie is right that one of the steamers was going down the wrong side and when trying to get to the proper side was run into by the other amidships. It would have occurred to me that a £3, 3s. fine was a ridiculous penalty with which to visit such an offence.

But what about the other party? and what about the prosecutor if he knew and intended to present that as his case? That would be totally unjustifiable conduct on the part of any prosecutor. Upon that ground of judgment I have no hesitation, and it is unnecessary to decide that the River-Bailie Court is an inappropriate tribunal for such case, although I personally am strongly of opinion that it is. What I should propose as the ground of judgment on the only question which was argued therefore is that this was an unfitting and unsuitable complaint—unfitting and unsuitable to bring two parties like these together in the same complaint, and merely to say that they were both culpable and reckless, so that they came into collision. The complaint does not meet the facts stated in the case at all, and upon the assumption of these facts it certainly is not such a complaint as any prosecutor should have presented. I propose therefore that we should sustain the appeal, set aside the conviction, and find the appellant entitled to expenses.

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LORD CRAIGHILL.—I entirely agree with your Lordship. I confess that when I read the papers I was surprised at the way in which the complaint had been framed. If the facts proved were in the knowledge of the procurator-fiscal at the time he prepared the complaint, I am quite at a loss to understand how he came to include in it the masters of both these vessels. It is plain in the proved circumstances that one master, and one master alone, was to blame. I think therefore that the master who alone was to blame should alone have been charged, and that he should have been informed in the complaint of the circumstances which constituted the fault which the prosecutor proposed to prove against him. Upon that ground I concur; but more than that, even if the complaint had been sufficient, I think the appellant ought to have been acquitted after the evidence had been led, for the facts proved do not support the case set forth in the complaint; on the contrary, they prove an entirely different set of circumstances.

LORD M'LAREN.—I concur. This is not like a case where several persons are charged with the same crime committed in the execution of a common purpose. The two vessels were coming in opposite directions; the crews were strangers to each other; they were probably ignorant of each other's presence until they were close together. The collision may have been the result of the negligence of the one or of the other, or of both, but if the last was the case, then there were separate acts of negligence, and it is not in accordance with the spirit of our law that two persons accused of crimes different in their circumstances should be charged under one criminal libel. I think, too, that the accused is entitled to more specific information as to the facts which constituted the negligence with which he is charged than he obtains under this complaint, which I agree in thinking is irrelevant. I also concur in your Lordship's observation as to the propriety of giving such accused persons the advantage of having their cases tried by a tribunal more fitted to deal with the important questions of responsibility which such cases present.

THE COURT quashed the conviction.

RONALD & BITCHIE, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 11.

June 8, 1887.
Morrison v.
Morrison.

JOHN MORRISON, Appellant.—*C. S. Dickson.*
ALEXANDER MORRISON (Procurator-Fiscal of Elgin), Respondent.—
C. J. Guthrie.

Public-house—Breach of public-house certificate—“Giving out” alone charged.
—A public-house keeper was charged with an offence against the Public-Houses Acts, in so far as at a time and place libelled he did “give out” a certain quantity of whisky in breach of his certificate. He was convicted “of the offence charged,” and appealed on a case stated, pleading, *inter alia*, that the complaint was irrelevant, in respect that “giving out” by itself did not necessarily import a breach of the certificate. The Court, being of opinion that on the facts stated in the case the appellant had committed a breach of his certificate, *refused* the appeal.

Public-house—Husband and wife—Proof—Competency of evidence of wife of accused in public-house prosecution.—A public-house keeper, convicted of a breach of his certificate, appealed on the ground, *inter alia*, that he had tendered his wife as a witness, and her evidence had been rejected by the magistrates as incompetent. The Court, without deciding that the evidence of the wife of the accused in a public-house prosecution was in all circumstances incompetent, *refused* the appeal.

HIGH COURT.
Lord Young.
Ld. Craighill.
Lord M'Laren.
Justiciary
Clerk.

ON 24th March 1887 John Morrison, public-house keeper, Elgin, was charged in the Burgh Court there, at the instance of the procurator-fiscal, with an offence against the Public-Houses Acts, in so far as he “did give out from the said licensed premises before eight of the clock in the morning of Friday the 11th day of March 1887, and after eleven of the clock at night of Thursday the 10th day of month and year aforesaid, a pint or other similar quantity of whisky to James Mowatt, butcher, residing in North Street, Elgin, in breach of the license certificate held by him.”

Morrison pleaded not guilty, but was convicted “of the offence charged,” and fined £2, 10s., with the alternative of one month’s imprisonment.

He took a case. The following were the facts stated:—“1. That between twelve and one o’clock on the morning in question, two policemen met James Mowatt in Commerce Street, Elgin, when Mowatt, who was the worse of drink, but aware of what he was doing, told them that he wanted a dram, and that he would have one although they followed him till 5 o’clock in the morning. 2. That the policemen, after a little, followed Mowatt to the back door of the appellant’s public-house in Lossie Wynd, Elgin, and saw him standing there. 3. That the policemen, when they saw Mowatt standing at the back door, returned to the front of the house, from which point they could not see the back door, and looking in at a window through a slit or space of about two inches at the top of the window between the roller of the blind and the blind itself, saw the appellant, who had only his shirt and trousers on, filling a black pint bottle with liquid from a metal measure, but could not see what with. 4. That when the appellant ceased filling the pint bottle, he put a cork into it and left the room therewith in a direction which leads to the back door as well as to the upper floor and other parts of the house, but after the appellant left the room the policemen did not see where he went. 5. That soon thereafter (about five minutes), Mowatt came round to the front of the house, when the policemen met him, and found a black pint bottle in the inside pocket of his coat filled or nearly filled with whisky. 6. That Mowatt, before leaving his own house the previous evening, got from his wife 1s. 3d. in money to purchase and take home with him a pint of whisky for their children suffering from toothache. 7. That Mowatt purchased and received a pint of whisky in a black pint bottle in the appellant’s public-house between 10 and 11 o’clock on the same

evening, which bottle he put in the inside pocket of his coat, and that he took a pint bottle of whisky home to his wife on the morning in question.

"The appellant's wife was tendered as a witness for him, but her evidence was refused as incompetent.

"Mowatt denied having received whisky from the appellant after 11 o'clock at night, and deponed that the bottle of whisky found on him by the policemen was that purchased by him from the appellant between 10 and 11 o'clock."

The questions of law stated were:—"1. Whether the charge of 'giving out' is relevant? 2. Whether the rejection of the appellant's wife as a witness was justified? 3. Whether the facts proved are sufficient to warrant the conviction appealed against?"

It was admitted at the hearing that the objection to the relevancy implied in the first question was stated to the magistrates and repelled by them.

Argued for the appellant;—(1) The complaint to be relevant ought to have set forth that the accused "did sell and give out." These were the words of the certificate, and it was the result of the authorities that "give out" was merely exegetical of "sell," and could not stand alone in a complaint, as there were many cases of giving out which were not struck at by the Act. The facts proved shewed that both the prosecutor and the magistrates had a difficulty in treating the case as one of selling, and so they charged and convicted under the head of giving out. It was plain that nothing was paid for the whisky, as Mowatt had spent all he had within legitimate hours. Therefore, either on the ground of irrelevancy or on that suggested by the third question, the conviction ought to be set aside. (2) The conviction was also bad in respect that the evidence of the appellant's wife had been improperly rejected. In *Bruce v. Linton*,² it was no doubt held that the accused himself was not a competent witness in a complaint charging an offence under the Public-Houses Acts, but such an offence was not, properly speaking, criminal—for one thing, the accused might be made liable through the fault of his servant. [Lord Craighill referred to the case of *Greenhill v. Stirling*.³] A wife's evidence ought therefore to be admitted. Here the case was one of peculiar hardship, for his own mouth being closed, his wife was the appellant's only possible witness, besides the man Mowatt, and she no doubt would have been able to explain away the suspicious circumstances.

The Court did not call on the Procurator-Fiscal.

LORD YOUNG.—The case for the appellant has been very fully and clearly stated by Mr Dickson, but we do not think it necessary to call for any reply. Two objections are taken to this conviction. The first is, that the simple charge of giving out spirits at a given time and place in contravention of the Public-Houses Amendment Act of 1862 is not a relevant charge, inasmuch as there may be disposals of spirits to which the term "give out" is applicable, which nevertheless are not contraventions of the statute. Now, it is a general rule, which we have frequently had occasion to apply in this Court, that either the complaint or the conviction should so specify the facts that the Court may see that the law has not been mistaken by the convicting magistrate. I do not

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¹ *Smith v. Stirling*, March 6, 1878, 5 R. (Just. Ca.) 24, 4 Coup. 13; *M'Petrie v. Cadenhead*, March 19, 1885, 12 R. (Just. Ca.) 35; *Welsh v. Stewart*, May 28, 1886, 13 R. (Just. Ca.) 61.

² *Bruce v. Linton*, Dec. 13, 1861, 24 D. 184, 34 Scot. Jur. 80.

³ *Greenhill v. Stirling*, March 19, 1885, 12 R. (Just. Ca.) 37.

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think that that rule applies with any particular force here. We are considering this conviction in an appeal on a case stated by the magistrates, and the facts, according to the case, are these :—That the publican sold a pint of whisky on the occasion specified in the complaint to a customer, who got the whisky, and took it away. That is the result of the evidence of the two policemen, if the magistrates believed them, and they must have believed them, otherwise they could not have convicted, because there was no other evidence. The publican says that that is not true—that he gave out no whisky, so that the issue raised between the prosecutor and the appellant was not the character or quality of the giving out, but whether there was any giving out at all. If there was any giving out, it is certain that it was in contravention of the statute. I am therefore quite prepared to repel that ground of suspension, and in doing so I have this qualification in view, which I now state in supplement of what I have already said, that in any real case, in which the publican says “I did give out whisky, I admit that, but I did so in such circumstances that the giving out was not a giving out in the sense of the statute,” the publican may have perfect safety, for he is entitled to require the magistrates to state a case, and so to enable him to maintain in this Court, as was done successfully in some former cases, that the giving out was not of the character maintained by the prosecutor, but of the character maintained by him.

The second objection to the conviction is that the wife of the appellant was tendered by him as a witness, and her evidence rejected by the magistrates as incompetent. Now that is a large general question, the fact certainly being, so far as we have any information, that in no case under this statute has a wife ever been examined as a witness, and therefore if we should decide that this objection is well founded, taking it in the abstract, we should be deciding for the first time the general question that a wife is in all cases admissible as a witness in a prosecution under this Act. Now, I should desire to avoid deciding this general question, and to make this decision as limited as the exigencies of the case will admit. I do not know whether it is quite logical—*prima facie*, I rather think it is not—to say that without deciding absolutely and without qualification the question of the propriety of examining a wife in such prosecutions, we may decide that the rejection of the evidence of the wife here is not a sufficient ground of appeal in this case. That would still leave it an open question where the person accused in very special circumstances tendered his wife as a witness to prove a certain specific fact, or certain specific facts, which could not be proved otherwise than by her evidence, and in that way made out a very strong case for allowing her to be examined as a witness to prove that fact or those facts. “Here is a special case,” the accused might say, “The turning point is so and so. My wife is able to give testimony upon that, and no one else is able to give it, and I accordingly tender her as a witness for that purpose.” I am not prepared to say that circumstances such as these might not arise in which the wife's evidence would be admissible. I do not say that the general rule is so general as to exclude such evidence. In the present case it was not stated to the magistrate for what purpose the wife was tendered as a witness, and the appellant's counsel was without information as to any particular fact that she alone could speak to. She was just tendered as a witness generally. I therefore propose to your Lordships that we should reject this ground of appeal also, and all I desire to guard myself against in so deciding is against being supposed to lay down now that in no cases and under no circum-

stances can we allow a wife to be examined in prosecutions under this Act. On No. 11. the whole matter, I think we should dismiss the appeal.

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LORD CRAIGHILL.—I concur in all that your Lordship has said. With regard to the second ground of objection, I think that in the present case the wife's evidence was very properly refused. The course of practice since 1862, and under the Forbes Mackenzie Act, affords sufficient evidence that in ordinary cases the wife is not a competent witness against her husband in public-house prosecutions. No precedent was adduced to us, and I can see nothing exceptional in the facts here.

LORD M'LAREN.—I also concur. In regard to the question of the admissibility of the wife's evidence, I entirely agree in what your Lordship and Lord Craighill have said, that it is only in very special and exceptional circumstances that such evidence may competently be taken. We know that in the ordinary practice of the Criminal Courts there are cases in which the evidence of the wife is admitted—cases of assault in which the wife is the injured party. These are variations of the ordinary rule introduced by the Criminal Courts, and not by statute, and there may be other cases to which it may be found necessary to extend the benefit of the exception. In considering the exceptions to a known general rule, it is impossible to determine beforehand what particular cases are to be regarded as exceptions. It is enough to say of the present case that I do not consider it to be an exception.

THE COURT dismissed the appeal, and affirmed the determination of the magistrates appealed against, with expenses.

BOYD, JAMESON, & KELLY, W.S.—GIBSON & PATERSON, W.S.—Agents.

JAMES GOURLAY, Appellant.—*C. S. Dickson.*

JOHN LANG (Procurator-Fiscal of the Dean of Guild Court, Glasgow), Respondent.—*Sol.-Gen. Robertson—Ure.*

No. 12.

June 4, 1887.
Gourlay v.
Lang.

Dean of Guild—Guild offence—Alterations "affecting the exterior dimensions" of a building—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), secs. 364 and 365.—The Glasgow Police Act, 1866, secs. 364 and 365, enacts that the proprietors of buildings within the city who, without the authority of the Dean of Guild, alter their buildings "in a manner which will affect the exterior dimensions thereof," shall be guilty of a Guild offence, and liable in a penalty. *Held* that the insertion of a window 5 feet by 3, which did not project beyond the plane of the wall, in each of two gables of a building was not an alteration affecting the exterior dimensions of the building in the sense of the foregoing enactment.

ON 10th March 1887 John Lang, procurator-fiscal in the Dean of Guild Court, Glasgow, presented a petition in that Court against James Gour- lay, house factor, Glasgow, praying the Court to find that Gourlay had been guilty of a "Guild offence," within the meaning of the Glasgow Police Act, particularly sections 364 and 365* thereof, in so far as he had

HIGH COURT.
Lord Young.
Lord Craighill.
Lord M'Laren.
Justiciary Clerk.

* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 364, enacts,—“Every person who intends to erect any building within the city (not expressly authorised by Act of Parliament), or to alter any such building of which he is not the sole proprietor, or to alter any such building of which he is the sole proprietor, in a manner which will affect the exterior dimensions

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altered a building, or part of a building, situated at No. 43 Bridgegate Street, Glasgow, of which he was the sole proprietor, in a manner which affected the exterior dimensions thereof, without a warrant from the Dean of Guild: To find him liable in a penalty not exceeding £50, and to ordain him, if the Dean of Guild should see fit, to restore the building to its former state.

The alterations complained of, which it was not disputed had been made without a warrant from the Dean of Guild, consisted of the insertion of a window, 5 feet by 3, in each of two of the gables of the building. The windows were on the same plane as the rest of the gable, and they had been inserted under an arrangement by which a complaint to the Sheriff under the Public Health Act, 1867, at Lang's instance, as clerk to the Magistrates as the Local Authority of the burgh, to have Gourlay ordained to provide proper means of ventilation in the buildings, had, on 23d February 1887, been dismissed by the Sheriff-substitute, who had previously expressed his approval of the proposed alterations, but without pronouncing a written order.

Gourlay (whose grounds of defence appear from the questions of law to be given immediately) pleaded Not guilty, but was convicted and fined 20s., the Dean of Guild in his note stating that "it has not been considered necessary to impose more than a nominal penalty sufficient to uphold the authority of the Court; and seeing that the alterations made have been a sanitary improvement, the respondent has not been ordered to restore the building to its former state."

Gourlay took a case. The Dean of Guild stated the foregoing facts and the following questions of law:—“(1) Whether the procedure before the Sheriff in the foresaid proceedings under the Public Health (Scotland) Act, 1867, in so far as held proved by me, amounted to an order by the Sheriff to make the alterations complained of; and if so, whether it superseded or rendered unnecessary compliance by the appellant with the provisions of section 364 of the Glasgow Police Act, before carrying out said alterations? (2) And whether I was justified in holding that the forming of the windows in the gable of the building in question is an alteration struck at by section 364 of the Glasgow Police Act?”

LORD YOUNG.—We are all of opinion that the jurisdiction of the Dean of Guild Court in Glasgow and elsewhere is a convenient and useful jurisdiction, and we do not wish to do anything which will interfere with it, or hinder its proper and reasonable operation. When new buildings are intended to be erected in a town, or old buildings taken down, or structural alterations made, it is conducive to the public interest and safety in various ways that recourse should be had to a public officer for his sanction to the operations themselves thereof, or to alter any apartment which is registered in pursuance of the provisions hereinafter contained, shall make application to the Dean of Guild for a warrant to do so. . . .”

Section 365 enacts,—“Any person who erects or who alters in any of the respects herein before-mentioned any building within the city, or who converts any apartment which has been so stated to be an apartment not intended to be let or used for sleeping in, to an apartment to be let or used for that purpose, without a warrant, or otherwise than in conformity with a warrant of the Dean of Guild, shall be deemed guilty of a Guild offence and be liable to a penalty not exceeding fifty pounds, besides being bound, if and in so far as required by the Dean of Guild, to take down and remove the said building, or to restore it to the state it was in previous to the alterations thereon, or to alter it in such way as the Dean of Guild shall direct, so as to make it in conformity with his said warrant.”

and to the manner of conducting them. But here we have to deal with a particular case, and the general observations which I have made must be considered with reference to it. The particular case is this: Mr Lang, as clerk to the Magistrates and Town-council of Glasgow, complained to the Sheriff that a house belonging to the appellant was not in a healthy condition, in respect that there was a want of proper ventilation in it; and with the view of preventing further litigation the parties came to consider how this difficulty might best be met, the result being that it was ascertained that by putting one small window into one gable of the house and another small window into another gable, the difficulty might be obviated and the ventilation increased. I say "small" because the windows were to be only five feet high by three wide, which, however, is a pretty large space for ventilation openings—and ventilation, not light, was the main purpose for which it was proposed to have them made. Well, these alterations having been resolved upon and completed,—and the operation was carried out in a way that was entirely unobjectionable, and the windows themselves were not only unobjectionable but highly desirable,—the same officer, Mr Lang, next complained to the Dean of Guild that his old adversary, who had yielded to him in the Sheriff Court, was guilty of a Guild offence, in respect that he had made the windows without having applied for and obtained a warrant from the Dean of Guild; and the Dean of Guild in answer to this application says,—*"The alterations which you have made are all right and proper, and in themselves very beneficial, but before making them you should have got a warrant from my Court, and as you have not got one you have committed an offence under the 364th section of the Glasgow Police Act, 1885, which I punish with a fine of 20s."* There is then a case stated, the import of which, as regards the facts, I have just given, with two questions for the opinion of the Court, the first of which is this,—*"(1) Whether the procedure before the Sheriff in the foresaid proceedings under the Public Health (Scotland) Act, 1867, in so far as held proved by me, amounted to an order by the Sheriff to make the alterations complained of; and if so, whether it superseded or rendered unnecessary compliance by the appellant with the provisions of section 364 of the Glasgow Police Act, before carrying out said alterations?"*

I propose that we should not answer this first question as being unnecessary. It was arranged to the satisfaction of both parties that the cause of the complaint to the Sheriff would be obviated on the windows being made as proposed; and the Sheriff, on being satisfied that the cause of complaint had been so removed, dismissed the case. Whether that is tantamount to an order by the Sheriff to make the alterations or not, I do not say—most probably my opinion would be in accordance with the view of the Dean of Guild that it is not—but I do not think it necessary to answer that question, because the answer which I propose should be given to the second question appears to me sufficient for the decision of the case.

The second question is in these terms,—*"(2) And whether I was justified in holding that the forming of the windows in the gable of the building in question is an alteration struck at by section 364 of the Glasgow Police Act?"*

Now, I understand this question to refer to the very windows with which we are here dealing, and to the forming of these windows. The clause of the Police Act referred to strikes at the making of alterations on a building "in a manner which will affect the exterior dimensions thereof" without the authority of the Dean of Guild, and renders persons making such alterations liable in a penalty.

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I think that we must take the language of the clause in the plain common-sense meaning in which a citizen of Glasgow or of any other town would understand it. It is not taking down a building, or a part of a building, in such a manner as to involve danger to the public, and so require the sanction of the Dean of Guild as the guardian of the public safety. It is the alteration of a building in such a manner as to affect the exterior dimensions thereof. That implies that there may be alterations which do not affect the exterior dimensions of the building, and the question here is whether the formation of these two windows is an alteration of the building in a manner affecting its exterior dimensions. Now, I think that, if I wanted by way of illustration to put a case of an operation upon a wall which does not affect the exterior dimensions thereof, I should put this very case of an air-hole or a window, which is not a bow-window, and does not project. I am of opinion, therefore, that the Dean of Guild, in holding that these alterations do affect the exterior dimensions of the building—in holding that technically, for there is no substance in the thing at all, though I do not disparage the technical view—was plainly in error.

I therefore propose to your Lordships to decline to answer the first question, to answer the second in the negative, to sustain the appeal, recall the deliverance of the Dean of Guild, and find the appellant entitled to modified expenses.

LORD CRAIGHILL concurred.

LORD M'LAREN.—I concur in all that has been said as to the interpretation of the clause of the Police Act, and as to the reasonable restrictions on the Dean of Guild's authority. It has fallen to me to have had some experience of the practice in Dean of Guild matters in this city, as your Lordship also has had, and I think that it has never been held, where the proposed alteration neither affects the safety of the building nor its exterior dimensions, nor the rights of neighbours, that it falls within the jurisdiction of the Dean of Guild. No doubt it may be a question of degree, but it has long been considered that there may be alterations of so trifling a character as not to require the authority of the Dean of Guild for making them. It may be difficult to lay down a general rule, but it is not difficult in ninety-nine cases out of a hundred to say whether a particular alteration requires the Dean of Guild's authority or not. To take the illustration which your Lordship suggested in the course of the argument, of putting up a clock face on the wall of a house, according to the principle of the Dean of Guild's judgment here such an alteration could not be made without his authority. On the other hand, if the proprietor proposed to convert a large part of a wall of a shop into a plate-glass window for the purpose of exhibiting his goods more favourably to the public, but in such a way that the safety of the lieges might be affected, it may then be necessary for him to apply to the Dean of Guild Court for a warrant to carry out such alterations. Nothing we now say is to be held as negating that.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Find it unnecessary to answer the first question in the case; answer the second question in the case in the negative: Reverse the determination of the inferior Judge," with seven guineas expenses.

DOVE & LOCKHART, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

WILLIAM HESLOP, Appellant.—*J. C. Thomson—C. S. Dickson.*
GEORGE CADENHEAD (Procurator-Fiscal of Aberdeenshire), Respondent.—
M'Kechnie.

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Ship—Employment of person as master who has no certificate—Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 136.—The 136th section of the Merchant Shipping Act, 1854, enacts that no ship shall proceed to sea unless the master thereof has a valid certificate under the Act, and that any person who employs any person as master without ascertaining that he is possessed of such a certificate shall incur a penalty.

In a complaint against the owner of a whaling ship for a contravention of the above section, it was held proved by the Sheriff that the accused had employed on board, nominally as icemaster, a person who possessed great experience as a navigator among ice, and as a whale fisher, but had no certificate under the Merchant Shipping Acts, and also another person, nominally as master, who held a master's certificate but was without experience in the two respects named; that, acting under the instructions of the accused, the icemaster assumed the command of the ship from the time she left Scotland till she was abandoned in the Arctic Seas; that he was considered by the crew as master, occupied the master's berth, and with a single exception gave all the orders, although several of the crew deposed that they would have considered themselves bound to obey the certificated master in the event of a difference of opinion; that it was requisite that the person in command should have some special knowledge of ice navigation, and that it would not have been safe to have entrusted the command to a certificated master, however good, who was not possessed of such knowledge; and that the certificated master was entered in the ship's books as master, and signed the articles as such, the icemaster being designed as "icemaster, in full charge." The Sheriff convicted the accused. On appeal the Court (*dis.* Lord M'Laren) *quashed* the conviction.

WILLIAM HESLOP, Howie o' Buchan, Aberdeenshire, was charged in the Sheriff Court at Aberdeen, at the instance of the procurator-fiscal, with having contravened the Merchant Shipping Act, 1854, particularly section 136 thereof,† "in so far as the said William Heslop having, during the period after mentioned, being one of the registered owners, and also the managing owner of the sailing ship 'Catherine,' of Peterhead, a foreign-going ship within the meaning of the said Merchant Shipping Act, 1854, he, the said William Heslop, did, during the period from the 18th of March 1886, to the 29th day of September 1886, employ James Benzie, icemaster or harpooner, then and now or lately residing in or near Maiden Street of Peterhead, in the parish of Peterhead aforesaid, as master of the said sailing ship 'Catherine,' without ascertaining that the said James Benzie was at the time entitled to and possessed of a certificate of competency or service, as required by said Act, and the fact being that the said James Benzie was not at the time of going to sea after mentioned, or during the course of said employment, entitled to or possessed

HIGH COURT.
 Lord Justice-
 Clerk.
 Lord Young.
 Ld. Craighill.
 Lord M'Laren.
 Justiciary
 Clerk.

* Decided June 3, 1887.

† The Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 136, enacts:—"No foreign-going ship or home-trade passenger ship shall go to sea from any port of the United Kingdom unless the master thereof, and in the case of a foreign-going ship, the first and second mates, or only mate (as the case may be), and in the case of a home-trade passenger ship, the first or only mate (as the case may be), have obtained and possess valid certificates. . . . Every person, . . . who employs any person as master, or first, second, or only mate of any foreign-going ship, or as master or first or only mate of a home-trade passenger ship, without ascertaining that he is at the time entitled to and possessed of such a certificate, shall for each such offence incur a penalty not exceeding £50."

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of any such certificate, and the said sailing ship 'Catherine' did, on or about the said 18th March 1886, leave the port of Peterhead and go to sea, and did proceed to New Gummilouk, or elsewhere in the Arctic Seas to the complainer unknown, where she was abandoned on or about the 29th day of September 1886, during all which time the said James Benzie continued on board of the said ship as master thereof, and in the employment of the said William Heslop; and the said William Heslop did thus, on or about the 18th day of March 1886, and continuously thereafter up till and including the said 29th September 1886, and at or near the port of Peterhead aforesaid, contravene the said Act, whereby the said William Heslop has rendered himself liable to a penalty not exceeding £50, and with expenses."

Heslop, after stating objections to the relevancy, which the Sheriff (Dove Wilson) repelled, pleaded not guilty, but was convicted, and fined £10.

He took a case. The facts stated were:—“(1) That the ship 'Catherine' of Peterhead left that port on the 18th March 1886, and proceeded to Davis Straits, Hudson Bay, and Melville Bay, to prosecute the whale and other fishings, having on board a crew consisting of William Robertson, master; William Baxter, mate; James Benzie, icemaster; and nineteen other seamen. (2) That said ship arrived among the ice in April, and was abandoned at New Gummilouk, in the Arctic Seas, on 29th September 1886. (3) That accused was the manager owner of the 'Catherine,' and engaged the said James Benzie nominally as icemaster. (4) That the said James Benzie possessed great experience and a good reputation as a navigator among ice, and as a whale fisher, but had no certificate under the Merchant Shipping Acts of competency or service, and that the said William Robertson held a master's certificate, but was without sufficient experience in the two respects named. (5) That Benzie selected the crew and fixed their wages, and that he also engaged Robertson to go the voyage, and took him to the accused, who fixed the wages. (6) That Benzie received £4 a month of wages, 10s. a tun of oil-money, and £4 a ton of bone-money, while Robertson received £2, 10s. a month of wages, 3s. a tun of oil-money, and £1 per ton of bone-money. (7) That when the crew signed articles at the custom-house they did so in presence of the shipping-master of the port, Robertson acting and signing as master and Benzie signing as icemaster. (8) That Benzie, acting, as I held, in view of the whole circumstances, to be proved, under the instructions of the accused, assumed command of the 'Catherine,' and acted as master thereof from the time she left the port of Peterhead until she was abandoned. That he was considered by all the crew as master. That he occupied the captain's berth, and gave all the orders, unless on one occasion, when Robertson gave an order to the carpenter; but that it was at the same time proved by the mate, the first harpooner, and one of the boat-steerers, that, in the event of a difference arising, they would have considered themselves bound in law to have obeyed an order from Robertson in preference to one given by Benzie. (9) That during the voyage Robertson occupied an officer's berth, and that the only stated duties performed by him were those of ship-keeper, in which he took his orders from Benzie. (10) That there is a practice to a certain extent of whaling ships to employ an icemaster to act as master, but the custom was by no means general; one witness stating that in one voyage out of nine, another that in three voyages out of twenty, and a third that in two voyages out of twenty-six, they had acted under an icemaster, while in all the other voyages they had acted under a certificated captain who had practical experience of ice navigation. (11) That it was requisite that the person in command

should have special knowledge of ice navigation, and that it would not have been safe to have entrusted the command to a certificated master, however good, who was not possessed of such knowledge.

"There were produced at the trial the ship's articles and list of crew.*

"In these circumstances I found that Benzie was the real master of the 'Catherine,' and was employed by the accused as such. I therefore found the complaint proved, and pronounced" the judgment given above.

The question of law was,—“Whether the facts being as hereinbefore stated, the accused was properly convicted?”

Argued for the appellant;—If the appellant had not employed Benzie he would have fully complied with the Act, yet the ship would not have been so safe. The question really came to turn on this, that Benzie had been allowed to navigate the ship before it entered the ice region, for it could hardly be maintained that after it had done so Benzie ought not to have been allowed to navigate. But whatever Benzie did, he did by permission of Robertson; as appeared from the facts stated in the case, the crew in the event of a difference of opinion between Robertson and Benzie would have felt themselves bound to obey the former. Had Robertson been proved to be incompetent, that would have been a different case, but there was no evidence of that. Robertson was a duly certificated master. He had no special knowledge of ice navigation, and was not required by his certificate to have that; the Board of Trade did not give certificates for such special knowledge, and certificated masters with that knowledge were hardly to be had. It was therefore an eminently proper act to have on board in addition to the master a man who though not in any way certificated was *de facto* a skilful ice-navigator—as had been done here.

It was also stated for the appellant (and not disputed) that at the Board of Trade inquiry as to the loss of the ship Robertson was regarded as master, and that his certificate was suspended.

Argued for the respondent;—It was not enough to have a certificated master on board, he must be there as master, not as a passenger or as one of the crew. Here the evidence shewed that Benzie from the first assumed the position of master. At all events this was not a question of law, but of fact, and the Sheriff had decided that question of fact—viz., whether Benzie or Robertson was master—adversely to the appellant, and the Court could not get behind that finding.

LORD CRAIGHILL.—(After narrating the complaint and the proceedings)—The offence here charged does not consist in employing a person to fulfil a part, or to fulfil parts of the duties of a master. It is the employing of a person as master, and unless it be shewn that the person who was employed was so employed as to possess the complement of all the duties which are incumbent on a master, it is not possible that the statutory charge can be established. To employ a person as a master means that it is incumbent that he is appointed to a

* The agreement and account of the crew was signed by “William Robertson, master,” and “the particulars of engagement” forming part of the said agreement and account contained, *inter alia*, the following:—Under the head “Signatures of crew,” the first entry was,—“(1) William Robertson, master to sign first”; then “(2) William Baxter” (the mate); then “(3) James Benzie.” Under the head,—“In what capacity engaged, and if master, mate, or engineer, No. of his certificate,”—the entry applicable to Robertson was,—“52,550 C. of S. master”; to Baxter, “95,559, mate”; and to Benzie, “icemaster, in full charge.” The columns applicable to wages, &c., were blank as regarded Robertson; as regarded Benzie, they gave the figures set forth in article 6 of the statement of facts proved; and as regarded Baxter, the mate, they were £3 of wages, 8s. of oil-money per tun, and £4 of bone-money per ton.

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master's position, and that the duties which he has to discharge are those which belong to his office. These duties are multifarious. Some have to be performed on shore at the ship's port of departure, others have to be performed on board ship, and there are others which in certain circumstances have to be performed in any port of arrival or at any port at which the vessel may touch. But all belong to the master, and a person that is not appointed to fulfil all cannot be looked on as the master within the meaning of section 136 of the statute. This at anyrate is my reading of the enactment in question. There is, I think, no room for doubt upon the subject. The assumption on which the enactment proceeds is, that there is but one master, and that the person who is doing the recognised duties of master on board is the person to whose office it belongs that these shall be discharged.

What is to be considered therefore is, whether it has been proved that Benzie was engaged as master of the "Catherine." The Sheriff-substitute has so found, and the grounds of his judgment are the duties which he performed in the navigation of the ship from Peterhead to Gummilouk. If the question were, whether or not the man had been employed to navigate the ship there probably could be little if any hesitation in taking the view of the facts that has been adopted by the Sheriff; but the charge is not that he was employed for the navigation of the ship, but that he was employed as master, and whatever he did in the former capacity, though everything may have been done which that special service required, that does not warrant the conclusion that a person so acting had been employed as master. The Sheriff has, I think, overlooked this consideration. He has assumed that the navigation of the ship is everything, and that the person employed in this work was necessarily master. He has held therefore that a contravention was incurred. This view appears to me to be altogether erroneous. There are many duties beyond navigating the ship. There are official duties to fulfil before the ship leaves the port of departure. There are other duties if she returns which have to be performed on her arrival—all by the master, and there are powers which the master is entitled to exercise should there be a case of necessity which no other person on board can fulfil. For example, he is entitled to order necessaries on the credit of the owners. He may hypothecate the ship, he may even sell a portion of the cargo, and there are other the like rights or duties, for they may be the one or the other according to the circumstances in which they may have to be exercised. These are given to him by his appointment as master, but an employment merely to navigate is not an employment by which anything but the duty of navigation is conferred. The judgment of the Sheriff is, I think, open to this further objection. He has limited his views of the evidence simply to what was done in the way of navigation and management of the ship after she was at sea. He has taken no account of the evidence afforded by the conduct of parties before the ship left Peterhead, and of the evidence of the official writings which were executed in fulfilment of the provisions of the Merchant Shipping Act. In the agreement and account of the crew of the ship "William Robertson" is set forth, and he signs, as master. Benzie, on the other hand, signs only as icemaster. This was a document prepared and completed at the sight of the custom-house officials, and must, I think, be taken to be the best of evidence as to the persons who were employed in the several situations which were filled by those on board. How Benzie came to do all that was connected with the navigation of the ship has not been explained, and may naturally be the subject of speculation; but

he may have done all, and for anything that appears in the proof I think he did all, without being employed as master. That office was filled by Robertson, and as the latter was entitled to and possessed the requisite certificate, there is no ground for the complaint on which the appellant was convicted. Therefore, in my opinion, that conviction ought to be quashed.

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LORD M'LAREN.—This is a prosecution for a contravention of the 136th section of the Merchant Shipping Act, which provides—confining myself to the part of the section with which we are more immediately concerned—that no foreign-going vessel shall proceed to sea except it be in command of a person who has obtained a master's certificate. Then there are certain provisions with which I need not detain your Lordships. Then the second part of the section provides that—"Every person who employs any person as master, or first, second, or only mate of any foreign-going ship, or as master or first or only mate of a home-trade passenger ship, without ascertaining that he is at the time entitled to and possessed of such a certificate, shall for each such offence incur a penalty not exceeding £50." The averment is that the owners in this case employed Benzie as master of the whaling ship in question without ascertaining that he had a master's certificate; the fact being that Benzie had not a certificate. I think that the requirement of the statute is a beneficial one. In regard to ordinary employments the policy of our times is that employment shall be free, and that the public are to judge of the qualifications of those who carry on their respective trades and professions. There are certain occupations, however, in which the lives, the property, or the reputation of the public more or less depend upon the skill and character of those who exercise such professions. These trades and professions, for reasons of expediency, have been dealt with specially, and with regard to them the Legislature has exacted a certain amount of qualification as necessary for the protection of the interests of those who are served by such professions. In this respect there is no difference in principle between the requirements of the Shipping Act and the requirements of the Acts regulating the admission of persons practising the learned professions. In all such cases the qualification insisted on is nothing more than a minimum qualification. Now, that means nothing more than this—that so far as an examination can ascertain the possession of the qualification necessary for the trade or profession, the candidate for admission shall possess the minimum amount of knowledge which such examination prescribes. If he passes the examination satisfactorily, he is held to possess the minimum amount of knowledge required in anyone carrying on that profession or occupation. I think it can hardly be doubted that the master of any vessel, and especially any foreign-going vessel, ought to be required to give evidence of a certain minimum standard of proficiency in the business of navigation of a ship, and in those matters that cannot be learned by mere experience before the mast, but only by instruction. For instance, he must give evidence of his ability to determine the ship's position by astronomical observation, and after such observation he must be able by means of a chart to find out the position of the vessel, and hence the proper course which he should steer. That is a thing that no man can learn by experience, and which, therefore, is part of the information which he is required to possess before he can take command of a ship. I take it that the purpose of the Legislature in imposing the penalty in the section quoted is to prevent shipowners engaging as *de facto* commanders of vessels persons who do not possess the requisite qualifications.

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There are no doubt other qualifications which a shipmaster ought to possess, and which can only be learned by experience. Probably in different parts of the world the experience necessary to make a completely equipped navigator will be very different. It is quite evident upon the statements in this case that a man may be a certificated master and yet may not be qualified to navigate a vessel in the Arctic Seas, whether with the view of whale fishing or seal fishing, or for any other purpose. Without experience it is impossible for him to know thoroughly the dangers of the ice and how to guard against them, how to avoid getting into the ice, and how to extricate himself after he is in. All such things are learned only by experience, which may be gained either before or after the admission to the professional position of master. But surely it is quite possible to find a person competent to take the command of a whaling ship who has a master's certificate, and who has also acquired the kind of knowledge at which I have pointed. If such a person cannot be readily found, I confess I do not see any legal or practical objection to engaging two persons, one a certificated master who will really command the ship in all matters relating to navigation; and another who will conduct the whale-fishing and advise with the captain in matters where knowledge of ice is specially required. If that had been all that was done in this case, I should not have expected the Sheriff to convict the person charged with the offence under this statute. I think it is no offence under the statute, and that it is not within the reason and scope of the provision at all that, in addition to the services of a real shipmaster, the owner should engage a person described as icemaster to be of use specially in conducting the business of the ship in the Arctic Seas. But the case of the prosecution here is that James Benzie, who is described in the contract of employment as icemaster, was employed by the owners to go on board this ship and really to command it, although along with him, to satisfy the requirements of the Act, Robertson, a certificated master, was also employed—not employed to act as master, but to comply with the supposed provisions of the statute. Now, the facts must be ascertained from the statements of the Sheriff in the case. It appears to me that the eighth statement of fact really settles the question, because the Sheriff finds that Benzie acting, as he holds in view of the whole circumstances proved, under the instructions of the accused,—that is, of the shipowners—assumed the command of the “Catherine,” and acted as master until she was abandoned. He evidently was considered to be the master. The Sheriff goes on to give the particulars that impressed his mind, but that in brief is the finding in fact which he makes—that, acting under the instructions of the accused, Benzie assumed command of the ship and acted as master during the whole course of the voyage.

Now, looking to the reason of the thing, I cannot see that the mere appointment in the character of master of a certificated person who is never to act as master at all, can be a compliance with the statute. What the statute requires is the appointment of a person who is to do the duties of a master. If he is not to do these duties it appears to me that he might as well not be there at all. It is a waste of money to employ him if he is merely to occupy a particular berth and do nothing; and what could have prompted the Legislature, if this is to be allowed, to make this a part of the requirements of the Mercantile Marine Law, I am at a loss to conceive. It is very intelligible that they should have desired that one who was to do the duty of master should have a certificate, but that it should enter into the mind of anyone to suggest that it is

good for the ship to have a man with a certificate on board to do nothing is to me utterly inexplicable. Yet that is what the Sheriff has found to be the nature of the arrangement with Benzie and Robertson, made with the consent and under the instructions of the owner.

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If I had thought that in this case there had been a division of duty, that Robertson was the navigating officer, and that he only gave up his command to Benzie when in the ice, in the same way as a captain gives up his command to a pilot, the captain nevertheless being entitled to take back the command if he finds the pilot is clearly going wrong, then I should not have held the case to be proved. But it seems to me that the Sheriff's findings amount to this, that by an arrangement between the owners and the men, in order to have the ship cleared out of port, Benzie undertook the duties of master, and was *de facto* the real master during the whole course of the voyage. That appears to me to be just the thing that the statute was intended to strike at—the employment of an unqualified man. It seems to me that the penalty is not avoided by the employment of a qualified man, who, although able to do some of the duties, was not employed actually in the discharge of these duties. It may be that Robertson could not have navigated the ship as well as Benzie in the Greenland Seas. But I think that what the owners ought to have done, and what would have been a proper compliance with the statute, was to employ a certificated master who had also experience in navigation in the Arctic Seas. I am therefore for affirming the judgment of the Sheriff.

LORD YOUNG.—The facts stated by the Sheriff amount in substance to this—A man of the name of William Robertson, who had a valid certificate, was *ex facie* employed as master. The contract of employment between him and the owner was that he should be the master. He was entered on the ship's books as master. He was announced to the shipping authorities and to the crew as master. He was endowed with all the authority of master which the law gives to a master. That, I think, is all proved *ex facie*. He proceeded to sea with the ship. *Ex facie* therefore the statute is complied with. The ship does not go to sea without a person employed as master entered upon the ship's books as such—without a man put into that position with all the authority attached to it, and possessing a valid certificate. There may be some sham and unreality in the matter, but so far as things are on board the ship, she goes to sea with a man employed as master and possessing the requisite qualifications. If there was nothing else—no other person put on board—the prosecution would be ridiculous, but another person was employed as icemaster. It was explained to us that there is at least a difficulty in finding a certificated master who possesses the requisite knowledge of the Arctic Seas—able to take sole charge of a vessel proceeding there. So much is that the case that the owners of such vessels, while employing certificated masters, find it necessary to conjoin with them—for that is stated to be the practice—persons who from experience have a knowledge of the Arctic Seas and of whale-fishing. And this complaint is founded upon the instructions—I suppose really the tacit instructions following upon a common usage—as to the several departments of these two employees. It cannot signify to the charge under the statute what the comparative wages of these two men are. The statute makes no provision about wages, although the facts regarding the wages may be an element in the case if there be any fraudulent conduct about the matter, or anything of that kind. But there

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really can be no suggestion of that sort, because the owner of this ship, like the owners of other ships, can have no interest except to provide for the safety of his vessels in the most reasonable manner. Any interest of his is entirely in that direction, and against any other direction.

The wages, therefore, are of no importance. What you can get a man for must depend upon the supply and demand. You may require a man with special knowledge and training and experience of the whale fishing in those Arctic regions. You have to go and find how many such can be had, and what is the rate at which they are paid. You will have to pay more, if there is a considerable demand for them, than you would have to pay perhaps for certificated masters and certificated mates. But such men are to be had and they have their own price. In accordance with the usual custom such a man was employed here, and in point of fact he had higher wages than the master of the ship, and he took a general charge of the ship. But the safeguard of a certificated master on board, which is all that the statute requires, the safeguard that a master with a valid certificate shall be put in possession with all the authority which the law allows a master was here observed, and there is no provision of the statute about controlling a certificated master by any regulation or order in the due exercise of his authority. The charge resolves itself simply into this, that you, the owner, employed a certificated master, you put him on board in that capacity with the authority attaching to his position, but by your orders and instructions you controlled him in the exercise of his duties. There is no provision in the Act of Parliament that is applicable to that so far as I can find. We are very familiar in the case of yachts, larger many of them than this ship I suppose, where the owner has a certificated master on board, and yet thinks—sometimes justly and sometimes not—that he himself is a very good navigator, and therefore takes charge of the ship. In such a case as that he always supersedes the master, but that is not considered to be the case of a ship going to sea without a master. Then, in the case of a merchant who owns large ships himself going to sea on board of one of them—he has probably been a yachtsman or had some experience—or, as I have known to be the case, been an old ship-captain. I say he is on board, and sometimes he will supersede his captain. He has no certificate, but he takes it into his head to amuse himself, and he may do so at any part of the voyage, by taking charge of the ship. For all that the statute is considered to be complied with, notwithstanding that this merchant or old sea-captain takes it into his head to navigate his own vessel. With respect to the very important view of the case suggested by Lord M'Laren, I mean the policy of requiring examinations—if any astronomical observations are required to be made, or any recourse required to be had to the art of navigation—why, the certificated master is on board ready to be resorted to. He is really a guarantee for safety, and therefore the statute requires his presence there; but if the certificated master is there, the statute is complied with. It says, you shall have a certificated master on board; but I cannot say that because another is on board, and even takes charge of the vessel when passing along the common seas before reaching the Arctic Seas, that is any violation of the statute. Indeed it approaches the ridiculous to say that you violate the statute because the owners have taken an admittedly necessary additional precaution in putting the icemaster on board, who is to have a supereminent charge of the ship, because of his superior qualifications. If he had been absent,—this man with his superior qualifications, and ability to help the ship in difficult situations

in the ice,—then this prosecution, instituted in the interests of safety, would not have been competent; but his presence, which only gives additional security, and which is paid for by the party interested in the additional security, is the foundation of the prosecution for the promotion of security. No. 13.
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Now, I cannot assent to anything like that. I think the statute has been complied with here, not merely literally, but in the spirit of it, for I think that the spirit of the statute is that a certificated master, who may be resorted to in any circumstances requiring resort to him, is to be put on board in that capacity, and I hold that he has here been put on board in that capacity, for he is entered as such in the ship's books, and consequently he has the statutory authority as master. I think that is all that the statute means to exact. It is all the compliance that the statute requires with its provisions. What has to be done for the management of the ship in particular circumstances, or even generally, the statute does not interfere with.

I am therefore of opinion with Lord Craighill, and, I confess, without sharing any of the doubts which I understand my learned brother at one time entertained, that Robertson was the master of this vessel, and that Benzie was not employed as master. I am also of opinion that the instructions to Benzie as to taking charge were not contrary to the provisions of the Act of Parliament. I therefore think the appeal ought to be sustained and the conviction quashed.

THE COURT sustained the appeal, and quashed the conviction.

ALEXANDER MORISON, S.S.C.—CROWN AGENT—Agents.

ARCHIBALD MACAULAY, Complainer.—*Young.*

ARCHIBALD MACDONALD, Respondent.—*Boyd.*

No. 14.

School—Failure to educate children—Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 70—Education (Scotland) Act, 1883 (46 and 47 Vict. cap. 56), secs. 9 and 10.—In order to a prosecution under the Education Acts, 1872 and 1883, for failure to educate children, it is essential that there should be produced either a certificate of failure to educate under section 70 of the Act of 1872, or an attendance order under sections 9 and 10 of that of 1883. June 4, 1887.*
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Macdonald.

ARCHIBALD MACAULAY, crofter, North Uist, was charged in the Sheriff High Court at Lochmaddy, at the instance of Archibald Macdonald, compulsory officer of the School Board of North Uist, with having failed to educate his children, John and Jessie, as required by the Education Acts, 1872 and 1883. No certificate in terms of section 70 of the Education Act of 1872† was produced by the prosecutor, and although an attend- Lord Young.
Lord Craighill.
Lord M'Laren.
Justiciary
Clerk.

* Decided June 3, 1887.

† The Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 70, enacts that the school board may summon before them any parent who fails to perform the duty of providing elementary education for his child or children, and if he shall fail to appear, or to satisfy the board that he has not failed in such duty without reasonable excuse, and if he shall not undertake to perform such duty, "it shall be lawful to and shall be the duty of the school board to certify in writing that he has been and is grossly and without reasonable excuse failing to discharge the duty of providing elementary education for his child or children, and on such certificate being transmitted to the procurator-fiscal of the county or district of the county in which the parent resides, or other person appointed by the school board, he shall prosecute such parent before the Sheriff of the county for such failure of duty as is in the certificate specified. . . ."

No. 14.

June 4, 1887.
Macaulay v.
Macdonald.

ance order under the Act of 1883 * was produced it was dated the year previous, and referred to John and another child of Macaulay's named Mary, but not to Jessie.

The Sheriff-substitute (Webster) convicted Macaulay, and imposed a penalty. Macaulay brought a suspension.

Argued for Macaulay ;—It was a condition of a prosecution under the Education Acts for a penalty for failing to educate children, that either a certificate under the Act of 1872, or an attendance order under that of 1883, should be produced ; here there was neither, for the attendance order produced was a year old, and referred to different children.

Argued for the respondent ;—There was here a substantial compliance with the Act of 1883. The parent had had full notice, and the Judge of a Summary Court was satisfied that the prosecution ought to be entertained, and that was all the Act required. The attendance order produced was in the circumstances enough.

LORD YOUNG.—I am very sorry to interfere with the Sheriff Court proceedings in a case of this kind, but in the circumstances I think it is unavoidable. It is always a delicate matter to interfere with a parent in the education of his children, and therefore the compulsory provisions of the statute ought to be enforced with great discrimination and forbearance. The leading check is the opinion of the school board. The school board must be satisfied that the parent is neglecting his duty as a parent, and has no reasonable excuse. If they are satisfied of that, they may authorise a prosecution before a magistrate, who may decline to find that the parent is neglecting the duty of educating his children, or in his discretion may find that the parent is guilty of that neglect. Here it does not sufficiently appear that the school board satisfied themselves of the parent's neglect. There was no application for a certificate under section 70 of the Act of 1872, nor was there an attendance order under the later Act. There was nothing but an application to the magistrate to punish the parent *de plano*, and I think that the magistrate, in so proceeding to punish him, has erred. I am of opinion, therefore, that this appeal should be sustained.

LORD CRAIGHILL and LORD M'LAREN concurred.

THE COURT passed the bill and suspended the conviction.

MACPHERSON & MACKAY, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

* The Education (Scotland) Act, 1883 (46 and 47 Vict. cap. 56), sec. 9, enacts,—“ If the parent of any child without reasonable excuse neglects to provide efficient elementary education as aforesaid for his child, or fails to secure the regular attendance of his child at some public or inspected school, it shall be lawful for the school board, after due warning to the parent of such child, to complain to a Court of summary jurisdiction, and such Court may, if satisfied of the truth of such complaint, order that the child do attend some public or inspected school willing to receive him and named in the order. . . . An order under this section is in this Act referred to as an attendance order.”

Section 10 enacts,—“ Where an attendance order is not complied with, without reasonable excuse, a Court of summary jurisdiction, on complaint made by the school board, may, if it think fit, impose a penalty not exceeding twenty shillings, with expenses, or of imprisonment not exceeding fourteen days.”

HERCULES SCOTT, Appellant.—*C. J. Guthrie.*
DAVID THOMSON, Respondent.—*J. C. Thomson—Law.*

No. 15.

June 4, 1887.
Scott v.
Thomson.

Administration of Justice—Alleged competition of civil right—Day poaching.
—A person charged on a summary complaint with day poaching produced a written permission by a burgh to shoot “over the lands belonging to” the burgh, and alleged that the *locus libellè* in the complaint formed part of the lands belonging to the burgh. The burgh declined to state whether they claimed the ground in question as their property, and it was not disputed that it was in the occupation of one of the complainer’s tenants. The Sheriff-substitute dismissed the complaint in respect that it involved a question of civil right. On an appeal, *held* that no question of civil right was involved, and case *remitted* to the Sheriff-substitute to be tried.

On 30th March 1887 David Thomson, labourer, Bervie, was charged in High Court. the Sheriff Court, at Stonehaven, on a summary complaint, at the instance Lord Young. of Hercules Scott, Esq. of Brotherton, with an offence within the meaning Ld. Craighill. of the Act 2 and 3 Will. IV. cap. 68, in so far as on 15th March 1887, he Lord M’Laren. did, in the daytime, commit a trespass in pursuit of game on a ploughed Justiciary Clerk. field on the farm of Annieston in the parish of Benholm, and county of Kincardine, the property of the complainer.

The case was adjourned till 25th April, on which day the Sheriff-substitute (Brown) pronounced this interlocutor:—“The Sheriff-substitute, in respect the complaint involves a question of civil right, dismisses the same.”

Mr Scott took a case. The facts stated were:—“The respondent pleaded not guilty to the complaint. He produced a written permission in his favour to shoot over the lands belonging to the burgh of Inverbervie, signed by the town-clerk by order of the town-council, and alleged that the place libellèd was on the lands of the said burgh. He further produced a copy of a crown-charter in favour of the said burgh dated 1595, and alleged that the place libellèd was within the boundary therein described. He also produced the Ordnance Survey plan of the district, and alleged that the place libellèd was shewn thereon to be within the boundary of the lands belonging to the burgh. In support of the complaint the appellant produced a notarial instrument in his favour in the lands and estate of Brotherton, recorded in the General Register of Sasines on 23d April 1860, and alleged that the place libellèd was on the lands therein conveyed.”

The question of law was:—“Whether, in the circumstances stated, the proper procedure was to dismiss the complaint?”

At the hearing on the appeal the appellant produced a copy letter dated 15th April 1887, from his agent, Mr Falconer, to the town-clerk of Inverbervie in which, after setting forth the nature of the complaint against Thomson and of the defence, Falconer continued:—“Up to the present time no intimation whatever has been made to Mr Scott by the burgh that any such claim was pretended, and he can scarcely believe that any permission granted by the burgh to Thomson ‘to shoot on the ground belonging to the burgh,’ was intended to authorise Thomson to shoot on the farm of Annieston. In view, however, of the defence put forward by Thomson, and of his case coming up again on Monday, 25th inst., to which date it was continued, I am directed by Mr Scott to call on the burgh to say distinctly whether the authority granted to Thomson ‘to shoot on the ground belonging to the burgh’ was intended to apply to Mr Scott’s farm of Annieston, and whether such a right to that farm, as Thomson stated, is maintained by the burgh.”

No. 15.

June 4, 1887.
 Scott v.
 Thomson.

The reply of the town-clerk, dated 23d April, was to refer Falconer to the terms of the permission granted to Thomson.

The appellant further stated that the ground in question was part of a farm belonging to him, and occupied by his tenant.¹

LORD YOUNG.—I have no hesitation in setting aside the deliverance of the Sheriff-substitute here, and remitting the case to him to be tried, which it has not yet been. The case is this :—A perfectly relevant and unambiguous complaint charging the offence of day poaching against the respondent was presented to the Sheriff-substitute and in ordinary course he ought to have tried it, but he refused to try it and instead pronounced this deliverance :—"The Sheriff-substitute, in respect the complaint involves a question of civil right, dismisses the same." The complaint involves no question of civil right : it simply states that on a ploughed field belonging to the appellant the respondent was found poaching in contravention of the statute. There was nothing to be tried but that. Then there is the case which the Sheriff-substitute has stated, but, how is there in the statements in it any question of civil right raised? Who is the person claiming against Mr Scott of Brotherton's seisin, and his averment that he is in possession of the farm which is worked by his tenant? Nobody in the world, except this alleged poacher, who produces a permission to shoot over the lands belonging to the burgh, and points to a copy of a crown-charter dated nearly 300 years ago, and to an Ordnance Survey map, and says, "You will find that these shew that the place mentioned in the complaint is burgh property, and so is within my permission." But the burgh do not say that the land is theirs—they claim nothing. When asked civilly by Mr Scott whether they did so, they decline to make any answer. They decline to raise any question of civil right. I am of opinion that the whole argument on which the Sheriff-substitute has acted is erroneous. I think we ought to sustain the appeal, and remit to the Sheriff-substitute to try the case, and find the respondent liable in expenses.

LORD CRAIGHILL and LORD M'LAREN concurred.

THE COURT sustained the appeal, answered the question in the case in the negative, recalled the judgment appealed against, and remitted to the Sheriff to try the case, finding the appellant entitled to five guineas of expenses.

COWAN & DALMAHOY, W.S.—D. ROBERTS, S.S.C.—Agents.

No. 16.

June 4, 1887.
 Linton v.
 Sherry.

THOMAS LINTON (Procurator-Fiscal in the Police Court of Edinburgh),
 Appellant.—*D.-F. Mackintosh—Boyd.*

ELIZABETH SHERRY, Respondent.—*Lyell.*

Public-house—Penalty—Modification—Home Drummond Act (9 Geo. IV. cap. 58), sec. 30—Public-houses Acts Amendment Act, 1862 (25 and 26 Vict. cap. 35), sec. 17—Summary Jurisdiction Act, 1881 (44 and 45 Vict. cap. 33), secs. 3 and 6—Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), sec. 319.

¹ *Respondent's Authority.*—Higgins v. Earl of Moray, Sept. 9, 1884, 12 R. (Just. Ca.) 1.

THE EDINBURGH MUNICIPAL AND POLICE ACT, 1879, sec. 319, in dealing with offences against the Home Drummond Act and the Public Houses Acts Amendment Act, 1862, enacts that "Every such offence or breach shall be proceeded with, tried, and determined, and all penalties incurred shall be recovered and applied by the Judge of Police in the manner and subject to the conditions provided in the said Acts."

By the Home Drummond Act, section 30, a power was conferred upon the Court of mitigating the statutory penalties to not less than one-fourth part thereof, but that power was taken away by The Public Houses Acts Amendment Act, 1862. By the Summary Jurisdiction Act, 1881, sec. 3, it is provided, *inter alia*, that "where there is a general or local Police Act in force, it shall be optional in police prosecutions either to use the forms prescribed by such Act, or the forms provided by the Summary Jurisdiction Acts." Sec. 6, subsec. (a), of the same Act enacts that when the punishment of a penalty or a fine is imposed, the Court may reduce the amount of such fine.

In a prosecution for an offence against the Public Houses Act, which was brought under the Edinburgh Police Act of 1879, and not under the Summary Jurisdiction Acts of 1864 and 1881, the magistrate convicted the accused, but imposed a modified penalty. The prosecutor appealed on a case stated, the question being—"Whether the power to mitigate penalties, conferred by section 6 (subsection A) of the Summary Jurisdiction Act, 1881, can or can not be competently exercised in proceedings under the Public Houses Act brought in the Police Court of Edinburgh, by virtue of the provisions of the 319th section of 'The Edinburgh Municipal and Police Act, 1879'?"

THE COURT, without calling on the respondent, and without delivering opinions, *refused* the appeal.

W. WHITE MILLAR, S.S.C.—R. H. MACDONALD, Solicitor—Agents.

No. 16.

June 4, 1887.
Linton v.
Sherry.

HIGH COURT.
Lord Young.
Ld. Craighill.
Lord M'Laren.
Justiciary
Clerk.

No. 17.

July 13, 1887.
Nicol v.
M'Neill.

ROBERT NICOL, Complainer.—*Strachan—Craighie.*

DUNCAN M'NEILL (Procurator-Fiscal of Arbroath Police Court).—*Murray*
—*C. S. Dickson.*

Procedure—Competency of summary complaints not under Summary Jurisdiction Acts 1864 and 1881 (27 and 28 Vict. cap. 53, and 44 and 45 Vict. cap. 53)—Sunday Trading—Act 1661, cap. 18.—A complaint in a Police Court at the instance of the procurator-fiscal charging a contravention of the Act 1661, cap. 18, "for the due observation of the Sabbath-day," set forth that the accused was "liable, on conviction, to pay a penalty of £10 in Scots money, or 16s. 8d. in sterling money, and failing payment of said penalty, is liable to be exemplarily punished in his person, namely, to be imprisoned for any period not exceeding twenty days," and prayed that the accused should be punished "according to law." The complaint did not bear to proceed under any of the statutes relating to summary procedure. The evidence of the witnesses was recorded, and the recorded depositions were signed by the respective witnesses and by the presiding magistrate. The accused was convicted. On a suspension, conviction *quashed*, *per* the Lord Justice-General, Lord Young, and Lord M'Laren, on the ground that the case of *Bute v. More*, Nov. 24, 1870, 1 Coup. 495, 9 Macph. 180, decided that a summary complaint for a contravention of the Act 1661, cap. 18, was incompetent, and *per* the Lord Justice-Clerk, Lord Mure, Lord Craighill, and Lord M'Laren, on the ground that, even if a summary complaint were competent, the present complaint could not be sustained, not being brought under the Summary Jurisdiction Acts 1864 and 1881.

Observations on the question whether the Act 1661, cap. 18, was in desuetude.

No. 17.

July 13, 1887.
Nicol v.
M'Neill.

HIGH COURT.
Full Bench.
Justiciary
Clerk.

ROBERT NICOL, baker, Arbroath, was charged at the instance of the procurator-fiscal of the Police Court there on a complaint in the following terms:—

“Unto the Honourable the Magistrates of the burgh of Arbroath, officiating in the Police Court of Arbroath;

“The complaint of Duncan M'Neill, superintendent of Police of Arbroath, and Procurator-Fiscal of Court for the burgh of Arbroath, for the public interest;

“Humbly sheweth,—That Robert Nicol, baker or shopkeeper, in or near High Street, in the burgh of Arbroath, and county of Forfar, has contravened the Act passed by the Scottish Parliament in the year 1661, chapter 18, entitled ‘an Act for the due observation of the Sabbath-day,’ more particularly that part of said Act which relates to or prohibits the using of merchandise on Sabbath-days: In so far as on Sabbath, the 4th day of July, 1886 years, the said Robert Nicol did open, or cause or permit the shop or premises situated at 236 High Street, in the burgh of Arbroath, and county of Forfar, then, and now or lately occupied or rented by him, to be opened, and did keep, or cause or permit the same to be kept open for the using of merchandise, namely, the sale of goods, and did sell, or cause or permit pies, pastry, and lemonade or other goods or merchandise to be sold within said shop or premises on said Sabbath-day, to both or one or other of William Cargill, a fisherman, and now or lately residing in or near High Street, James Keir, assistant shop-keeper or messenger, and now or lately residing in or near John Street, both in the burgh of Arbroath and County of Forfar; and to several, or one or more of the lieges, whose name or names and place or places of abode are to the complainer unknown; said selling of goods or using of merchandise on said Sabbath-day not being a work of either necessity or mercy, whereby the said Robert Nicol is liable, on conviction, to pay a penalty of ten pounds in Scots money, or sixteen shillings and eightpence in sterling money, and failing payment of said penalty, is liable to be exemplarily punished in his person, namely, to be imprisoned for any period not exceeding twenty days.

“It is therefore craved that warrant be granted for summoning the accused to answer to this complaint, and for citing witnesses for both parties, and that said accused be thereafter punished according to law, or or that such other judgment be given as the case may require.

“According to Justice, &c.

“(Signed) D. M'NEILL,

“Procurator-Fiscal.”

On 7th July the magistrate granted warrant to summon the accused to appear on 12th July, which warrant was executed on the same day by delivering a copy of the summons, with a list of the witnesses annexed, to the accused.

On 12th July the accused by his agent stated the following preliminary objections, viz. :—“(First) That the petition in present form is incompetent must be in form of criminal libel, with major and minor propositions, and must libel and quote Act of Parliament, and clause founded on; (Second) That the present petition is further radically defective in respect that it states the punishment, failing payment of the fine, to be twenty days in place of thirty days; (Third) That the prayer of the petition is incompetent in respect that the definite punishment is not specified and concluded for.”

The magistrate repelled these objections. The accused then pleaded not guilty. Evidence was led for the prosecution and also for the defence the depositions of the witnesses being recorded, and the recorded depositions signed by the witnesses respectively and by the magistrate.

The magistrate found the complaint proved, and the accused guilty of the contravention charged, and therefore sentenced "the said Robert Nicol in the statutory penalty of ten pounds Scots money, or sixteen shillings and eightpence sterling money, and failing payment thereof within fourteen days from this date, sentences the said Robert Nicol to be exemplarily punished in his body, by being imprisoned in the prison of Dundee, for the period of seven days from the time of his incarceration," and granted warrant to apprehend. No. 17.
July 18, 1887.
Nicol v. M'Neill.

Nicol brought a suspension, stating—" (6) The preliminary pleas stated by the complainer's procurator before the magistrate, and hereinbefore quoted, or at least one or other of them, were sound in law, and ought to have been sustained. The proceedings in connection with the said complaint were regulated by the Act 19 and 20 Vict. cap. 48, which extended to magistrates of Police Courts the procedure introduced by the Act 9 George IV. cap. 29, and according to the form of libel or complaint in schedule C appended to the last-mentioned statute, it is necessary to 'specify the punishment concluded for' in the prayer of the libel. There was no punishment specified in the prayer of the libel or complaint against the present complainer, and there was thus a failure to comply with the said statute; moreover, it was necessary in a complaint founded on the statute libelled in this case that a definite punishment should have been specified and concluded for. (7) Further, it was set forth in the said complaint that the complainer was liable, on conviction, to pay a penalty of ten pounds Scots money, or sixteen shillings and eightpence in sterling money, and failing payment of said penalty, is liable to be exemplarily punished in his person, namely, to be imprisoned for any period not exceeding twenty days. There is no period of imprisonment specified in the Act of Parliament libelled, and the complainer had no authority for specifying twenty days as the maximum period of imprisonment which could follow on a conviction of the offence libelled. By the foresaid statute, 19 and 20 Vict. cap. 48, the summary jurisdiction of the magistrate is limited to cases concluding for a fine not exceeding £5, or for imprisonment not exceeding thirty days, and the maximum period of imprisonment which could be inflicted in the present case was accordingly thirty, and not twenty, days, as specified in the said complaint. (8) There was no relevant offence under the foresaid Statute 1661, cap. 18, either charged against the complainer or established by the evidence adduced under the said complaint. The said statute prohibits the 'keeping of mercats or using any sort of merchandise on the said day, and all other profanation thereof whatsoever, under the pains and penalties following.' And it is libelled in the said complaint that the complainer was guilty of a violation of the said statute, in so far as on the Sunday libelled he sold pies, pastry, or lemonade, or other goods or merchandise within his shop in the High Street of Arbroath. What was established by the evidence was that he sold two buns and two bottles of lemonade, which are not merchandise within the sense or meaning of the said Act. Moreover, to constitute an offence under the said statute, it is necessary that the act complained of should be calculated upon reasonable grounds to shock the feelings of the religious and well-behaved portion of the community, and it was neither averred nor proved that the act complained of was of that character. There was no open shop kept by the complainer in the ordinary sense of those words. The complainer and his family live behind and above the small shop kept by him, and on the occasion in question the shutters were not off the windows, and only the half of the shop door was open. This portion of the door was open to allow access to the kitchen, and not to admit customers."

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July 13, 1887.
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McNeill.

After a hearing before the Lord Justice-Clerk, Lord Young, and Lord Craighill, the case was appointed to be heard before a full bench.

Argued for the complainer;—The grounds of suspension were (a) that the complaint was incompetent, and (b) that the Act 1661, cap. 18, if it was intended to prohibit sales like those alleged here, was in desuetude, at least as regarded such sales. On the first point, *Bute v. More*¹ ruled that a summary complaint charging a breach of the Act 1661, cap. 18, was incompetent. That was the opinion of the majority of the Court in that case, and received effect in the interlocutor, which bore,—“Find that the offence charged in the complaint, on which the conviction and sentence complained of followed, could not competently be tried under the Summary Procedure Act,” and was conclusive against the present prosecution.

The Court called on the respondent without hearing the complainer on his second point.

Argued for the respondent;—*Bute v. More* did not decide that a summary complaint charging an offence against the Act 1661, cap. 18, was incompetent, though there might be opinions *obiter* to that effect. All that it settled was that where there was no restriction of the punishment, and no record of the evidence, the complaint and proceedings were incompetent. Here the punishment was restricted—for the fair reading of the prayer was by reference to the narrative of the complaint, by which the punishment was limited to imprisonment for twenty days; and the evidence had been recorded. The case here, therefore, was not ruled by *Bute v. More*. It was competent to restrict the punishment in the case of a statutory offence.² [LORD M'LAREN called attention to the Summary Jurisdiction Act, 1881, sec. 3.*] That provision affected only cases falling under the Summary Jurisdiction Act, 1864.

At advising,—

LORD JUSTICE-CLERK.—This case raises some questions of considerable interest. It is a suspension of a judgment pronounced by the Magistrates of Arbroath on a complaint proceeding on the Statute 1661, cap. 18, for the better observance of the Sabbath. Substantially it charged the party complained against with having on the particular day in question sold lemonade and buns to a customer in breach of that Act. The case came up for hearing in the Justiciary Court before Lord Young, Lord Craighill, and myself. We thought that whatever might be the opinion of the members of the Court upon the general question of the propriety of enforcing that statute, the case in its facts was of too trivial a character to make it desirable that a question of such large and general importance, and involving points of policy to a considerable extent, should arise and have to be decided in such a form. We therefore suggested to the parties that they should withdraw the case. That advice, however, was not followed, and consequently we thought that trivial as the case in its facts might be, the general importance of the questions involved made it desirable that it should be heard before a full bench, and accordingly it has been heard by your Lordships.

The two questions which we intended should be argued before the full bench

¹ *Bute v. More*, Nov. 24, 1870, 9 Macph. 180, 1 Coup. 495.

² *Clark and Bendall v. Stuart*, June 8, 1886, 13 R. (Just. Ca.) 86.

* The Summary Jurisdiction Act, 1881 (44 and 45 Vict. cap. 33), sec. 3, is, with the Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), sec. 32, quoted in the opinion of the Lord Justice-Clerk, *infra*, p. 51.

was, in the first place, the competency of the proceeding, and secondly, the merits of the conviction. The case has been argued, but only with respect to the question of competency as yet, and it is upon that question that we are now to give judgment. No. 17.
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The case of *Bute v. More* in 1870 dealt with most of and decided some of the questions which are raised in this complaint. It was there held that a complaint of the same nature, and proceeding upon the same statute, could not competently be brought under the Summary Procedure Act, which was the phrase at that time, and the main grounds upon which that judgment was pronounced, and upon which the Court, I think, was unanimous, were, in the first place, that there was no punishment concluded for, or rather no punishment concluded for as mentioned in the Act; and, in the second place, that there was no record of the evidence, and therefore no provision for an appeal, which those old statutes seem to contemplate. Upon these points the Court were, I think, substantially agreed. There were some observations made with regard to other forms which might have been adopted. Some of the Court thought that the Act 19th and 20th of the Queen might have been a good vehicle in such a case for raising the question, but nothing was decided beyond the points which I have mentioned. There were also opinions expressed, and I think that on that matter also we were unanimous, that those Acts were not in desuetude, but could still be enforced.

This bill of suspension, if it had been in the form required by the Summary Procedure Act, would certainly have raised a different question from that which occurred in the case of *Bute v. More*, because the two specialties referred to in the case of *Bute v. More* do not occur in this case—that is to say, there is here a specific penalty concluded for, and there is also a record of the evidence. At one time I did think that perhaps this conviction might have been sustained as a conviction under the Summary Procedure Act, but even that ground I am now satisfied is not tenable, for this complaint is not brought under the Summary Procedure Act, but under the 19th and 20th of the Queen. It does not contain a prayer as enjoined by the Summary Procedure Act, and it does not contain the designation that it is brought under the Summary Procedure Act, which is required by the schedules of that Act, and what is of more consequence, the proof which has been taken under it is taken in the forms prescribed by the 19th and 20th of the Queen. That being a condition of affairs, we are referred to the Statute of 1881, which appears to me to leave us no choice whatever. For that statute provides that the option which was formerly given either to use the forms of the Summary Procedure Act, or to use other forms in the special Acts on which the complaints proceeded, should be taken away. The clause in the Summary Procedure Act is the 32d, which provides,—“The proceedings in any action or complaint for the prosecution for offences or recovery of penalties under any Act of Parliament may either be according to the form prescribed by such Act or any Act incorporated therewith, or according to the form prescribed by this Act, or where such proceedings are before the Sheriff, according to the form prescribed by the first recited Act.” But a statute was passed in 1881 which appears to me to be of the greatest possible consequence. That was an Act to amend the Act of 1864, and in its 3d section that later Act has this provision,—“The provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, shall apply to all summary proceedings as enumerated and described in the 3d section of the Summary Pro-

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cedure Act, 1864, and to all proceedings of the like nature which by any future Act are directed or authorised to be taken summarily or under the provisions of the Summary Jurisdiction Acts, and the 32d section of the Summary Jurisdiction Act, 1864, is hereby repealed." I read that in connection with the context of the sentence—which I do not trouble your Lordships by going over—to be substantially an enactment that in summary proceedings the forms of the Summary Procedure Acts—or rather of the Summary Jurisdiction Acts—are alone to be followed, and that the forms established by the Act 9 George IV., applicable to Sheriff Courts, and by the Act 19 and 20 Victoria, applicable to Burgh Courts, are no longer available for prosecutions of the kind brought in this case. I have come to that conclusion, and I think it unnecessary to express any further opinion in the matters that have been brought under our notice.

LORD YOUNG.—When this case was argued before the Lord Justice-Clerk, Lord Craighill, and myself, I thought it one of the greatest possible importance, not, I confess, upon the question which has been argued before the full bench, and upon which I understand we are now to decide the case, but upon the more important question whether the old Scots Act of 1661, chapter 18, anent the due observance of the Sabbath, and authorising exemplary punishment to be inflicted upon the person of anyone who violated its provisions, is still in force or is in desuetude. I thought that a very interesting question, and when I rather urged upon my learned brethren to refer the case to a full bench—and they were good enough to yield to my request—it was really that question of importance—a question deserving of the utmost consideration—that I had in view.

We were referred in the course of the argument to the case of *Bute v. More* in 1870—seventeen years ago—as deciding that a prosecution under the Sabbath Observance Act could not competently take place under the Summary Procedure Act of 1864, and we were also referred to that case as containing very strong and distinct expressions of opinion by the learned Judges who took part in the decision that the Act of 1661 was not in desuetude, but was in observance. Of course the decision being that the whole prosecution was inept, there could be no decision *ultra* upon the question whether the Act of 1661 was in desuetude or not. Nevertheless, the opinions expressed by the learned Judges, although in a case which was dismissed as inept, upon a question which would have presented itself had the proceedings been regular, are of the greatest possible value, and entitled to the greatest possible respect. Still there was no decision, nor could there be, and the weight and respect due to an expression of opinion by the learned Judges is of a different order from the weight and respect which is due to a judgment; and as some—I rather think all—of the learned Judges, although expressing the opinion that the Act was not in desuetude, but was in observance, declared that no instance of a prosecution under it had been referred to, and that they were not themselves aware of any prosecution under it, it appears to me to be not unworthy of reconsideration by the Court—whether an Act more than 200 years old upon such a subject, and having for its immediate companions in the Statute-book statutes of the kind to which we have been referred requiring people, for example, to attend church—and to attend the parish churches—under severe penalties, is still enforceable. It occurred to me also that if we were to look not to the expressions of opinion

on this matter in a case which was inept in itself, but to the actual judgment of the Court, which was unanimous, that judgment was conclusive of the prosecution here as being directly applicable to it. That question alone was argued before your Lordships, the question, namely, whether, under the judgment which was pronounced in 1870 in the case of *Bute v. More*, the form of prosecution in this case could be sustained, or whether it must be dismissed as inept. Now, I am of opinion upon the authority of *Bute v. More* alone, and irrespective of the Act of 1881 altogether, which, with great deference to the Lord Justice-Clerk, I think has no bearing upon this case, that the procedure here is inept, and that the case must be dismissed accordingly.

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We were referred in the course of the argument to three statutes. The first was the Act 19 and 20 Vict., passed in the year 1857, and extending, with certain qualifications, the very familiar provisions of the Sheriff Court Act of 9 Geo. IV. to the Justice of Peace and Burgh Courts. The second Act to which we were referred was the Summary Procedure Act of 1864, and the third was the Summary Jurisdiction Act of 1881. Now, my opinion is that if an offence against the old Scots Act of 1661 can be prosecuted under any one of these three Acts, or could ever have been so prosecuted, there is no objection to this prosecution—at least the only one of them that would suggest an objection to the form of process adopted here is the 19 and 20 Vict., because that Act requires the punishment to be specified in the prayer of the complaint, and it is not concluded for here. The prayer of this petition is,—“It is therefore craved that warrant be granted for summoning the accused to answer to this complaint, and for citing witnesses for both parties, and that said accused be thereafter punished according to law, or that such other judgment be given as the case may require.” There is no limitation in the prayer. Now, that might have founded an objection before the Act of 1864 to this prosecution proceeding in summary form before the Justices, but under the Act of 1864 it is absolutely unobjectionable. There is, as far as I can see, no objection to this complaint under the Summary Procedure Act of 1864 in point of form. The offence which is charged may not be triable under the Act of 1864. I think it is not—at least I think that it was so decided in *Bute v. More*—but if it is triable under the Act of 1864 I can see no objection to the form of it. It is quite true that the complaint does not bear in its title to proceed under the Act of 1864 as the schedule to the Act suggests, but then the Act itself provides “that no objection shall be allowed by any Court to any complaint under this Act for any alleged defect therein in substance or in form,” and it would not be dreamt of as an objection to the complaint that the title “Under the Summary Jurisdiction Act, 1864,” was omitted, the complaint itself being in all respects as required by the provisions of that Act, as I think this complaint is. Now, the Act of 1881 makes no provision at all about the forms of process. Here are the words of it—“The provisions of the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, hereinafter called the Summary Jurisdiction Acts, shall apply to all summary proceedings as enumerated and described in the 3d section of the Summary Procedure Act, 1864, and to all proceedings of the like nature which by any future Act are directed or authorised to be taken summarily.” The procedure here is not under a future Act—that is to say, an Act subsequent to the Act of 1864 directing summary procedure. Therefore clause 3 of the Act of 1881 has no further application, so far as we are concerned, than to the summary procedure enumerated and described in the

No. 17. 3d section of the Summary Procedure Act of 1864. Then is this a summary

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proceeding enumerated and described in the 3d section of the Summary Procedure Act of 1864? If a prosecution under the Act of 1661 is a summary proceeding enumerated and described in the 3d section of the Summary Procedure Act, 1864, then the decision in *Bute v. More* was wrong, for the decision there was that it was not. The prosecution there was held to be inept, and was dismissed just because it was. Allow me to make that plain. Your Lordship in the chair who delivered the first opinion in that case said this,—“But, in the first place, it occurs for consideration whether this complaint can competently be tried with reference to the first subdivision of the 3d section of the Summary Procedure Act.” That refers to the first part of the subsection, which makes any prosecution theretofore competent under 19 and 20 Vict. or 9 Geo. IV. competent under the Act of 1864. Your Lordship negatives the notion that the complaint in question was one which fall within either of these statutes, and the conclusion of the paragraph of your Lordship's opinion is—“It is consequently incompetent to try it under the first subdivision of the 3d section of the Summary Procedure Act itself.” Then the residue of the 3d section is dealt with by your Lordship, with the result that you arrive at the conclusion that the prosecution is as incompetent under the 2d subsection as under the first. The other learned Judges concurring in that opinion—I should have thought unanimously, but there may have been a difference of opinion on the part of the Lord Justice-Clerk and Lord Ardmillan—the judgment of the Court is—“Find that the offence charged in the complaint, on which the conviction and sentence complained of followed, could not competently be tried under the Summary Procedure Act, 1864, and that the offence having been so tried, the conviction is invalid and void.” That is the judgment in *Bute v. More*—that the offence could not competently be tried under the 3d subsection of the Summary Procedure Act of 1864, and consequently I think that the Act of 1881 has no bearing upon this case at all. It was passed for a very legitimate and intelligent purpose, with which we are not now concerned. Before it was passed prosecutors thought it was in their option either to proceed under the Summary Jurisdiction Acts, or under the special Acts which created the particular offence which they were prosecuting, and that option was taken away by the Act of 1881, and it was very fitting that it should be taken away. But we are not concerned here with any such option, but only with this—if this was competent under the 3d section of the Summary Procedure Act of 1864, it must now be tried under that Act, and under nothing else. But then, as I have tried to explain, section 3 of the Act of 1864 has been decided not to be applicable to cases of contravention of the Act 1661, cap. 18, for preventing Sabbath desecration, and therefore in my view the prosecution falls altogether. If competent under the Act of 1864, it is competent under the Act of 1881, which indeed makes no change in the procedure. What seems to me to be said is simply this—that you shall not prosecute upon another statute which deprives the Court of the discretion as to penalties which the Summary Procedure Acts confer on the Court. I have heard that since the Act of 1864 there have been prosecutions under the 19 and 20 Victoria and the Act 9 George IV. Had the information not come from such a source as one cannot doubt I should have doubted it, because after the Act of 1864 there can be no object in prosecuting under the two older Acts. The form of procedure under these Acts is very similar to that under the Act of 1864, the only difference being that the Act of

CASES

DECIDED IN

THE COURT OF SESSION, &c.,

1886-87.

WINTER SESSION.

WILLIAM COOK, Pursuer (Respondent).—*M^r Kechmie—J. Wilson.*
ALEXANDER STARK, Defender (Appellant).—*D.-F. Mackintosh—*
C. S. Dickson.

No. 1.

Oct. 15, 1886.
Cook v. Stark.

Reparation—Master and Servant—Power of manager to delegate his duty of superintendence.—While the manager of a quarry may in ordinary circumstances delegate his duty of personally superintending particular operations in the quarry, yet, if the operation be one of peculiar difficulty, danger, and rarity, it is his duty personally to superintend it, and if he neglects to do so, and one of the workmen taking part in the operation is injured, the fact of his absence will be a ground for rendering his employer liable in damages to the injured workman, under the Employers Liability Act, 1880.

Reparation—Master and Servant—Contributory negligence.—Held that an ordinary labourer in a quarry, who, along with a skilled quarryman appointed by the manager, was employed in extracting an unusually large unexploded blast charge, which was an operation of peculiar difficulty, danger, and rarity, and was injured by an explosion caused probably by the skilled workman having made use of a steel jumper instead of a copper needle, was not barred by contributory negligence from obtaining damages from his employer.

ON 15th July 1885 William Cook, a labourer in the service of Alex-^{2D DIVISION.}
ander Stark, quartermaster, Auchinstarry Quarry, Kilsyth, was engaged Sheriff of Stir-
along with James Stark in the quarry in extracting an unusually large ling, Dumber-
charge of gunpowder which had missed fire about an hour before. ton, and Clack-
James Stark was a brother of Alexander Stark, and also of William Stark, mannan.
the manager of the quarry, and was a quarryman of experience. Stark I.
had begun the operation with a copper needle, but before Cook had come
up (to take the place of another workman) had exchanged that for a steel
jumper. Cook held the jumper in the bore, and poured water into the
bore, and Stark struck the jumper with a hammer. After this had gone
on for about half an hour the charge exploded, probably in consequence
of a steel jumper having been used instead of a copper instrument, and
Cook's left hand was blown off, and his eyesight injured. He brought
an action against Alexander Stark, under the Employers Liability Act,
1880, in the Sheriff Court at Stirling, averring that the injuries were due
to the fault of William Stark, the defender's manager.

In defence Alexander Stark maintained (1) that James Stark and the
pursuer were engaged in the operation of extracting the charge without
the authority or knowledge of William Stark, the manager; (2) that if

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M'Neill.

pared to sustain the objection which has been urged against the regularity of the conviction before us. But for that Act, so far as I can see, these proceedings are just as competent as any proceedings that could have been taken under the 19th and 20th of Victoria. If there was a restriction of the punishment to thirty days' imprisonment or a fine of £5, then any proceedings could competently be brought in the form prescribed by the Act Geo. IV. cap. 24. That required no doubt a limitation of the punishment, and there is a limitation of the punishment here. My brother (Lord Young) says that in the prayer there is no restriction, but I think that in truth that is a misreading of the prayer, for in the words used in the prayer we are referred back to the concluding sentence of the paragraph in the petition which immediately precedes. There a punishment of twenty-one days is invoked. There also we have a limitation of the fine, which is also within the limits prescribed for magistrates. That being so, in so far as regards the form of the prayer, there is no difficulty, and there being no difficulty in regard to that, we break ground upon which objection was taken in the case of *Bute v. More*. You have the limitation, and the limitation so brought within the restriction of 19 and 20 Vict. No doubt it may be said, and has been said more than once in the course of the discussion, that where you are dealing with a statutory punishment you are not entitled to limit the discretion of the magistrate. It was farther said—or it might have been said—that when you have personal pains prescribed as the appropriate punishment you must use the expression, and you must allow that to be carried into effect by the magistrate in pronouncing sentence. I think that that contention is entirely overruled, first by the consideration that a prescription of punishment, so far as regards the person, in the Act of 1661 had by all our authorities been regarded as superseded by personal imprisonment. It was so said by Hume long ago, and that is the view that has been adopted by the expressions of opinion of the Judges, and acted on in the procedure of our Courts. It is further said that there is a statutory penalty, and that you are not entitled to restrict it. That is provided for by the decision in this Court in the case of *Clark*, 13 R. (Just. Ca.) 86. That case was brought under the 11th section of the Criminal Law Amendment Act of 1885, which prescribed that for an offence under that statute there may be imposed as punishment a sentence of imprisonment for a period not exceeding two years. *Clark* was said to have contravened the statute, and the case was brought before the magistrate in Edinburgh under the Summary Procedure Statutes, but there was a limitation of the imprisonment to sixty days. There was a suspension brought, and the case in that way came before us. It was contended that to make a limitation of the imprisonment so as to bring the case within the Summary Jurisdiction Acts of 1864 and 1881 was in truth to change the enactment in the Criminal Law Amendment Act. The Court had no difficulty in overruling that contention. They held that a statutory punishment, just as much as a common law punishment, might be limited by the prosecutor, and that the prosecution could be instituted and carried forward before the magistrates acting under the provisions of the Summary Procedure Act of 1864. And so I think that but for the enactment of 1881 this is a case that might quite well have been tried—and in point of fact was tried, under what misapprehension I know not, except forgetfulness of the statute—under 19 and 20 Vict. For there was proof taken, and proof recorded, and the proof was authenticated in the way prescribed by the Act. All that was done—of course forgetting the Act of 1881—solely for the purpose,

as I imagine, of getting the better of that objection which was brought forward No. 17.
in *Bute v. More*, to the effect that the non-recording of the proof, the adoption July 18, 1887.
of a form of proof by which there was no record of the proof—had the effect of Nicol v.
taking away the right of appeal which otherwise belonged to the accused. But M'Neill.
when under the Act of 19 and 20 Vict. there could be that record, then it is
plain that that objection no longer could be urged, and it was for the purpose
of overcoming that, as I think, that this course was adopted.

On the whole matter I am of opinion that the conviction must be set aside
on the grounds set forth in the opinion of the Lord Justice-Clerk and Lord
Mura.

LORD M'LAREN.—I agree with Lord Young that the Acts of Parliament
referred to are all Acts having relation to a summary criminal jurisdiction of
the same character, and therefore that if under one of these statutes a prosecu-
tion for Sabbath-breaking is not competent, neither is such a jurisdiction com-
petent under any of the other statutes of the same class. The enactments I
refer to are the summary clauses of 9 Geo. IV. (Sir William Rae's Act), which
apply to Sheriff Court prosecutions, the Statute of 19 and 20 of the Queen,
which applies to the jurisdiction of burgh magistrates and justices, and the two
Summary Jurisdiction Acts which apply to prosecutions before Sheriffs, magi-
strates, and justices.

I also agree with the Lord Justice-Clerk that the Summary Jurisdiction Acts
have superseded the two earlier statutes, and on both grounds I conceive that
the decision in *Bute v. More* is conclusive against the competency in the present
prosecution.

If the Statute of 1661 is in force at all, the offence against which the statute
is directed is an offence against the ecclesiastical polity of the country, and
although in a certain sense it is to be tried summarily, I think the accused is
entitled to require that it should be stated in the form of a criminal libel, and
that an interlocutor of relevancy should be pronounced as a protection against
the risk of the statute being strained, and in order that citizens may not be
interfered with in the exercise of that liberty of opinion and action in matters
of religious belief which the constitution of the country prescribes.

As the question of the statute being in desuetude was not argued, we give no
opinion upon it. But, as the question may hereafter arise, I desire to say that
while opinions of great weight were offered on this question in the case of *Bute*
v. More, I conceive it to be a question entirely open to consideration, no deci-
sion having yet been pronounced upon that question. I wish to reserve my
opinion on it, because in point of fact the statute has not been enforced within
living memory, and the public opinion of the country does not demand its
enforcement.

These, it may be well argued, are the conditions for the tacit repeal of a
statute in conformity with the ancient Scottish constitutional doctrine.

LORD YOUNG.—Your Lordship will permit me to make an explanation. Lord
Craighill seems to think that in the observations I made I referred to the power
of a prosecutor to limit the punishment in his conclusion. I did not refer to
that. What I referred to was the power claimed by the prosecutor to limit a
Judge in his discretion in mitigating the penalty. I never doubted the pro-
secutor's power of limiting his conclusion. I meant also, with respect to the

No. 17. prosecutor's power of limiting his conclusion, to say that where he brings the prosecution in the form prescribed by the Act of 1864, which is the same as the Act of 1881, he thereby necessarily limits the conclusion without expressing the limitation. And the correct view of the law—which is in accordance with the practice with which we are familiar—is stated by Mr Moncreiff in his useful book on Review in Criminal Cases, p. 126. "Under this form," he says, referring to the form under the Act of 1864, "it is not necessary as it is under schedule C of the Act 9 Geo. IV. cap. 29, to specify the punishment concluded for, but the pains of law competent to follow in such a complaint are of course restricted to those mentioned in the recited Acts."

July 18, 1887.
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M'Neill.

LORD JUSTICE-GENERAL.—I think that *Bute v. More* is conclusive against the competency of this prosecution, and I have nothing more to say.

LORD ADAM was present at the hearing, but was taking a proof in the Court of Session at the advising.

THE COURT quashed the conviction.

T. F. WEIR, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

No. 18. **GEORGE CADENHEAD** (Procurator-Fiscal of Justice of Peace Court of Aberdeenshire), Appellant.—*D.-F. Mackintosh—Cheyne.*
RICHARD MILNE, Respondent.—*J. C. Thomson—Orr.*

July 14, 1887.
Cadenhead v.
Milne.

Road—Locomotive on Highway—Locomotive Act, 1861 (24 and 25 Vict. cap. 70), sec. 6—Locomotives Amendment (Scotland) Act, 1878 (41 and 42 Vict. cap. 58).—A bridge on a highway may be stopped for locomotive traffic by a bye-law relating to it passed under the powers given by the Locomotives Amendment (Scotland) Act, 1878, by the road authorities of the district, and, after the advertisement specified in that Act, duly confirmed; and, therefore, a complaint alleging a contravention of such bye-law does not require to libel the Locomotive Act, 1861, or to set forth that, as required by section 6 of that Act, a notice was placed at the bridge itself that it was insufficient for the ordinary traffic of the district.

HIGH COURT. **RICHARD MILNE**, the driver of a traction-engine, was charged before the Justice of Peace Court for Aberdeenshire, with having contravened the bye-law for regulating the use of locomotives upon the highways, and preventing or regulating the use of locomotives upon bridges situated within the county of Aberdeen, made by the Aberdeen County Road Trustees as the road authority under the Locomotive Amendment (Scotland) Act, 1878, and confirmed on 27th July 1886, by having driven a locomotive and waggons across Cromriehilloch Bridge, in the parish of New Deer, Aberdeenshire, which bridge was specified in the schedule subjoined to the bye-law, without having previously obtained the consent in writing of the road surveyor of the district in which the bridge was situated, whereby he was liable in a penalty.

Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

Inter alia, the following objections were stated to the relevancy—First, that it was not stated in the complaint that a notice that it was insufficient to carry weights beyond the ordinary traffic of the district had been placed, as required by section 6 of the Locomotive Act, 1861,* at the

* The Locomotive Act, 1861, 24 and 25 Vict. cap. 70, enacts by sec. 1, that "it shall not be lawful for the owner or driver of any locomotive to drive it over any suspension bridge, nor over any bridge on which a conspicuous notice has been placed by the authority of the surveyor or persons liable to the repair

CASES

DECIDED IN

THE COURT OF SESSION, &c.,

1886-87.

WINTER SESSION.

WILLIAM COOK, Pursuer (Respondent).—*M'Kechnie—J. Wilson.*
ALEXANDER STARK, Defender (Appellant).—*D.-F. Mackintosh—*
C. S. Dickson.

No. 1.

Oct. 15, 1886.
Cook v. Stark.

Reparation—Master and Servant—Power of manager to delegate his duty of superintendence.—While the manager of a quarry may in ordinary circumstances delegate his duty of personally superintending particular operations in the quarry, yet, if the operation be one of peculiar difficulty, danger, and rarity, it is his duty personally to superintend it, and if he neglects to do so, and one of the workmen taking part in the operation is injured, the fact of his absence will be a ground for rendering his employer liable in damages to the injured workman, under the Employers Liability Act, 1880.

Reparation—Master and Servant—Contributory negligence.—Held that an ordinary labourer in a quarry, who, along with a skilled quarryman appointed by the manager, was employed in extracting an unusually large unexploded blast charge, which was an operation of peculiar difficulty, danger, and rarity, and was injured by an explosion caused probably by the skilled workman having made use of a steel jumper instead of a copper needle, was not barred by contributory negligence from obtaining damages from his employer.

ON 15th July 1885 William Cook, a labourer in the service of Alex-
ander Stark, quarrymaster, Auchinstarry Quarry, Kilsyth, was engaged
along with James Stark in the quarry in extracting an unusually large
charge of gunpowder which had missed fire about an hour before.
James Stark was a brother of Alexander Stark, and also of William Stark,
the manager of the quarry, and was a quarryman of experience. Stark
had begun the operation with a copper needle, but before Cook had come
up (to take the place of another workman) had exchanged that for a steel
jumper. Cook held the jumper in the bore, and poured water into the
bore, and Stark struck the jumper with a hammer. After this had gone
on for about half an hour the charge exploded, probably in consequence
of a steel jumper having been used instead of a copper instrument, and
Cook's left hand was blown off, and his eyesight injured. He brought
an action against Alexander Stark, under the Employers Liability Act,
1880, in the Sheriff Court at Stirling, averring that the injuries were due
to the fault of William Stark, the defender's manager.

In defence Alexander Stark maintained (1) that James Stark and the
pursuer were engaged in the operation of extracting the charge without
the authority or knowledge of William Stark, the manager; (2) that if

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Sheriff of Stir-
ling, Dumbar-
ton, and Clack-
mannan.
I.

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repealed, and it was quite applicable. It applied whether there had been a bye-law made under the Act of 1878 or not. The objection was not technical, for without such a conspicuous notice at the bridge itself a driver could not know whether he might cross or not. These engines travelled widely over the county, and the driver, while he might have studied the bye-law and been well aware that particular bridges came under it, had no way of identifying the particular bridge in the absence of a notice posted thereat. This was a good illustration, for more than a hundred bridges were named in the schedule to this particular bye-law. It was just when a driver had studied the bye-law that he needed the notice.

LORD YOUNG.—I am quite of opinion that the Justices have fallen into an error in this case, and if the prosecutor thinks fit in the circumstances to proceed with the complaint I think that the Justices must try it.

If this was a case of an innocent transgression, the case is a strong one for a modified or nominal penalty, or even a withdrawal of the prosecution. But on the legal ground, whether a bridge can be stopped for locomotive traffic by a bye-law regularly made under the Act of 1878, irrespective of a notice under the Act of 1861, such as is contended for by the respondent—the bye-law being alleged in the complaint—I have no doubt whatever. This bridge then having been stopped for such traffic by a bye-law, and it being alleged in the complaint that there has been a transgression of the bye-law, I think that if the prosecutor insists in the complaint, as for all I know he may have good reason to do, the Justices must try the case.

LORD JUSTICE-CLERK and LORD CRAIGHILL concurred.

THE COURT sustained the appeal, and remitted the case to the Justices.

MACKENZIE & KERMAK, W.S.—PHILIP, LAING, & TRAIL, S.S.C.—Agents.

No. 19.

July 20, 1887.
Bremridge v.
Gray.

RICHARD BREMRIDGE (Registrar under the Pharmacy Acts, 1852 and 1868), Complainer (Respondent).—*Murray—Shaw.*

ANDREW W. GRAY AND OTHERS, Respondents (Appellants).—*D.-F. Mackintosh—Orr.*

Pharmacy Act, 1868, 31 and 32 Vict. c. 121, secs. 1 and 15—Sale of drugs—Chemist and Druggist—Joint stock company.—A limited company carried on business as "Wholesale Chemists, Druggists, and Tea-merchants," doing both a wholesale and retail business. None of the shareholders was a duly qualified chemist and druggist under the Pharmacy Act, 1868, but the dispensing of drugs was done by duly qualified chemists and druggists. *Held* that the individual shareholders were not liable under sec. 1 and sec. 15 of the Act to be prosecuted for the offence of unlawfully taking and using the name chemists and druggists, and advertising the company as chemists and druggists.

HIGH COURT.
Lord Justice-
Clerk.
Lord Young.
Ld. Craighill.
Justiciary
Clerk.

ANDREW W. GRAY, and six other persons, were charged in the Sheriff Summary Court at Edinburgh at the instance of Richard Bremridge, registrar under the Pharmacy Act, 1868 (with concurrence of the Procurator-fiscal of Midlothian), with an offence against section 1 and section 15 of that Act,* in so far as, first, between 1st December 1886 and 17th May 1887, they did all, acting together or separately, in contravention of

* The Pharmacy Act, 1868, 31 and 32 Vict. c. 121, on the narrative that it is expedient for the safety of the public that persons keeping open shop for the retailing, dispensing, or compounding of poisons, and persons known as

these sections, "put up, use, or exhibit . . . the name or title of chemists and druggists, above or in connection with a shop at No. 49 Leith Walk, Leith, and in the county of Midlothian, occupied by them, or by the Leith Depot, Limited, of which they are the sole partners or shareholders; and also with another shop at No. 33 Ferry Road, Leith, in said county, occupied by them or by the Leith Depot, Limited, of which they are the sole partners or shareholders: And the said Andrew W. Gray, . . . all and each, or one or more of them, did, during said period above libelled, or part thereof, within or near the shops occupied by the said Leith Depot, Limited, at 49 Leith Walk, Leith, and 33 Ferry Road, Leith, aforesaid, and at other places in Leith and Edinburgh, the particular place or places being to the complainer unknown, in the county of Midlothian, unlawfully, and in contravention of the said 1st and 15th sections of the said recited Act, issue to the public, or cause or procure to be issued to the public, in connection with the businesses or either of them, carried on by them or by the said Leith Depot, Limited, of which they are the sole partners or shareholders, in the premises at 49 Leith Walk and 33 Ferry Road, Leith, aforesaid, printed circulars, labels, and advertisements, having the words chemists and druggists printed or written thereon, none of the said Andrew W. Gray; . . . being a duly registered pharmaceutical chemist, or a chemist and druggist within the meaning of the said recited Act," whereby they had each become liable to a penalty of £5.

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July 20, 1887.
Bremridge v. Gray.

Objection was stated to the relevancy of this charge, on the ground that it "did not set forth that each or all of the appellants had as an individual or as individuals, put up, used, or exhibited, the title chemist and druggist, or had as an individual or individuals, issued to the public circulars, labels, and advertisements bearing the words chemist and druggist, and that the complaint charged was in truth a complaint against the Leith Depot, Limited, in respect that the company put up, used, or exhibited the title chemists and druggists in the manner set forth, and also issued to the public, in connection with the business of

chemists and druggists, should possess a competent and practical knowledge of their business, and to that end that from and after the day herein named all persons not already engaged in such business should, before commencing such business, be duly examined as to their practical knowledge . . . enacts, by sec. 1,—“From and after the 31st December 1868 it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title ‘chemist and druggist,’ or chemist or druggist or pharmaceutical or dispensing chemist or druggist in any part of Great Britain, unless such person shall be a pharmaceutical chemist or a chemist and druggist within the meaning of this Act, and be registered under this Act, and conform to such regulations as to the keeping, dispensing, and selling of such poisons as may from time to time be prescribed by the Pharmaceutical Society, with the consent of the Privy Council.”

Sec. 6 makes provision for the due examination of persons desirous of becoming qualified as chemists and druggists.

Sec. 15.—“From and after the 31st December 1868 any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons, or who shall take, use, or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, pharmacist, or chemist and druggist, or who shall take, use, or exhibit the name or title pharmaceutical chemist, pharmacist, or pharmacist, not being a pharmaceutical chemist, or shall fail to conform with any regulation as to the keeping or selling of poisons made in pursuance of this Act, or who shall compound any medicines of the British Pharmacopœia except according to the formularies of the said Pharmacopœia, shall, for every such offence, be liable to pay a penalty”

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the company, circulars, labels, or advertisements, bearing the words chemists and druggists, and that such a complaint was irrelevant."

The Sheriff-substitute (Rutherford) repelled the objection, on the grounds stated in his opinion,* which was held as part of the case

* " OPINION.— . . . On the part of the respondents, an objection has been taken to the relevancy of this charge, which, it was maintained on their behalf, should have been directed against the Leith Depot, Limited, and not against them as individuals, because none of the respondents is alleged to have as an individual assumed the title chemist and druggist, but merely to have used or exhibited that title in connection with the premises occupied by the company, or with the business which it carries on. Now, I must take it for granted, in so far as concerns this particular charge, that none of the respondents did assume the title chemist and druggist in his or her individual capacity. They did not put it on their visiting-cards, or on the door-plates of their private dwelling-houses. Nothing of that kind is alleged. But then the 15th section of the Act does not require that in order to constitute the statutory offence a person must make use of or exhibit the title chemist and druggist in his individual character or in connection with his own name, and I am of opinion that it is sufficient to infer liability for the penalty that the partners or shareholders in a company of this kind, none of them having the requisite qualification, assume the title in connection with the business carried on in the name of the company. It must be kept in view that the leading purpose of the Legislature, as shewn in the preamble of the Act, was the safety of the public, and it was with that end in view that it was judged expedient that persons known as chemists and druggists,—that is, persons who openly deal in chemicals and poisonous drugs,—should possess a competent practical knowledge of their business. If no one of the partners in a company of this kind required to be a duly qualified chemist or druggist, it is manifest that the purpose of the Act might be easily defeated. There would be nothing to prevent any seven persons from setting up a business for the sale of poisons and other drugs in the name of a company registered under the Companies Acts, and adding the designation chemists and druggists. They would by this device of uniting themselves into a company evade the Act in a way which no single individual could possibly do. For it has been decided, and I must assume rightly, by the House of Lords in a case cited in the course of the discussion—*The Pharmaceutical Society v. The London and Provincial Supply Association* (July 22, 1880, L. R., 5 App. Ca. 857)—that the word 'person,' as used in the 1st and 15th sections of the Act of 1868, does not include a corporation, the reason being that it is not possible for a corporation to qualify. A corporation cannot offer itself for examination, and go through the other preliminaries required by the statute with a view to registration; and accordingly it was held that any prosecution for penalties must be instituted not against the body corporate but against the individual offender. But the very fact that a company cannot obtain the qualification, and cannot be registered, shews conclusively to my mind that the title chemists and druggists, if adopted in connection with the name of the company, and the business carried on by the company, could only be assumed by individual shareholders, or at all events by some of their number, and that this prosecution has therefore been properly directed against them. It has been said that this view is contrary to the opinions expressed by some of the noble and learned Lords in the case to which I have referred. I think that, so far from that being so, it is only carrying the opinions of their Lordships to their just and logical conclusion. A great deal of light is thrown upon the case of *The London and Provincial Supply Association* by turning to the reports of what was done in the Queen's Bench Division (25th April 1879, L. R., 4 Q. B. D. 313), and afterwards in the Court of Appeal (16th March 1880, L. R., 5 Q. B. D. 310), whose judgment was affirmed by the House of Lords. The decision in the Queen's Bench, if it had not been reversed, would have led to the result that no corporation could carry on the business of chemist and druggist even although every one of its members might be duly qualified, and

obtained by the accused as after stated. Proof having been led, the Sheriff-substitute in respect thereof convicted the accused, and imposed a penalty. They took a case for appeal. The facts stated were,—“None of the appellants are duly qualified chemists and druggists under the statute. They are the sole shareholders of the Leith Depot, Limited, registered under the Companies Acts, 1862 and 1867. The company had two shops, one at No. 49 Leith Walk, and the other at No. 33 Ferry Road, Leith. The objects for which the company was established, as set forth in the memorandum of association which was produced, are the carrying on of the business of wholesale and retail chemists and druggists, as well as that of selling and dealing in tea, tobacco, spices, perfumery, and generally articles for domestic use or ornament. In addition to a wholesale trade in articles such as chemical food, syrups, and tinctures, but not in drugs or poisons, the business of an ordinary retail chemist and druggist was carried on at each of the shops. The title exhibited above both shops is ‘The Leith Depot, Limited, Wholesale Chemists, Druggists, and Tea-Merchants.’ All circulars, labels, and advertisements bore the words, ‘The Leith Depot, Limited, Wholesale Chemists, Druggists, Tea-Merchants.’ In the circulars and advertisements prominent reference was made to the retail and dispensing business carried on, and it was alleged that goods were retailed at wholesale prices. The shop at 49 Leith Walk was under the management of the appellant Mr Andrew W. Gray, one of the shareholders, and an assistant, Mr Nicholas Dodds, who is a duly qualified chemist and druggist. The shop at No. 33 Ferry Road was managed by an assistant, Mr Henry Forewell, who is a duly qualified chemist and druggist.”

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The questions of law were:—“(1) Whether the first charge in the complaint is or is not relevant? And assuming the first query to be answered in the affirmative, (2) Whether the use and exhibition of the title chemists and druggists by the appellants as aforesaid, was or was not a contravention of the 15th section of ‘The Pharmacy Act, 1868’?”

Argued for the appellants;—I. The decision of the Sheriff was erroneous in itself, and inconsistent with that of the House of Lords in the case of *The London and Provincial Supply Association*.¹ The appellants were the shareholders of a corporation, being a company under the Companies Acts. It had been decided in the case of *The London and Provincial Supply Association*¹ that a corporation not being a natural person was not a “person” in the sense of the Act, and could not be sued for a penalty. Such a “person” could not be examined by the board established by the Act, or comply with other requirements imposed on “persons” by it. This prosecution was therefore brought against the individual partners of the incorporated company, and the contention of the prosecutor must be that a company could not sell drugs unless the part-

it was, I think, in connection with that view of the matter, and by way of deprecating that result, that the Lord Chancellor and Lord Blackburn expressed themselves as they did in those passages of their opinions which were founded upon by the counsel for the respondents in the present case. The company was sought to be made liable in a penalty for selling poison, although the person by whom the sale was effected, who was himself a partner of the company, was a duly qualified chemist and druggist; that was manifestly a very different case from this, where the prosecutor alleges that not one of the partners possesses the necessary qualification. According to the judgment of the House of Lords, proceedings must be taken not against the company but against the individual wrongdoer, and that is just what the prosecutor has done here. I therefore repel the objection to the first charge.”

¹ Cited in Sheriff-substitute's opinion.

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ners were qualified chemists. It was submitted on the contrary that it was sufficient that a company dispensed drugs by duly qualified agents. In the one shop, which was managed by the appellant A. W. Gray, this company had a qualified chemist and druggist to assist Gray, while the other shop was managed by a duly qualified assistant. If an unqualified person dealt in drugs, it would be no defence under the Pharmacy Act that he was only an agent and not a principal, and his employer, whether a corporation or a natural person, might be liable as art and part with him, but the Act did not interfere with a corporation which transacted its business through a duly qualified person. The mischief to be guarded against, as the preamble shewed, was danger to the public, and that was sufficiently secured by the construction that the Act struck at the unqualified compounder of drugs, whether principal or agent. The Sheriff-substitute seemed to think that the judgment of the House of Lords merely went the length of holding that where one member of the corporation was duly qualified the corporation escaped liability. The judgment, however, was that a corporation might legally carry on the business. If it could do so, it was impossible to hold that every member of it was liable to be prosecuted for acts lawfully done by it.

II. As to the second question, the appellants did not call themselves "chemists and druggists," but "wholesale chemists, druggists, and tea-merchants." The taking of that designation was not unlawful under the Act. No doubt the appellants did in fact carry on a retail business.

Argued for the respondent;—The House of Lords had decided that a corporation could not under the Pharmacy Act, 1868, be indicted for a penalty, and that was accepted by the prosecutor here, who indicted the individuals composing it. It had not decided that a corporation might call itself chemists and druggists. In the Court of Appeal Lord Justice Thesiger said,—“I feel bound to add that I am by no means satisfied that although a corporation as a separate entity be not liable to the penalty which is sought to be recovered in this case, the individual members of the corporation, whether directors of the company or otherwise, may not be liable, and thus the mischief be remedied.” It also appeared from the opinions of Lord Justice Bramwell and of Lord Blackburn in the House of Lords that in their view a corporation could not use the name “chemists and druggists.” In a case of selling, indeed, the corporation would be employing a “person” in the sense of the Act to sell for them, but in “keeping open shop,” using the name “chemist and druggist,” this corporation was itself acting. Although the corporation might escape because it was not a “person,” the unqualified individuals who were assuming the name and keeping open shop could not. The statute had not said that they might use the name if they had a qualified assistant. They might probably have escaped if they had held out by their signboard and advertisement only that Nicholas Dodds, their assistant, was a “chemist and druggist.”

As to the point that they called themselves not chemists and druggists, but wholesale chemists, druggists, and tea-merchants, it was idle to take that distinction so long as it was admitted that they were doing a retail business.

LORD JUSTICE-CLERK.—This has been an interesting discussion, and the subject is one that no doubt deserves and requires consideration. Fortunately for us, the principles involved in the debate have been the subject of debate in the House of Lords, which is of great weight and authority, and I am of opinion, though not without some difficulty, that the principles announced in that judg-

ment of the House of Lords must govern this case, and that consequently the conviction cannot be sustained. No. 19.

I do not require, at any length, to go into the grounds upon which the controversy has been maintained. The Act is a very defective Act, and the state of facts disclosed in this case is simply not provided for. The draftsman of the statute, whoever he was, had not taken into account that some of the acts provided against in this statute might be acts authorised and enjoined by persons who could not acquire the statutory qualification, and who might carry on such businesses as are dealt with through the agency of others. That, truly, is the origin of all the difficulty here. It was a category that should certainly have been in view, and the reasonable provision to be made for it was that if the business was carried on by persons who were not themselves capable of acquiring the qualification or expected to acquire it, it should be sufficient that they carried on business and kept open shop solely by persons who had acquired the requisite qualifications. That was all that was required, and there was no provision of that kind in the statute, and the common sense view of the case could only, therefore, be reached by way of inference. The inference, I am bound to say, is not of the clearest or most transparent description; but it is found by the judgment of the House of Lords that the word "person" in this Act signifies what is called "a natural person," that is to say, an individual and not a collective body, corporation, or company. Their Lordships came to that result, and I do not see that we can well differ from the result. The result of that would be that this Act does not apply to a partnership at all. That is the view at which I arrive. I do not think it applies in any of its parts to partnership. It seems to me that that is the result of the judgment of the House of Lords, and that no liability can here be inferred under the penalty clauses of the Act against the shareholders of this corporation. It seems to me that that is the necessary result of the limitation of the word "person" which the judgment of the House of Lords has imposed. So I should very much doubt whether a corporation, or a member of a corporation, would be responsible even although the person who carried on the business was not qualified. That might be inferred, but it is not so said in the Act. On that question, however, I reserve my opinion, as I do not think it is the question before us at present. Nor do I think it necessary to say more. I think the judgment of the House of Lords leaves us no alternative, and that we should therefore decide this case in conformity with that judgment.

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LORD YOUNG.—I am of the same opinion. I think the judgment in the House of Lords case conclusively governs this case, but I confess I am not sorry that the House of Lords arrived at the conclusion at which they did arrive, and that we have an opportunity now of expressing our concurrence in that judgment, arriving at the same conclusion not only in deference to the judgment of the House of Lords, but also because we approve of the grounds upon which their Lordships proceeded.

It is a matter of considerable importance no doubt—I think it is of first-rate importance to the public—that drugs and chemicals should only be dispensed by qualified persons. I am very doubtful, however, whether any special legislation is necessary to that end, or whether the ordinary competition in that, as in other trades, would not secure all that the public desires in that direction. But, assuming that a qualification ought to be exacted by the Legislature from those

No. 19. who compound or sell drugs, I should be disposed to go no further than is manifestly necessary to that end in the construction of the statute or otherwise, and avoid carefully putting any constraint upon trade. The public are interested in having such drugs or chemicals as they require at reasonable prices, and it is a matter of common knowledge that most extravagant prices are exacted, and from very poor people who have occasion to go to ordinary chemists' shops, for the drugs which are prescribed by their physicians. I was informed, and I give it as a mere illustration, by a physician of eminence, and in large practice, that a patient to whom he had given a prescription complained to him after a while of the cost of the article. He had to get his little phial filled repeatedly, and the charge to him on each occasion was two shillings. The physician said he compassionated the poor man, and told him the two articles of which it was compounded, directing him to get the one in one chemist's shop and the other in another chemist's shop, and with the result that he got for threepence what made some dozens of bottles, bottles which in the chemist's shop were sold at two shillings each. Well, it is not unreasonable that the public should desire some check to be put upon that. There is no grudging of payment for professional skill; but, where the payment for skill is extended to matters of that sort in that way, the public are interested in companies, even in joint stock companies, taking the sale of drugs and chemicals into their business as part of their ordinary trade, these companies being careful at the same time that that part of their business is conducted by duly qualified people. And I suppose this corporation introduced this sale of drugs into their business for that very reason, that conducting it by means of duly qualified people they were able to supply the public upon much more reasonable terms than ordinary chemists did. And I very thoroughly concur in what Lord Selborne said upon this head in the case which has been put before us, and where the very statute under discussion was sought to be put in force so as to terminate any such trade by corporations who could not be qualified chemists and druggists. His Lordship says, L. R., 5 Ap. Ca. at p. 867, after noticing that drugs and chemicals were extensively sold by corporations before the Act—by joint stock companies who kept open shop for their sale,—proclaiming the fact of selling in open shop those very things,—“That having been the state of the law and the facts, I think it would be wrong for your Lordships without necessity to impose upon the word ‘person,’ used in such a context as that in which you find it here, a construction which might render illegal that mode of carrying on business of chemists and druggists by such corporations, although there is no direct reference from the beginning of the Act to the end to any such bodies or to that kind of case.” Lord Blackburn says very emphatically the same thing,—“My Lords,” he says, “my conclusion, looking at this Act, is that it is clear to my mind that the word ‘person’ here is so used as to shew that it does not include a corporation, and that there is no object or intention of the statute which shews that it is requisite to extend the word to a sense which probably those who used it in legislation were not thinking of at all.” Then his Lordship says that he does not think that the Legislature were thinking of the construction contended for by those who were prosecuting, and he begins with the preamble, and then examines the Act, and goes on to say that it all leads to the conclusion that a corporation is not to be prosecuted as a person. He said that if the prohibition contained in the Act were directed against a corporation as a person, if in the language of the clause prohibiting the thing to be done,

the word "person" was used in a sense which included in that word "person" No. 19.
 a corporation, which it might, then he should have no difficulty in including
 it in the clause imposing the penalty, for a penalty may be imposed upon July 20, 1887.
 a corporation; but he says the two things are to be taken together, and if the *Bremridge v. Gray.*
 word "person" in the clause prohibiting the act—declaring it to be illegal—
 does not include a corporation, neither is it included by the same word in
 the other clauses. He says,—“The 15th section imposes a penalty, and the
 15th section in imposing the penalty repeats the words which make the thing
 unlawful. I think these two sections must be construed together, and looked
 at together.” Now, the result was that the prosecution for a penalty was dis-
 missed, and the judgment of the magistrate, who refused to convict, was affirmed;
 but that was not upon the ground that the corporation might not have incurred
 a penalty, but on the ground that the word “person” in the clause prohibiting
 the thing, in consequence of which the penalty was said to have been incurred,
 did not include a corporation.

Now, in view of that case and the state of the facts to which reference has
 been made, I can hardly characterise the attempt which is now being made to
 attain the same result in another way than as a contrivance. It was held
 upon the proper merits that by the statute corporations are not intended to be
 prohibited from keeping open shop for the sale of drugs, and that upon grounds
 of public policy—that without necessity an end is not to be put to a trade which
 was carried on extensively before, and which was carried on extensively by corpo-
 rations and associations before the Act was passed. Well, what is the contrivance
 that follows? You cannot complain of a corporation, because the statute does not
 prohibit a corporation from doing it; but they say—“Oh! we will prosecute
 you—the whole individual members composing the corporation.” My Lords, if
 we allowed that construction of the statute, or a construction that permitted that,
 would it not be a construction which led to the result that Lord Selborne,
 then Lord Chancellor, so deprecated as terminating without any necessity a trade
 that was extensively and lawfully carried on before? You cannot terminate it
 by prosecuting a corporation. It is entitled to do the thing that is complained of.
 But you can terminate it now by prosecuting each of the seven or seventy or seven
 hundred members composing the corporation, and thus attain the same result which
 was sought to be attained in that case in England. I have no hesitation in dismiss-
 ing a complaint which strives to reach that end in that way, and I dismiss it entirely
 on the same grounds on which the other case was dismissed, and I repeat what
 your Lordship has noticed, and what Lord Selborne and Lord Blackburn dwelt
 upon, that the real object and purpose of the statute does not require such a
 result for the protection of the public. The public are sufficiently protected
 already, and that is all the public interest in the statute—that the public should
 be sufficiently protected. The trades’ union interest is not one which I should
 look upon very favourably. The public interest is entirely protected by the
 provision, that if this business is carried on in any shop it shall be conducted,
 the drugs shall be compounded and dispensed, and everything in which the
 safety of the public is concerned shall be done, by duly qualified individuals.
 There may be a difficulty, or there might have been a difficulty but for the
 In deference of these noble and learned Lords in a former case, who are quite clear
 pursuers upon the point,—I say there might have been a difficulty in
 the authorisation of prosecution under the statute against an assistant dispensing or com-
 poun-
 age, who himself is not duly qualified, but their Lordships say that

No. 19. they have no difficulty in saying who might be prosecuted ; and so the whole public interest, ends and objects, and the safety of the public which were in view in the passing of this statute, are entirely attended to and preserved. Without any hesitation, therefore, I agree with your Lordship, and I repeat that I am very glad that we have an opportunity of expressing this view of the law, which I think is one beneficial to the public, and quite consistent with the public safety. I am for quashing this conviction.

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LORD CRAIGHILL.—I agree. I think the decision in this case is governed by the decision of the House of Lords. In the judgment in the House of Lords it was found that the Act of Parliament in question does not apply to corporations. When we reach that length by the aid of that decision—when corporations cannot be prosecuted for infringing the statute—I do not think that individual members of a corporation can be said in this particular matter to contravene it, as is alleged here. They are not liable, therefore, to the penalties sought to be recovered in the complaint. I therefore concur in the judgment.

THE COURT pronounced this interlocutor :—“ Having considered the case, and heard counsel for the parties, sustain the appeal: Reverse the determination of the inferior Judge, and decern: Find the appellants entitled to expenses: Allow an account thereof to be given in, and remit the same when lodged to the Clerk of Court to tax and to report.”

WISHART & MACNAUGHTON, W.S.—P. MORISON, S.S.C.—Agents.

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CASES

DECIDED IN

THE COURT OF SESSION, &c.,

1886-87.

WINTER SESSION.

WILLIAM COOK, Pursuer (Respondent).—*M'Kechnie—J. Wilson.*
ALEXANDER STARK, Defender (Appellant).—*D.-F. Mackintosh—*
C. S. Dickson.

No. 1.

Oct. 15, 1886.
Cook v. Stark.

Reparation—Master and Servant—Power of manager to delegate his duty of superintendence.—While the manager of a quarry may in ordinary circumstances delegate his duty of personally superintending particular operations in the quarry, yet, if the operation be one of peculiar difficulty, danger, and rarity, it is his duty personally to superintend it, and if he neglects to do so, and one of the workmen taking part in the operation is injured, the fact of his absence will be a ground for rendering his employer liable in damages to the injured workman, under the Employers Liability Act, 1880.

Reparation—Master and Servant—Contributory negligence.—Held that an ordinary labourer in a quarry, who, along with a skilled quarryman appointed by the manager, was employed in extracting an unusually large unexploded blast charge, which was an operation of peculiar difficulty, danger, and rarity, and was injured by an explosion caused probably by the skilled workman having made use of a steel jumper instead of a copper needle, was not barred by contributory negligence from obtaining damages from his employer.

ON 15th July 1885 William Cook, a labourer in the service of Alex-^{2D DIVISION.}
ander Stark, quartermaster, Auchinstarry Quarry, Kilsyth, was engaged Sheriff of Stir-
along with James Stark in the quarry in extracting an unusually large ling, Dumber-
charge of gunpowder which had missed fire about an hour before. mannan.
James Stark was a brother of Alexander Stark, and also of William Stark, I.
the manager of the quarry, and was a quarryman of experience. Stark
had begun the operation with a copper needle, but before Cook had come
up (to take the place of another workman) had exchanged that for a steel
jumper. Cook held the jumper in the bore, and poured water into the
bore, and Stark struck the jumper with a hammer. After this had gone
on for about half an hour the charge exploded, probably in consequence
of a steel jumper having been used instead of a copper instrument, and
Cook's left hand was blown off, and his eyesight injured. He brought
an action against Alexander Stark, under the Employers Liability Act,
1880, in the Sheriff Court at Stirling, averring that the injuries were due
to the fault of William Stark, the defender's manager.

In defence Alexander Stark maintained (1) that James Stark and the
pursuer were engaged in the operation of extracting the charge without
the authority or knowledge of William Stark, the manager; (2) that if

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William Stark knew that they were so engaged he did not know that they were using a steel, not a copper instrument, and that he was entitled to trust to the skill and discretion of his brother James in the management of the operation without himself giving it any personal superintendence; and (3) that the pursuer was barred by reason of his contributory negligence in taking part in such a dangerous operation as using a steel jumper to extract an unexploded charge.

A proof was allowed. The findings in fact of the Sheriff (Muirhead), which were affirmed by the Second Division on appeal, taken along with the facts above narrated, explain the nature of the evidence. These findings were:—“(1) That the pursuer, on 15th July 1885, was a labourer in the service of the defender, Alexander Stark, in his quarry at Auchinstarry, and in receipt of a wage of 21s. a-week; (2) that the manager of said quarry was William Stark, a brother of the defender's; (3) that in the forenoon of said day the pursuer, having finished loading stones into a canal boat, was told by the defender to apply to the said William Stark for instructions as to what he was to do next; (4) that having done so, he was directed by the said William Stark, as manager aforesaid, and in the exercise of the superintendence entrusted to him by the defender, to go and work along with James Stark (a brother of the defender's and of the said William Stark); (5) that the said James Stark was then engaged in attempting to extract from a bore a charge of powder which had missed fire about an hour before; (6) that said bore was four feet deep, and was charged with fourteen inches of powder, covered with two feet of sand stemming, and furnished with a gutta percha ‘strum’ or fuse; (7) that the extraction of such a charge had rarely if ever been attempted in defender's quarry, and is an operation of very considerable danger; * (8) that the pursuer had never before seen such an operation performed; (9) that the said William Stark, when he directed the pursuer to go and work along with James Stark, knew that the said James Stark was attempting to extract the aforesaid charge, but did not apprise

* On this point the Sheriff in his note stated,—“That the operation of extracting this charge was peculiarly hazardous, I cannot doubt. The defender himself says,—‘I consider that what the pursuer was doing that day was dangerous. If I had known it was being done, I would have stopped it.’ In many quarries it is not allowed, and in metalliferous mines it is absolutely prohibited by statute. The words of general rule No. 2 are—‘A charge of powder which has missed fire shall not be unrammed’—(35 and 36 Vict. cap. 77, sec. 28). The Act does not apply to quarries, but the prohibition shews how dangerous the operation is usually considered.

“Miss-fires of ordinary plug charges, furnished with straw fuses, are not uncommon on the defender's quarry; but a miss-fire of so great a charge as in the present case seems to have been very rare (probably because such heavy charges are infrequent). William Stark, the manager, who has been connected with the quarry for thirteen years, says,—‘I have had no experience of an unexploded shot of this kind. This was the first case in our quarry in which the charge has missed fire with a fuse or strum.’ No doubt James Stark says that in the ten years in which he has been in the quarry it has happened twice, and that on one at least of these occasions he drew the charge in accordance with instructions received from the manager. It is difficult to reconcile these statements. The evidence of the defender seems to corroborate that of his manager, for he says,—‘I have never seen it done (i.e., a charge drawn) in my experience. I have no experience of drawing shots. We generally bore a new hole when a shot fails to explode.’ As the defender and his manager, according to their own avowals, had no experience of such an operation, the pursuer may be believed when he says,—‘I never bored a shot before, or was present when one was being bored.’”

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the pursuer of the danger, nor give him any instructions as to the precautions proper to be taken in the circumstances; (10) that the said William Stark did not personally superintend the operation; (11) that while the pursuer was assisting the said James Stark, and holding in the bore a steel jumper which the said James Stark was striking on the head with a 'mash' or hammer, in order to dislodge the stemming, the charge exploded, and the pursuer's left hand was thereby blown off above the wrist, and his eyesight temporarily injured; (12) that there was no contributory negligence on the part of the pursuer."

On 18th March 1886 the Sheriff-substitute (Buntine) assoilzied the defender, being of opinion that while the manager, William Stark, was aware that his brother James and the pursuer were extracting the charge, he did not know that they were using a steel jumper, and that they were guilty of negligence in using such an instrument.

On 21st April 1886 the Sheriff (Muirhead) pronounced this interlocutor (after the findings in fact above quoted):—"Finds in law that, the facts being as above set forth, the defender is liable to the pursuer in damages; therefore recalls the interlocutor appealed against; assesses the damages at £150 sterling," with interest and expenses.

The defender appealed.¹

LORD YOUNG.—(After expressing his opinion that the pursuer took part in the operation with the knowledge and authority of William Stark, but that the latter did not know that a steel jumper was being used.)—That leaves only this kind of case then, irrespective of the plea of contributory negligence, with which I shall deal last, that there was no negligence on the part of William Stark in allowing the pursuer to go on with this operation, because although the pursuer was himself a man quite inexperienced in this sort of work, he was nevertheless under the immediate superintendence of James Stark, who was a quarryman of considerable experience. Now, I can understand that sort of case generally. The manager of a quarry may not be able to give personal superintendence to every operation that is going on in the quarry,—in a large quarry there may be several going on at the same time in different parts of the quarry,—and it may be said truly that the manager will usually perform his duty perfectly if only he takes care that no dangerous operation goes on without some one of the workmen being a person of experience. But here the operation was not only highly dangerous but of extremely rare occurrence, so rare that in this particular quarry it had never occurred before—at the least the manager says so, and I think we may take his evidence, seeing that it is adverse to himself. He is quite explicit that this was the first case in the quarry in which a charge with a fuse or strum had missed fire—not an ordinary plug charge; instances of these missing fire had occurred before. Now, this admittedly highly dangerous operation was performed here in a highly dangerous manner. Then, is no one to blame? Is the manager to blame? He knew that this highly dangerous and almost unprecedented operation was going on, that it had been going on for nearly half an hour, and yet he never interfered to see whether it was being proceeded with in a proper manner or not. In these circumstances I cannot take it from him that he was entitled to trust to his brother James so as to absolve his employer from

¹ *Authorities*.—Pollock v. Cassidy, Feb. 26, 1870, 8 Macph. 615, 42 Scot. Jur. 303; Stark v. M'Laren, Nov. 2, 1871, 10 Macph. 31, 44 Scot. Jur. 56; Robertson v. Brown, May 17, 1876, 3 R. 652. (*On the question of contributory negligence*)—M'Gee v. Eglinton Iron Co., June 9, 1883, 10 R. 955; Senior v. Ward, Jan. 13, 1859, 28 Law Jour. Q. B. 139.

No. 1. liability to the pursuer. That leaves only the question of contributory negligence. It is all very well to say that most human beings of average intelligence know that if you strike rock with steel there will be sparks, and that sparks are dangerous when they come in contact with gunpowder. But the gunpowder here was in a deep hole, packed deep, and I suppose the object of using the steel jumper when the copper needle failed to extract the charge was to widen the hole at the top, so that even sparks there were not necessarily dangerous, and the operation had in point of fact been going on for half an hour before the accident took place. It is enough that it was not so obviously dangerous that the pursuer, an inexperienced workman, was inexcusable in continuing to assist James Stark in obedience to the orders of William Stark, the manager. I therefore negative the plea of contributory negligence, and, on the whole matter, think that we ought to affirm the judgment of the Sheriff.

Oct. 15, 1886.
Cook v. Stark.

LORD CRAIGHILL concurred in thinking that the pursuer took part in the operation of extracting the charge with the manager's knowledge and authority, and was further of opinion that as the manager knew that a steel jumper, not a copper needle, was being used, the defender was liable in damages.

LORD RUTHERFURD CLARK.—I concur with your Lordship in the chair, and have nothing to add.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced this interlocutor:—"Find in fact and in law in terms of the findings of the Sheriff's interlocutor of 21st April last; dismiss the appeal; affirm the judgment of the Sheriff appealed against; of new ordain the defender to make payment to the pursuer of the sum of £150," with interest and expenses.

WILLIAM DUNCAN, S.S.C.—DOVE & LOCKHART, S.S.C.—Agents.

No. 2. JOHN MACRAE (John Lightbody's Trustee), Pursuer (Appellant).—*Strachan—Salvesen.*
J. & P. HUTCHISON, Defenders (Respondents).—*Balfour—C. S. Dickson.*

Oct. 16, 1886.
Lightbody's
Trustee v. J. &
P. Hutchison.

Carrier—Goods—Condition—Construction of contract.—Question, whether a printed circular post-card sent by shipowners to possible shippers of goods in Galway, which stated that the s.s. "Clara" would sail from Glasgow to Galway on a date named, and contained this intimation:—"All goods carried on conditions as per sailing bills," which conditions relieved the shipowners from all liability for the consequences of their own or their servants' fault, could be held to apply to the return voyage of the "Clara" from Galway to Glasgow, so as to import the conditions on the sailing bills into a contract for that voyage.

2D DIVISION.
Sheriff of
Lanarkshire.
1.

In February 1884 John Lightbody, marble merchant, Glasgow, bought a lot of Irish black marble from Millar & Moon, marble manufacturers, Galway, which, on 19th February, Millar & Moon shipped on board the s.s. "Clara," belonging to J. & P. Hutchison of Glasgow, for conveyance to Lightbody. The marble having been delivered in a damaged condition, John Macrae, the trustee on Lightbody's sequestrated estate, in March 1885, brought an action of damages in the Sheriff Court at Glasgow against J. & P. Hutchison.

J. & P. Hutchison, in defence, stated, *inter alia*, "that by the terms of defenders' sailing bills, which were well known to the shippers of said goods, defenders are not liable for inward condition, leakage or breakage,

contents or weight of packages,' nor for any loss or damage 'arising from the act of God, . . . steam navigation, or from any peril of the seas or rivers, or act, neglect, or default whatsoever of the company or their agents or servants, or from any defect in the steamer, its machinery, equipments, ballasting, or stowage, . . . or any other cause whatsoever, or from any consequences of the causes above stated, it being an express condition that the . . . owners of . . . goods undertake all risks whatsoever.' Further, the 'shipping and landing of goods is performed at shipper's risk,' and 'all bills of lading and other receipts for . . . goods signed by any agent or officers of the company shall be subject to these conditions, whether or not the same be repeated therein.'"

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The defenders pleaded;—(3) Any damage to said goods occurring while in defenders' hands having been caused by the risks of carriage, for which, under their conditions of carriage, defenders are not responsible, they should be assoilzied, with expenses.

A proof was allowed. The evidence, in so far as it related to the foregoing ground of defence, was directed mainly to the question whether the defenders had sent a post-card in the following terms to Millar & Moon:—

"Direct Steamers.—Glasgow to Galway and West of Ireland.—The undernoted or other first-class steamer is intended to be despatched from Glasgow direct to Galway:—S.S.....on.....188... Carrying goods at lowest rates for Athenry," and a number of other towns in Ireland.—"For freight, &c. apply to J. & P. HUTCHISON, Coal Yard, New Dock, Galway.—Head office—62 Broomielaw, Glasgow.

"*.*. All goods carried on conditions as per sailing bills."

The defenders adduced evidence to shew that they had sent such a post-card, the blanks in which were filled in by the word "Clara" and a date applicable to the voyage of the "Clara" from Glasgow to Galway immediately preceding that on which she took the marble from Galway to Glasgow. The defenders further maintained that this post-card, if received, was sufficient to import the conditions on the sailing bills. One of the sailing bills was produced. It had, *inter alia*, the conditions above quoted printed on the back, and on the front a statement of certain sailings of the "Clara" (in May 1881) both to and from Galway.

The pursuer adduced evidence to shew that Millar & Moon had never received such a post-card, and he further contended that in law the post-card, even if received, was not sufficient to import the conditions on the sailing bills into the contract.

It was admitted that no bill of lading or other document had been granted for the marble.

On 31st August 1885 the Sheriff-substitute (Guthrie) pronounced this interlocutor:—"Finds that in February 1884 Messrs Millar & Moon shipped at Galway for delivery to the bankrupt, on whose estates the pursuer is trustee, on board the defenders' general cargo steamer 'Clara' the quantity of black marble in slabs consigned on: Finds that by the advertisements or sailing bills of said ship it was notified that the defenders carried goods on the conditions only, *inter alia*, that they were not liable for any loss or damage to such goods, arising from any peril of the seas or rivers, or act, neglect, or default whatsoever of the company or their agents or servants, or from any defect in the steamer, its machinery, equipments, ballasting, or stowage, or from any consequences of the causes above stated, it being an express condition that the owners of goods undertake all risks whatsoever: Finds that the advertisement or sailing bill was duly intimated to the public and intending shippers including Messrs Millar & Moon, who must be taken as acting for the pursuer in this matter: Finds that the marble was badly and unskilfully stowed, the

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slabs being laid in the hold flat, and not as they ought to have been, on their edges, whereby many slabs were delivered broken: Finds that by the terms of the said advertisement or sailing bills, constituting the contract with the pursuer's author, the defenders are not liable for the damage arising as aforesaid: Therefore assoilzies the defenders, and decerns: Finds the defenders entitled to expenses."

On 20th February 1886 the Sheriff (Clark) on appeal adhered.
 The pursuer appealed.

LORD YOUNG.—(After reviewing the evidence, and coming to the conclusion that the terms of the defenders' sailing bills had not been communicated to Millar & Moon, the pursuer's agents)—It is not necessary to decide the point, though I think it may be proper to indicate an impression, approximating at all events to an opinion, which I myself have, that I should not be satisfied in point of law that proof of the receipt of a circular applying to the sailing of a particular vessel on a particular day from Glasgow to Galway, and importing conditions into the contract of carriage of goods by that vessel and voyage by reference to the back of a sailing bill, was sufficient to import these conditions into a contract for the carriage of goods from Galway to Glasgow. One would not be disposed to be astute to import by way of inference into a contract terms which would have the effect of discharging one of the parties from nearly all his common law liabilities. I should say that, as a general proposition, the carrier of goods, whether by land or sea, who wishes to free himself from the common law rules of liability, ought to make a special contract for the purpose. There are many cases shewing how this may be done. It is a question whether it is sufficient to notify such conditions on the back without printing a reference on the front to the back. But here there is neither a front nor a back. The contract was a parole contract, constituted merely by sending the goods, and I am not disposed to be subtle to introduce into it by way of inference terms which would qualify the ordinary legal liabilities of the ship-owner in the way which it is attempted to do here. But, as I have said, it is not necessary to decide that point in the view which I take regarding the transmission of the circular.

LORD CRAIGHILL.—I am of the same opinion. The special contract which the defenders here aver is a very peculiar one, which would require the very clearest proof to establish it, because its necessary result, if established, would be to free the defenders from all liability for injuries which may happen to goods entrusted to them for carriage. I agree with your Lordship that such a contract has not been established by the proof which has been here led.

LORD RUTHERFURD CLARK.—I am of the same opinion. I am satisfied on the proof that no circular was ever sent to Millar & Moon. It was incumbent on the defenders to produce the very clearest evidence of this in order to import terms so remarkable into the contract, and this, in my opinion, they have failed to do. I further share Lord Young's doubt whether the circular can be construed so as to apply to the inward as well as to the outward voyage. That seems to me a very doubtful question.

The LORD JUSTICE-CLERK was absent.

THE COURT pronounced the following interlocutor:—"Find in fact, first, that on 19th February 1884 twenty-five slabs of marble

were by Messrs Millar & Moon, acting for John Lightbody the bankrupt on whose estate the pursuer is trustee, delivered to and received by the defenders at Galway, for carriage by them in their steamer "Clara" to Glasgow, and delivery there to the said John Lightbody; second, that the said slabs of marble were carried and delivered by the defenders accordingly; third, that in the course of the carriage, and when in the custody and charge of the defenders, the said slabs were broken and damaged, and were in that condition delivered to Mr Lightbody; fourth, that the money value of the said damage is £26 sterling; fifth, that there was no contract or agreement between the parties whereby the legal liability of the defenders at common law, as carriers of the said marble, was limited or affected; sixth, in particular, and *separatim*, that the terms of the defenders' sailing bills, referred to by them on record, were not communicated or known to Messrs Millar & Moon, and that the contract for the carriage of the said marble slabs was not made with reference to the said conditions: Find in law that the defenders are liable to compensate the pursuer as trustee foresaid, for the damage to the said marble slabs: Therefore sustain the appeal; recall the interlocutors of the Sheriff and Sheriff-substitute appealed against; ordain the defenders to make payment to the pursuer of the said sum of £26," with interest thereon, and with expenses.

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Trustee v. J. &
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PETER DOUGLAS, S.S.C.—J. & J. Ross, W.S.—Agents.

SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY, LIMITED, AND
OTHERS, Pursuers (Respondents).—*Murray—W. C. Smith.*
DUNCAN MACPHERSON, Defender (Reclaimer).—*Asher—Cosens.*

No. 3.

Oct. 23, 1886.
Scottish
Rights of Way
and Recreation
Society v.
Macpherson.

Process—Proof or jury trial—Declarator of right of way.—An action of declarator of a public right of way appointed to be tried by a Lord Ordinary without a jury, in respect that the alleged right of way, which was in Forfarshire, had been the subject of correspondence in the *Scotsman* newspaper, and of a report submitted by the Scottish Rights of Way and Recreation Society to its members.

THE SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY, LIMITED, an association formed for the preservation and defence of public rights of way in Scotland, with members from all parts of Scotland, raised an action against the proprietor of Glen Doll, near Kirriemuir, for declarator of a public right of way across his property. The alleged right of way extended from Glen Clova to Braemar, passing through the defender's property. Two persons, one a farm manager in Glen Clova, the other a shepherd in the district, were also pursuers.

2D DIVISION.
Lord Kinneir.
M.

The defender maintained that the case should be tried by the Lord Ordinary without a jury on the authority of *Blair's case*.¹ It appeared that a deputation from the Society in July 1885 had gone along the road, and the directors had referred to this fact, and to their intention of taking proceedings, in their annual report to the shareholders of the Society. The road had also been mentioned and the steps taken to preserve it referred to in the general report of the Society to its members. There had, besides, been, in 1885, two letters in the *Scotsman* newspaper, and one in the *London Standard* newspaper on the subject of the alleged right of way.

¹ *Blair v. Macfie*, Feb. 2, 1884, 11 R. 515.

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The Lord Ordinary (Kinnear) appointed the case to be tried before himself and a jury on issues.*

The defender reclaimed, and argued;—The case was similar to *Blair's* case, in which the principal ground of judgment was that the minds of the public had been biassed by public discussion of the matter. Although the road was in Forfarshire, the members of the society were to be found in the Edinburgh district, and it was there that the *Scotsman* newspaper was read.

The pursuers argued that the general rule was to try such cases by a jury. *Blair's* case had several specialties,—first, the right of way claimed was complicated; next, the pursuer had himself sent the correspondence there complained of to the newspapers, and was therefore barred from any favour in the eyes of the Court.

At advising,—

LORD JUSTICE-CLERK.—Had I been to act on my own impression I should not have been disposed to interfere with the Lord Ordinary's discretion, but I understand that it is the general feeling of the Court that this case will be better tried by the Lord Ordinary without a jury. Considering that feeling, and looking to the authority of the case of *Blair*, I move your Lordships that it should be so tried.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and remitted to him "to proceed without a jury."

ANDREW NEWLANDS, S.S.C.—TAIT & CRICHTON, W.S.—Agents.

No. 4.

Oct. 27, 1886.
M'Inally v.
King's Trustees.

JOHN M'INALLY, Pursuer (Appellant).—*Rhind*—A. S. D. Thomson.
ARCHIBALD KING AND OTHERS (King's Trustees), Defenders (Respondents).
—*Low*—*Craigie*.

Reparation—Master and Servant—Contributory negligence.—An action of damages was raised against quarrymasters by the representatives of a workman killed while engaged at the quarry in tunnelling a bank of earth with a view to its removal. The work was thus carried on: Two chambers were cut about ten feet apart, and a tunnel was cut between them, supports being left for the roof on each side. The supports were then removed, and the soil allowed to fall in. This work was safe at first, but became dangerous as it approached completion. It was the practice, as a necessary precaution to prevent accident, to station a man on the top of the ground, as the work became dangerous, to warn the workmen below if any cracks shewed themselves, but it did not appear to be under-

* "NOTE.—The defender maintains that this case should be tried without a jury, on the ground to which the Court gave effect in *Blair v. Macfie*, viz., that the minds of the public, and particularly of that part of the public from which juries are drawn, have been prejudiced in regard to the merits of the case by discussions in the newspapers. But the only publications for which the pursuers are responsible appear to me to be of a very different character from the letters which were addressed to the newspapers by the pursuer in the case referred to. It cannot be supposed that the public mind has been so prejudiced by anything that appears in the pursuers' reports as to render a fair trial by jury impossible or improbable; and the mode of trial ought not to be affected by the letters of persons for whom the pursuers are not shewn to be answerable, or by letters addressed to a newspaper published in London. This case is distinguishable from that of *Blair* on another ground, because the road now in question is at a distance from Edinburgh, so that there can be no local feeling upon the subject in the district from which the jury are to be drawn."

stood whether it was the duty of the foreman or of the workmen engaged in the work to see to this being done when it became necessary. When the accident happened the deceased was engaged in removing one of the supports, and no watcher had been stationed on the surface of the tunnel.

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Held that there was fault on the part of the employer in respect either that the foreman had not sent a man to watch the surface or made it clear to the workmen that that was their duty, and that there was no contributory negligence on the part of the deceased, who was entitled to rely on the precaution having been taken, and did not carelessly rush upon a seen danger.

THE testamentary trustees of James King, builder, were owners of a 2^d Division. freestone quarry near Coatbridge, and in November 1885 were engaged in stripping the face off a portion of the quarry so as to open it up, John M'Inally being one of the labourers employed by them at this work. The workmen, in order to remove the earth, dig two chambers in the face of the bank of earth, and then tunnel between them, leaving in supports until the tunnel is finished. They then take out the supports or "legs," and the tunnel falls in. The loose earth is then carted away. On the 26th November M'Inally and two other men had been working at a tunnel of this kind, and on the morning of the 27th they finished it and were beginning to take out the "legs," when the earth above, in weight about twelve tons, fell in upon M'Inally and killed him. The weather had for some days before the accident been frosty, but during the night of the 26th there had been heavy rain. In this state of the weather the soil is especially liable to slip.

Sheriff of
Lanarkshire.
I.

M'Inally's father brought an action against the trustees for reparation for the death of his son. He averred,—“The accident was caused by the fault or negligence of the defenders, as trustees foresaid, and of their foreman, Robert Miller, in ordering the pursuer's son, and others, to do work of a dangerous character, without taking all ordinary and necessary precautions to prevent accidents. In particular, they ought to have had a man on the ground above, so as to give warning to those working underneath the moment he saw signs of the ground giving way.”

The pursuer pleaded;—The pursuer having suffered loss, injury, and damage, through the fault or negligence of the defenders, as trustees foresaid, or of those for whom they are responsible, the pursuer is entitled to decree.

The defenders stated;—“It is the duty and custom of defenders' workmen, when they are ready for a fall of earth, and begin to take out the supports, to send one of their number above to watch and give warning to the pickmen below taking out the supports when there are any signs of the earth giving way.”

The defenders pleaded, first, that the accident was a *damnum fatale*; and, second, that the deceased had contributed to the accident by his own negligence.

A proof was allowed. It appeared that a new foreman (Miller) had come to the quarry the day before the accident. It was proved that in the ordinary case of a fall such as had occurred, before it took place cracks would shew themselves in the soil above. It had been customary for a man to be stationed above the tunnel as the work approached completion, and it came near the time for removing the "legs," to watch for these cracks, and warn the workmen in time for them to escape. Until the work reached that stage there was not much danger. The only serious conflict in the evidence was as to whether the foreman set this man to watch, or the workmen did so themselves.* The Court did not de-

* Alexander Robb, a fellow-workman, said,—“A new foreman had come to the works the previous day. His name was Miller. The foreman before that

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termine this, holding that at all events it had not been shewn that there was an established rule of the quarry to the one effect or to the other, and that therefore the system of management was defective.

The Sheriff-substitute (Birnie), on 1st July 1886, pronounced this interlocutor:—"Finds, in fact, that, on 27th November 1885, the deceased John M'Inally was killed while in the employment of the defenders, bringing down a fall in a field near Langloan Quarry, and that the pursuer, his father, has suffered damage thereby to the extent of £50: Finds that the deceased was guilty of contributory negligence: Finds, in law, that the defenders are not liable in the damage suffered by the pursuer; assoilzies them from the conclusions of the action."*

was called Dawson. In Dawson's time there was always a man at the top to give warning, so as to protect the men working below . . . Cross.—We were working away, thinking that someone was watching on the surface. I thought so, because there was always a man watching before. It was not one of our squad that usually watched. By the Court.—We did not send word to Dawson when we thought we required a watch, but he sent and put on a watch. There were different squads holing along the face. The face was pretty much in a line. Dawson would send a man from some of the other squads when one squad was to bring down a fall."

The evidence of several other labourers examined for the pursuer was to the same effect, and Mitchell, one of the defenders' witnesses, deponed,—“It was the custom, when a squad were ready to take out supports, to send a man above. I would not have started to take out supports without a man above. We had been warned by the gaffer, Dawson. We were always warned, when we commenced the holing, to put a man on the watch. Cross.—I know Dawson. He knew his business well enough, and attended to it. He always warned us not to go in without sending some of us up. I have seen Dawson send men up to watch. If Dawson had been present he would decidedly send a man to the top. I do not know whether it was Dawson's duty to send a man to the top or not. I know that, since the accident, there is always a man watching at the top, or Miller watches himself.”

On the other hand, Miller the foreman (a witness for the pursuer, recalled by the defenders), deponed,—“It is not customary for the foreman to send a man above to watch. I have been a quarryman all my days since I was fourteen or fifteen, and I am now forty-three or forty-four. The men send a man out of their own squad. Dawson might send up a man sometimes, and he might not. In his time the men did it themselves. While Dawson was foreman I was filling bogeys, the same as I was doing at the time of the accident. Had I been holing I would not have started to take out supports unless a man was watching above. I would not expect any man to do it.” A labourer, Moffat, also deponed,—“It was the men's place to have seen there was a watchman before they commenced. Cross.—I was never but once sent by Dawson to watch for a fall on the top. I never saw other men sent by Dawson to watch. The men gaed themselves that were holing. The particular way to do it is, the men that are holing—one of them—go up to see the danger.”

* “*NOTE*.—It is admitted that there ought to have been a watch on the top, at all events, when the legs began to be taken out. The pursuer says it was the duty of the foreman to set that watch—the defenders that it was the duty of the men themselves. The evidence leaves this in doubt, and it is a point on which there ought to have been no doubt. Had there, therefore, been nothing else in the case, I would have been inclined to think the defenders were liable, on account of their defective system of working. But it seems to me impossible not to hold that the deceased was guilty of contributory negligence, in commencing to take out a leg without seeing that there was a watch. No doubt, in certain cases, a workman is entitled to trust to his superior taking the requisite steps for his safety, but it is not proved, in the present instance, that the foreman always set the watch, and still less that the deceased was entitled

The pursuer appealed, and argued;—There should have been a watch. That was admitted. It was then the duty of the master to provide it, or to make it very clear that he left that to the workman. There then was fault in the defenders, a fault in carrying out a plain duty, or a fault in their system. Trust by the workman that the master would do his duty was not contributory negligence, which implied that one rushed into plain danger with open eyes. No. 4.
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The defenders argued;—The workman, by stepping back a yard or two, could have seen whether a watch had been set or not. He knew well that a watch was necessary, and on the evidence it had been shewn that the workmen had often supplied that watch for themselves.

LORD JUSTICE-CLERK.—In this case the Sheriff-substitute is of opinion that there was a breach of duty on the part of the employers on the ground that the system of working in this quarry was defective, that there was an obligation to place a watchman on the top of the place where excavation was going on in the circumstances on which this action proceeds, and that that obligation was not fulfilled. But the Sheriff-substitute has held that the pursuer was guilty of contributory negligence in proceeding to take out the legs without seeing that there was a watchman. I am unable to come to that conclusion on the assumption that the Sheriff's premise is sound, for, if it was the duty of the employers to set a watch, the workman was entitled to rely on that duty being fulfilled, and that is sufficient to dispose of the plea of contributory negligence.

That plea is not an exact counterpart of the obligation incumbent on the employers; there may well be duties on the part of the employer, which do not attach at all to the workman. The principle is that workmen are not to make their master responsible for all accidents which are attributable to their own carelessness. There is no room for that plea here. It was the duty of the foreman to have a watch set, and that all the more that there had been a rainy night after frost. In these circumstances there is no room for the principle of contributory negligence, and there being negligence on the part of the employer I think he is liable to the pursuer's representatives.

LORD YOUNG.—That is my opinion also, but it is not without hesitation and after consideration that I have come to the conclusion that the Sheriff-substitute's judgment, which obviously is well considered, ought to be altered. In supplement of what your Lordship has said, I may express my own view in a very few sentences.

First, this was a dangerous operation, and admittedly there ought to have been a watcher on the top to see what effect the mining was having on the mass above, cracks usually shewing themselves in time for warning to be given by anyone stationed above. It is conceded that it was the foreman's duty either to go himself or to send someone to see if there were any indications of that. There then is fault to begin with. That was a precaution, proper to be taken, which was omitted, and which, if not omitted, would have made the accident less likely to happen. That is in law sufficient to found liability. The accident has happened, and therefore there will be liability, unless there is contributory negligence.

to trust to him doing it. It was easy for the deceased to see if there was a watch or not. The foolhardiness of taking out a leg without making sure of this was manifest, and it would, in my view, be of bad example, and likely to lead to much danger, were workmen to be encouraged in such foolhardiness."

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All the contributory negligence amounts to no more than this, that the workman should have been intelligent enough to refuse to go to work unless he was satisfied that there was a watchman there, or ought to have stopped sooner unless he was satisfied that Miller had done his duty, and that the watchman was there. That is a narrow case of contributory negligence. The ordinary case is that a man rushes into a seen danger in disregard of the ordinary rules of prudence. I do not think M'Inally was doing that here. I rather think he was entitled to assume that Miller had done his duty. I cannot say that he was guilty of a reckless disregard of his own safety in going to his work and continuing his work, for it is according to evidence that this precaution was usually taken. If there was any rule that a workman was to work on until the work became dangerous in his judgment and then appeal to the foreman to set a watch, that ought to have been established as a rule. There should have been no doubt about it. If there was a doubt about it, then the system of this work was bad.

LORD RUTHERFURD CLARK.—I have found this a very narrow and troublesome case, but I do not differ.

LORD CRAIGHILL was absent.

THE COURT pronounced this interlocutor:—"Find, first, that on the morning of 27th November 1885 John M'Inally, son of the pursuer, with other workmen in the employment of the defenders, by orders of Robert Miller, their foreman, resumed work in making excavations in the face of a bank of earth in order to bring down the superincumbent soil, on which work M'Inally had been engaged on the preceding day, and that while in obedience to said orders he was so occupied the earth fell upon him and killed him; second, that it was the duty of the defenders to have placed a man on the summit of the bank to watch and give notice to the workmen engaged below whenever the surface gave indications of being affected by the excavation, but that they failed to do so, and that the death of the said John M'Inally is attributable to their failure; third, that he did not by any fault or negligence on his part contribute to his death: Find in law that the defenders are bound to compensate the pursuer for the loss and damage sustained by him through the death of his son: Therefore sustain the appeal: Recall the judgment of the Sheriff-substitute appealed against: Assess the compensation due to the pursuer at £100," &c.

WILLIAM OFFICER, S.S.C.—R. T. GIBSON, S.S.C.—Agents.

No. 5.

Oct. 29, 1886.
Oastler v.
Dill, Smillie,
& Wilson, &c.

MRS BEATSY YATES OR OASTLER, Pursuer (Appellant).—*J. C. Lorimer.*

DILL, SMILLIE, & WILSON AND OTHERS, Defenders (Respondents).—

J. C. Thomson—R. L. Orr.

Agent and Client—Liability of agent—Agent for both parties to a loan—Presumption.—In an action brought by a client against a firm of law-agents for recovery of money invested through them on a bad security, it was proved that the agents acted for both parties, the borrowers being the brothers of the leading partner of the agents' firm. The client, a widow lady of middle age, handed the money, a sum of £400, to this partner, and he lent it at five per cent on the security of house property bought by the borrowers immediately before for £1350, and already burdened with a bond for £1000 and a feu-duty of £15. The pursuer averred and deponed at the proof that she had told her agent to lend her money on a first bond, and had given no further instructions; the agent, on the other hand, averred and deponed that he had arranged with a

relative and adviser of the pursuer, since dead, before he met her, that this particular security should be taken, and that it was taken with her full approval and in knowledge of its being a postponed security. There was no other material evidence.

Held on the proof that the defender had been employed as agent for the pursuer, and that that agency was not limited, as the defender averred, and that, therefore, the security being such as no prudent agent should have taken for a client, the defender was liable for the loss.

Question (per Lord Justice-Clerk) whether the defender's allegation, even if proved, would have availed him.

Opinion (per Lord Craighill) that, the agency and receipt of the money being proved, the *onus* was upon the defender.

Observations (per Lord Justice-Clerk and Lord Craighill) on the impropriety of the same agent acting for both borrower and lender.

MRS BEATSY YATES OR OASTLER, a widow lady of middle age, living in Glasgow, raised an action in March 1886 against the firm of Dill, Smillie, & Wilson, writers in Glasgow, Mr T. J. Smillie, the only surviving partner of the firm and the executor of Mr Wilson, who, with Mr Smillie, had carried on the firm's business as sole partners for some years. Mrs Oastler's summons concluded for a sum of £480, being a principal sum of £400 invested by her through the firm, and arrears of interest to the amount of £80. The principal sum she had in November 1874 placed in the hands of Mr Smillie, who acted for his firm throughout the transaction, and it was by him invested in a postponed bond at five per cent over house property in Braehead Street, Glasgow. This property was bought in November 1874 by George and Matthew Smillie, two brothers of the principal defender, at a sum of £1350. £350 of this only was paid, the balance being left as a first bond on the property. Besides this, the property was liable in a feu-duty of £15, 2s. Not having received interest for several years, Mrs Oastler raised this action for the principal and arrears of interest, offering to assign the bond on receiving payment.

She averred that she had given Mr Smillie "instructions to invest it in a first bond upon good heritable security." She further averred that she "did not learn till some considerable time afterwards that her money had been invested in the said second bond. She then, and frequently thereafter, complained to the defender Smillie about the transaction, but he put her off from time to time, stating that her money was all right, and that he would see she lost nothing."

Defences were lodged for the firm and Mr Smillie. They denied the pursuer's averments, and averred that the firm had, before the purchase, got a valuation of the subjects at £1450 above the feu-duty. They further alleged that Mrs Oastler had consulted Mr Brownlee, her brother-in-law, as to investments. Mr Brownlee was a retired farmer, and was in the habit of advising her. He, it was averred, had called on the firm, and discussed several loan proposals. In particular, a proposal from the Smillies over the Braehead property was submitted to him, along with the valuation, and it was also explained to him how much had been paid for the property, and the amount of the first bond. The said George Brownlee was so satisfied that he accepted the loan for Mrs Oastler as an investment for her money, and he was to inform Mrs Oastler of the arrangements he had made for her.

It was also averred,—“On the 7th of November Mrs Oastler called and stated that Mr Brownlee had informed her of the arrangements he had made for the investment of her £600 (of which the £400 was part); and after the transactions had again been fully explained to her she left the £600 to be so invested, for which an interim receipt was given her. The

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said George Brownlee and the pursuer were both aware at the time of the transactions that the two loans were on second bonds, and the rate of interest was fixed at five per cent, being the rate usually paid on second bonds." The defenders attributed "the present position" of the security to the depreciation of trade, and stated that if trade improved "it may confidently be anticipated that the value of the property will be sufficient to meet the pursuer's bond."

They pleaded;—(3) The said sum of £400 having been placed in defenders' hands for the special purpose of being invested as a second loan over the property in Braehead Street belonging to George and Matthew Smillie, and the money having been invested as instructed, the defenders are entitled to absolvitor, with expenses. (4) All the particulars connected with said security having been fully explained to the pursuer and to her friend, George Brownlee, on her behalf, and she having, while fully cognisant thereof, agreed to lend said money as a second bond at the increased rate of 5 per cent, being the amount usually paid on second bonds, was bound to take the risk of the property depreciating in value, and the defenders are entitled to absolvitor, with expenses.

A proof was led. The result of it was that Mrs Oastler deponed to the truth of her averments, and Mr Smillie to the truth of those made by him on behalf of the firm and himself.* Mr Brownlee was dead by this time.

* Mrs Oastler deponed,—“I knew the difference between first and second bonds. I was warned after my husband's death by my son-in-law and a brother to be very careful not to put any money on a second bond—to make sure it was a first. My sister, Mrs Brownlee, said if I had a little money, to invest it with Mr Smillie. I did so. I called upon him one day with some money. Mrs Brownlee was with me. I left the £600 on that date. I gave him the money and got a line that he had received it. I gave it to him to put on a good investment on a first bond. I was particular about that. I never authorised Mr Brownlee to find an investment for me. He never did so in his life. I had no conversation with Mr Brownlee about the investment. . . . I trusted Mr Smillie with the £400, and told him to put it on a first bond. Mr Smillie was very highly thought of by Mr Brownlee at that time. Mr Smillie did not explain on the day I left the £600 that it was to be put on a second bond in Braehead Street. He did not tell me of the investment at all at that date. I was only a few minutes in his office. I did not get the bond till two years afterwards. I wrote for it to Mr Smillie repeatedly. My son-in-law read it very carefully, and he told me first that it was a second bond. I was very much astonished. I called upon Mr Smillie and asked him why he had put the money upon a second bond. . . . He said on different occasions that I would lose nothing by him, not a farthing. The interest was paid to me up to 1880. I told Mr Brownlee about my money being put on a second bond after I found it out, and he was very much struck with it. He never knew where the property was, and never knew it belonged to Mr Smillie's brothers till I found it out. Mr Brownlee told me so.”

Mr Smillie deponed,—“In 1874 we were frequently consulted by Mr George Brownlee with reference to investments of money belonging to himself, and once or twice regarding investments for pursuer. He informed me that pursuer had asked him to look out for a suitable investment for her. . . . A variety of proposals were submitted. They are in the books, and were attended to by Mr Wilson, and signed by Mr Wilson. Numerous proposals were made to Mr Brownlee, and investments were made for him. On 1st October 1874 we wrote:—‘We have a chance just now to invest £250 on security of a valuable property in North Street. It would be a first bond, and the interest 5 per cent. It is to take the place of an existing bond. This might suit Mrs Oastler very well.’ That proposal was declined. On 2d November 1874 I placed a proposal before Mr Brownlee for a second loan of £400 over this property in Braehead

The Sheriff-substitute (Lees), on 18th June, pronounced this interlocutor:—"Finds that in November 1874 the pursuer granted a loan of £400 on a second bond over a property in Braehead Street, which has proved a security insufficient for the loan: Finds that the pursuer has not proved that this loan was effected on the advice and responsibility of the defenders as her agents: Finds in law that, in these circumstances, the defenders are not responsible to compensate the pursuer for the loss she has suffered: Therefore, assoilzies them from the conclusions of the action, and decerns." * No. 5.
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Street. He accepted that proposal on behalf of pursuer. There were two proposals—one of £200 to M'Kinlay, and this £400, and both were settled at the same time. I explained to Mr Brownlee everything about these properties. I had nothing to conceal. I told him that the purchasers of the property were my two brothers; I told him the price that was being paid; and I stated, what I then believed, and what I still believe, that the properties were well purchased at the time, looking to the situation and other prospective attractions. I left him to decide himself. About that time there were three other proposals, and these were rejected. I had never spoken to pursuer before she and her sister, Mrs Brownlee, called on the morning of the 7th. I had no communication whatever. I assumed she had been communicated with by Mr Brownlee on the particulars, and took for granted she was familiar with them. . . . That money was paid to me for the specific purpose of being invested on these two loans. I have no doubt whatever of that. Pursuer did not then say that the money was to be placed on a first bond. She knew it was a second bond, and that the interest was 5 per cent, and she knew the investments Mr George Brownlee had. I presumed she knew the property. I gave her the particulars she required. Mr Brownlee was neither old nor infirm. He was up in years, but in sound health up to within a few days of his death. He was a thoroughly shrewd man, more especially in connection with money matters. He was a man who would naturally prefer large interest on his money. I considered him quite capable of judging for himself when I put the particulars before him." He denied that he had accepted any personal responsibility for the loan, but stated that he had expressed sympathy for the pursuer.

The books of the firm shewed that Mr Smillie had had meetings at this time both with Brownlee and the pursuer. She was not charged anything for the transaction, all charges being, as usual, paid by the borrower.

* "NOTE.—The case on which the pursuer comes into Court is set forth in the second article of her condescendence, and is as follows:—"Sometime prior to 12th November 1874 the pursuer placed a sum of £400 in the hands of the defenders, Dill, Smillie, & Wilson, with instruction to invest it in a first bond upon good heritable security.' Whatever other points may be in doubt through the lapse of time, this is certain, that that statement is not true. It is clearly proved that the pursuer did not place this or any other sum in the defenders' hands with such instructions. On the contrary, the first time she saw the defenders was the day she came with the money. The loan having been resolved on, the defenders were thereon employed to carry through the transaction. Assuming that it was an imprudent loan—as I think it was—the question is, is a law-agent liable in compensation for the loss that is caused by carrying into execution an imprudent loan which his client has resolved to grant? . . . It seems to me, on a consideration of the whole case, that the pursuer has not proved that she employed the defenders as her agents, or that they agreed to act as such, either for payment or gratuitously, at any period of the negotiations, which would imply that they were responsible to her for loss caused by negligence or imprudent advice on their part as to the sufficiency of the security.

"If these views be sound the defenders are entitled to absolvitor. But I only give them half the expense attending the proof—a step which I stated to them in the course of the proof I might have to take—inasmuch as at least one-half

No. 5. The pursuer appealed.

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LORD JUSTICE-CLERK.—It is always an unpleasant duty which the Court has to discharge in judging of a question involving personal responsibility like this. The charge is made against a firm of writers in Glasgow that they invested the money of their client on a security which they knew, or ought to have known, was insufficient. That it was insufficient is not now, I think, disputed, and indeed it hardly could be.

The Sheriff-substitute admits, in very strong and forcible language, that it was a kind of transaction that no prudent agent would have gone into with a proper view to the interests of his client, and I agree with him. I do not say that all second bonds should be excluded from transactions of this kind. But here the margin, the apparent margin, was very small; no valuation has been shewn to us that makes out the transaction to have been a proper transaction, and the rate of interest in itself indicates that there was a certain amount of risk.

But the transaction becomes far more unfavourable for the law-agent when it appears that the person in whose favour the loan was negotiated was the brother of the agent. Mr Smillie, too, acted both for the borrower and the lender, a situation in which no law-agent can with propriety place himself.

All these things are not doubtful, but the case, as stated for the defenders, is, that Mr Smillie undertook nothing, that Mr Brownlee had settled with him that the money was to be invested in the way in which it was, and consequently that he, the defender, is no way responsible for the failure of the security. That would be a very singular kind of case, and I doubt whether, even if it had been proved, it would have availed the defender. Mr Smillie knew that the money was Mrs Oastler's, and therefore he was bound to have very sufficient proof of the authority of the third party to settle with him. But there is not a trace or a vestige of such a thing on the face of the transaction. If Mrs Oastler is to be believed—and I see nothing that is satisfactory to contradict her—she stipulated for a first bond, she gave Mr Smillie the money, and trusted to him doing his best in investing it on proper security. I find nothing to contradict that in the written documents, and indeed nothing in the case except Mr Smillie's evidence. I do not prefer it to that of Mrs Oastler. I do not say that I think every word she says is accurate, but I think it is proved that she handed the money to Mr Smillie in the confidence that a proper investment would be found for it, and a proper investment was not found.

LORD YOUNG.—I think this is an exceptionally clear case. That the relation of agent and client for the purpose of lending money existed is too clear to be contested. I believe Mrs Oastler's testimony, and I am prepared to act according to it.

Mrs Oastler then lent her money on a security on which no man of business could possibly be justified in lending his client's money. There

of the evidence led by them was to shew that, even if they had advised the pursuer in regard to this loan, the advice was not imprudent. In my opinion this point is hardly open to question. The property was bought at £1350, and was subject to a feu-duty of £15, 2s., and to a first bond of £1000. Whatever doubt there may be as to when a second bond is expedient, I think it is certain that by no stretch of indulgence could it be said that the property was fit a few days afterwards to bear a second bond of £400."

is apparently a margin of £350 on the price of the house, but when you take the feu-duty into consideration there is really no margin at all, there is no security at all, and I agree therefore with the Sheriff-substitute when he says, "Whatever doubt there may be as to when a second bond is expedient, I think it is certain that by no stretch of indulgence could it be said that the property was fit a few days afterwards to bear a second bond of £400."

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The case for the defender then is this, that a shrewd old gentleman, Mr Brownlee, who was in the habit of giving advice on such matters, selected this as a good security, leaving nothing to the agent's judgment, and freeing the agent therefore from responsibility. But any such case is inconsistent with the character attributed to Mr Brownlee. This defence—that the agent received special instructions to lend this money on this particular security, be it ever so bad—is not in my opinion proved. It is against the evidence of Mrs Oastler, against the evidence of Mr Brownlee, which we have through her, and against all probability.

I agree with your Lordship, and I am prepared by our judgment to negative the defender's version of the case and affirm that given by the pursuer.

LORD CRAIGHILL.—I concur, and I agree with Lord Young in thinking that this is about as clear a case of the kind as ever was brought before a Court. It is much to be regretted that such a case was ever defended, and I am grieved and astonished to think that so many of these cases are connected with the fact that the agent for the lender is also agent for the borrower. It is hard for any man faithfully to serve two masters, and I would have agents earnestly to consider that, if they cannot do justice to both, they should accept employment from one only, so that fidelity to him shall not be affected by any duty due from them to the other.

As regards the first question here, there is no doubt at all that the pursuer employed the defender to lend out her money. He owed her a duty then, and that duty was to advise her as to the security on which the money was to be lent. If all he had to do was to lay out the money on a security already selected and see that the necessary deeds were drawn up, then he had no duty to advise her as to the security. But if there is no evidence to the contrary, the presumption is that she looked to her agent for advice as to whether the proposed security was such a security as is generally accepted for sums proposed to be advanced. The defender does take up the position that he had no duty to give advice, the property to be taken in security having already been made matter of agreement. I have said what, if we were left to presumption, would be the presumption in such a case, but I agree in thinking that the defender's allegations are negatived by the proof.

LORD RUTHERFURD CLARK.—I agree.

THE COURT pronounced this interlocutor :—"Find in fact, 1st, That in November 1874 the pursuer employed the defenders, as her agents, to invest a sum of £600 then placed by her in their hands; 2d, That she did not authorise the defenders to invest the said sum, or any part of it, on a second or postponed security, but instructed them to invest it as a first charge on good heritable security; 3d, That the defenders, in disregard of these instructions, lent £400 of the said sum to two brothers of the defender Thomas J. Smillie on a bond and disposition in security of subjects in

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Braehead Street, Rutherglen Road, Glasgow, then recently acquired by them at the price of £1350; 4th, That the said subjects were charged with a feu-duty of £15 and an heritable debt of £1000, which exhausted their value, and the said sum of £400, with interest thereon to the amount of £80, has been lost to the pursuer: Find in law that the defenders are bound to indemnify the pursuer for the loss thus sustained by her: Therefore sustain the appeal: Recall the judgment of the Sheriff-substitute appealed against: Ordain the defenders jointly and severally to make payment to the pursuer of the sum of £480 sterling, with the legal interest thereof from the date of citation to this action till paid, the pursuer being bound thereupon to deliver to the defenders at their expense an assignation to the said heritable debt," &c.

WILLIAM BLACK, S.S.C.—W. & F. C. MACIVOR, S.S.C.—Agents.

No. 6.

Oct. 29, 1886.
Muirhead.

JAMES MUIRHEAD (Clerk to the Police Commissioners of Hillhead),
Petitioner.—*C. J. Guthrie.*

Burgh—Municipal election—Appointment of returning officer—Police Burgh—Nobile officium.

1ST DIVISION.
C.

THE Provost and one of the two junior Magistrates of the police burgh of Hillhead fell to go out of office at the same date, both being candidates for re-election. The other junior Magistrate had died. By the 22d clause of the Ballot Act, 1872 (35 and 36 Vict. cap. 33), it was provided that,—“All municipal elections shall be conducted in the same manner in all respects in which elections of councillors in the royal burghs, contained in schedule C to the Act 3 and 4 William IV., cap. 76, intituled, are directed to be conducted.” In ordinary circumstances the Provost would under the statute have been returning officer at the election, and in the event of his being one of the retiring commissioners the duty would have devolved upon one or other of the junior Magistrates.

In these circumstances the Clerk to the Commissioners presented a petition stating that it had become necessary to apply to the Court, in the exercise of its *nobile officium*, to appoint a returning officer, and suggesting that one of the other commissioners who did not retire at that date should be appointed.

THE COURT named one of the Sheriff-substitutes of Lanarkshire (Balfour), whom failing, the senior Sheriff-Clerk-Depute of the County, to act as returning officer, superseded extract (the election falling to be held two days later), and authorised the expenses to be paid out of the burgh funds.

MORTON, NEILSON, & SMART, W.S., Agents.

No. 7.

Oct. 30, 1886.
Urquhart v.
M'Kenzie.

DONALD URQUHART, Pursuer (Respondent).—*Rhind—A. S. Paterson.*
ALEXANDER M'KENZIE, Defender (Reclaimer).—*Jameson—M' Lennan.*

Reparation—Slander—Wrongous apprehension—Malice and want of probable cause—Relevancy.—In an action of damages for alleged wrongous apprehension, the pursuer averred that he had passed the night in a hotel, and had left in the morning to attend a market in the neighbourhood without paying his bill; that he had not returned to do so, but that when seated in the train in the afternoon on his way home he had beckoned to the innkeeper (the defender), whom he saw on the platform, and was told by him that the amount of the bill was 3s. 6d.; that he then produced a £1 note, and without parting with it received from the innkeeper the 16s. 6d. of change, and that while they

were discussing the proper amount due the train left the station, the pursuer taking both sums with him; that the defender forthwith telegraphed, or caused the constable on duty to telegraph, to the police authorities at next station to have the pursuer arrested on a charge of theft; that the pursuer was apprehended at the next station, which was his destination, and that on the following day the defender falsely, maliciously, recklessly, and without probable cause, informed, or caused to be informed, the procurator-fiscal that the pursuer had stolen 16s. 6d., and that he did this for the purpose of inducing him to prosecute the pursuer as being guilty of said crime. It was not stated that the pursuer was known to the defender, or that the latter even knew what he was or where he lived. The Court allowed the pursuer an issue (*disa.* Lord Rutherford Clark, who held that there was no relevant case).

No. 7.

Oct. 30, 1886.
Urquhart v.
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IN an action of damages for wrongous apprehension on a charge of ^{to Division.} theft, at the instance of Donald Urquhart, a farmer at Lamington, near ^{Lord Lee.} Tain, against Alexander M'Kenzie, a hotel-keeper at Bonarbridge, ^{M.} Sutherlandshire, the pursuer averred,—(Cond. 2) "On or about 1st December 1885, the pursuer had occasion to attend a market at Ardgay, near Bonarbridge, and he stayed the night at the defender's hotel there. The market was continued on the following day, and the pursuer rose early that morning to attend it. The pursuer met the defender at the market, and offered to pay his bill, but the defender refused to accept payment, saying that he could not tell the amount. It was the pursuer's intention to return to the hotel, and pay the bill before leaving in the evening, but being pressed for time, and in a hurry to catch the train, and having become suddenly unwell, he was unable to do so. He entered the train at Ardgay Station intending to remit the amount to the defender whenever he got home." (Cond. 3) "When the train was on the point of starting from Ardgay Station, the pursuer caught sight of the defender standing on the platform, and beckoned him to come up so that he might settle with him. The defender said the amount of the bill was 3s. 6d., and after the pursuer had searched for in his pocket and produced a £1 note, handed him 16s. 6d. as change. The pursuer, however, fell to be credited by the defender with the sum of 1s. 6d., which was the change of a florin after deducting the price of a gill of whisky, and which the defender had been unable to give to the pursuer in the morning when the whisky was ordered. The pursuer told the defender this, but the train started before the matter was settled, and the pursuer called out to the defender that he would send the proper amount to him when he got home." (Cond. 4) "On the arrival of the train at Tain, the pursuer was apprehended by the policeman (Malcolm M'Donald, then in Tain, now sergeant of police at Invergordon), conveyed by him to one of the station apartments, and there searched for the money given by the defender as before stated. This was done on the instructions of the defender, who it is believed and averred telegraphed, or caused the constable on duty to telegraph, from Ardgay to the police authorities at Tain to have the pursuer arrested on a charge of theft. The pursuer's apprehension was made in the presence of a great number of people, many of whom were returning from the said market, including many of his acquaintances and friends with whom he had business relations. The defender, on the following day, or on one of the days of the said month of December, falsely, maliciously, recklessly, and without just or probable cause, informed, or caused to be informed, the then procurator-fiscal at Tain, that the pursuer had stolen the 16s. 6d. above referred to, and this he did for the purpose of inducing the said procurator-fiscal to prosecute the pursuer as being guilty of said crime." (Cond. 5) " . . . The said charge was false, and it was made and the other proceedings taken by the defender maliciously, recklessly, and without any just or probable cause. . . . "

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The defender stated in answer that the pursuer, who was quite unknown to him, had had ample time and opportunity to pay his bill, both in the morning and in the interval between the close of the market and the departure of the train. He further denied the pursuer's account of what had taken place at the station, and stated that it was only after some search that he had discovered the pursuer seated in the train, and had demanded payment of the bill. "The pursuer produced a £1 bank-note, and asked defender to supply him with the difference between that amount and the sum of 3s. 6d. due to the defender. The defender counted out 16s. 6d. of silver and handed it to the pursuer, who on receiving it placed both it and the £1 note in his pocket, and refused to pay the defender anything. The defender was again demanding his money when the train started, and defender had to leave the carriage without payment. It is denied that there was any sum remaining to be settled between the parties over and above the said 3s. 6d., and also denied that the pursuer referred to any such sum in the defender's hearing, or said that he would send the money when he got home." The defender further denied that he had made any charge of theft against, or given any instructions for the apprehension of the pursuer, and stated that he had merely consulted a police-officer at Ardgay as to the best means of discovering the pursuer's name and address. He further averred,—“Any slight annoyance or inconvenience which the pursuer may have experienced from being interrogated by the police-officer at Tain was entirely due to his own carelessness and negligence in not paying his hotel bill in the regular way, and in not furnishing the defender with his name and address. Further, his action in returning his £1 note to his pocket, after receiving 16s. 6d. of change from the defender, amply justified the defender in taking immediate steps to trace him out, and to demand an explanation.”

The defender pleaded;—(1) No relevant case. (2) The defender not having charged the pursuer with theft, or caused him to be apprehended, is not liable in damages. (3) The defender having acted in good faith and with probable cause, and *separatim*, the pursuer being himself to blame for the proceedings complained of, the defender should be assoilzied, with expenses.

The Lord Ordinary (Lee) approved of the following issue for the trial of the case:—“Whether, on or about 1st December 1885, the defender maliciously, and without probable cause, caused the pursuer to be apprehended on a charge of theft, and searched by a police-officer at Tain, to the loss, injury, and damage of the pursuer? Damages laid at £500.”

The defender reclaimed, and argued;—There was no issuable matter averred which could be sent to a jury.¹ Looking to the pursuer's own statement, the defender could not have done otherwise than he did. There was probable cause for the course alleged to have been taken by the defender. Probable cause in a case of this kind meant a ground for reasonable suspicion. The defender could only have had one motive, viz., to secure payment of his bill; no illegitimate motive—such as would imply malice—was averred, or could be inferred from the pursuer's statement.²

The respondent having replied,—

LORD JUSTICE-CLERK.—I think neither party comes well out of the admitted facts in this case, and certainly the pursuer does not, because, upon his own shewing, he went away without paying his bill, and more than that he had

¹ Craig v. Peebles, Feb. 16, 1876, 3 R. 441.

² Lightbody v. Gordon, June 15, 1882, 9 R. 934; Hassan v. Paterson, June 26, 1885, 12 R. 1164.

with him the 16s. 6d. of change which had been handed to him at the door of the carriage by the innkeeper. It is very likely that he did not mean to go away without paying his bill. But it remained unpaid, and accordingly the innkeeper sent word to the next station to have the matter inquired into. I think the whole circumstances under which the action of the defender was taken are matter for proof. The statement of the pursuer does not, perhaps, make it appear likely that he will be able to prove that the defender acted without probable cause, but, nevertheless, I think there is no course open to us but to approve of the issue as adjusted and to send the case to trial.

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LORD YOUNG.—I am unable to arrive at any other conclusion. This is not the first case of the kind in which I have thought that the pursuer had not set forth a very likely case, but where, according to experience, I have found it impossible to refuse an opportunity of having the question tried. Looking to the way in which the pursuer's statements have been met by the defender, the question we have to consider is, whether, assuming that the pursuer can establish the case he avers, he would be entitled to damages. His case stripped of superfluities is, that the defender caused him to be apprehended on a charge of theft at Tain Railway Station, and that, acting maliciously and without probable cause, the defender further informed the procurator-fiscal there the next day that he had stolen the 16s. 6d. That appears to me to be a perfectly relevant case for trial, although it may not turn out to be true.

The defender's denial of the truth of the pursuer's story is most explicit, and we cannot leave it out of view. That raises a simple issue of fact, but then the defender pleads further that, even assuming he did act as the pursuer says he did, there was, on the pursuer's shewing, probable cause for his action. Such alternative pleading, I think, generally has an unfavourable effect on the case of the party using it. I entirely appreciate the view, that if it appear on the pursuer's own statement that the defender must have acted without malice and with probable cause, then the case ought to be thrown out, but I cannot say more here than that the pursuer's case appears to be unpromising. He did not pay his bill, but, as the train was starting, he saw the defender, who handed him the change for £1, deducting the amount of the bill, being 3s. 6d.; the pursuer thus carried off both the £1 and the 16s. 6d.; but I could not say that the pursuer is not entitled to satisfy the jury, if he can, that the defender had no probable cause for the course he is said to have taken in giving the pursuer in charge and informing the procurator-fiscal. I think it likely that the case will assume such a complexion that a jury will hold that there was probable cause, but I do not think it according to practice to throw it out in such circumstances at this stage.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—I am sorry to differ from your Lordships. The circumstances are certainly peculiar, and probably unique, in this respect that the defence of probable cause is founded on the pursuer's averments, but nevertheless I am of opinion that the pursuer has not stated any relevant case. We are concerned with his averments only, and as the charge in question was made to the public authorities only, it is clear that it will not afford ground for an action of damages, unless it was made maliciously and without probable cause. If the pursuer had stated that the charge had been made with probable cause, then he would not have stated a relevant case, and although he has not used these words, I think it is quite plain from the statements he does make upon record

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that the defender had probable cause for acting as he did. It is not said by the pursuer that he and the defender were in any way acquainted with one another; so far as the record goes, they must be taken to have been complete strangers. The pursuer had lived in the defender's hotel, and had left in the morning after breakfast without paying. He did not return in the course of the day, and it appears from the averments that while the pursuer was seated in the train preparing to start upon his journey the defender appeared on the platform, and the pursuer beckoned to him to come to him. The result of the interview which followed, according to the pursuer's version, was that the pursuer was told that the amount of his bill was 3s. 6d., and that on being so informed he produced a £1 note and the defender handed him 16s. 6d. as change. Then there was a dispute as to the true amount, and while that dispute was going on the train moved off, and the pursuer called out that he would send the defender "the proper amount" when he got home. He did not say where his home was. He does not say there was any difficulty in his returning the 16s. 6d. before the departure of the train, and I cannot conceive that there could have been any difficulty in his doing this, however fast the train was moving. But the pursuer chose to retain both sums—simply saying that he would send the proper amount of the bill when he got home. The defender, from whom the sum of 16s. 6d. had thus been carried off by a person with whom it is not said that he was acquainted, and who had left no address, could not but have his suspicions raised as to the honesty of the pursuer, and for these suspicions he had probable cause. I cannot conceive that it could have been otherwise. It may be true that the pursuer was not dishonest, but that he had laid himself open to the strongest suspicion of dishonesty, such as thoroughly to justify the feeling on the defender's part that he might have committed a theft, is not open to doubt. Looking to this record, I cannot see that the defender had not, upon the pursuer's own shewing, the strongest probable cause for taking the steps he is alleged to have taken and giving the pursuer in charge.

We are not concerned here with the defender's statement in answer. But looking only to the averments which the pursuer has put upon record, I cannot see how we can send this case to trial. It seems to me that the case is just as clear as if the pursuer had put upon record the statement that the defender made a charge of theft against him with probable cause, which would not have been a relevant charge.

THE COURT adhered.

J. D. MACAULAY, S.S.C.—WILSON & MACKAY, S.S.C.—Agents.

No. 8. WILLIAM MACKINNON (Millar's Judicial Factor), Pursuer (Respondent).—*Asher—Low.*

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JOHN KNOX AND OTHERS (Millar's Trustees), Defenders (Reclaimers).—*D.-F. Mackintosh—C. S. Dickson.*

Trust—Liability of trustees—Personal liability of trustees for an imprudent investment.—Circumstances in which family trustees, with the fullest powers of investment on such securities, heritable or personal, as they should think proper, were made liable for the loss of a sum lent to a member of the family on insufficient security.

The trustees of Mr John Millar, draper in Glasgow, who died in 1863, held his estate, consisting, *inter alia*, of £4400 of capital in his business and his

business premises, for the purpose of paying his widow an annuity of £400 per annum, and of dividing the residue among his children. They had the fullest powers to invest the estate "on such securities, heritable or personal, as they should think proper." The eldest son, who subsequently carried on the business, in 1874 bought the premises for £25,000, and applied to the trustees, after paying £13,000 of the price, for a loan of £12,000 to meet the balance, offering as security the premises themselves, on which he had already borrowed £17,000, and other subjects belonging to him. All these subjects were already burdened. The margin of value of the whole subjects, including the business premises,—taking as the gross value in each case the prices paid for them within a year of the loan,—was £12,150. He also offered the security of a policy on his life for £2160, the surrender value of which was less than £500, and his share, viz., one-seventh, of the sum (£10,000) held by the trustees for security of the widow's annuity. In addition he offered the personal security of his father-in-law, engaged in business in Glasgow as a "club draper," who was proprietor of certain subjects in which large quantities of shale were believed to exist. Both he and the offerer were then (1874) in good credit. The offer was accepted, but no communication was made to the other beneficiaries, several of whom were of age. One of them shortly afterwards, on hearing of the loan, protested for himself and the other beneficiaries, but no notice was taken of his letter. In 1884, the debtor and his father-in-law having both become bankrupt, and the prior bondholders having entered into possession, an action was raised by the beneficiaries against the trustees for repayment of the loss sustained by the estate through the transaction.

Held that the trustees were personally liable as having invested on unsubstantial and insufficient security, contrary to the law and practice of trust administration.

JOHN MILLAR, draper in Glasgow, died in November 1863, leaving a trust-disposition and settlement with a codicil by which he directed his trustees to pay his widow an annuity of £400, and to divide the rest of the estate among his children. Mr Millar was twice married. Of the first marriage one son, William, survived him. Of the second marriage there were, at the date of the transactions to be narrated, six children living. His second wife also survived him.

The trust-deed contained this clause:—"Declaring that, as I have full trust and confidence in the integrity and ability of my said trustees, and feel satisfied that they will act in the execution of this trust as shall appear to them most for the benefit thereof, they shall not be liable for omissions, errors or neglect of management, nor *singuli in solidum*, but each shall be liable for his own actual intromissions only; and I authorise them to appoint one of themselves, or any other person, to be a factor under them, with the usual commission, declaring that they shall not be liable in any way for such factor further than that he is habit and repute responsible at the time of his appointment; and for the better enabling my said trustees to carry the foresaid purposes into effect, I hereby authorise and empower them, when they shall consider it necessary or expedient, to dispose of my whole estate, heritable and moveable, either by public roup or private sale, and to lend out the proceeds and other funds of the trust, or such parts thereof as may not be otherwise required, on such securities, heritable or personal, as they shall think proper."

The trust-estate consisted mainly of Mr Millar's share of the business, in which William was by this time a partner, and the premises in which the business was carried on. The first balance made after Mr Millar's death shewed his share of capital to be £4400. The trustees arranged with William that he should carry on the business, leaving his father's capital with him. William assumed his stepmother as a partner for a period of ten years, taking a lease of the premises at £400. Mrs Millar's share of the profits was one-half, and during the ten years of her partnership that share amounted to £14,000.

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In March 1874 negotiations began as to a new lease of the business premises. Mrs Millar and her children, of whom two had attained majority, insisted that the trustees should sell the property, No. 20 High Street. They were influenced in this wish by two considerations, the favourable state of the property market at the time, and the circumstance that the rent payable by William Millar (£400) was inadequate. The trustees, being advised by counsel that it was their duty to comply with the reasonable desire of the beneficiaries, obtained a valuation of the property, wherein the property was valued at £19,000. The beneficiaries considered that this valuation was too low, and at a joint meeting of the trustees and beneficiaries it was agreed that the property should be offered for sale at the price of £25,000. In May 1874 William offered this sum, "settlement to take place in May 1874." The offer was accepted, but no immediate settlement was made.

On 31st October 1874 a letter from William to Mr Black, the trustees' agent (he was also William's own agent), was read at a meeting of trustees asking them for a loan of £12,000, and informing them that he had already borrowed £17,000 over the premises sold to him in May. The security which he offered for this advance he thus stated:—

"Property, 30 High Street, valued by			
Mr Graham,	£6000	0	0
Bond,	4000	0	0
Reversion,			£2,000 0 0
Shops and back lands, 34, 36, 40, 42			
High Street,	£15,600	0	0
Bond,	11,000	0	0
Reversion,			4,600 0 0
Property, 20 High Street,	£25,000	0	0
Bond,	17,000	0	0
Reversion,			8,000 0 0
Life policy,			2,160 0 0
One-seventh part of £10,000 (the amount held by the			
trustees for security of the widow's annuity),			1,428 11 5
			<u>£18,188 11 5</u>

and, besides the above, the personal security of myself and my father-in-law, Andrew Walker, Esq. of Hartwood, West Calder."

The property valued at £6000 had been bought by Mr William Millar at Whitsunday 1873 for £5500, and bonded by him for £4000, leaving a margin of £1,500 0 0

The property valued at £15,600 had been bought by him at Whitsunday 1874 for £13,650, and bonded for £11,000, leaving a margin of 2,650 0 0

The property valued at £25,000 was bonded for £17,000, leaving a margin of 8,000 0 0

£12,150 0 0

These same properties had already been valued in April 1873 and March and June 1874 respectively by Mr Graham, valuator, at £6000, £15,600, and £25,000, values which would leave for the proposed loan of £12,000 a margin of £14,600.

The proposal was accepted by the trustees on 2d November 1874, and Mr Millar accordingly having paid £13,000 of the price granted a bond in favour of the trustees for £12,000, being the balance, with the real and personal securities above mentioned.

In December of the same year Mr M'Michael, property valuator, made a new valuation of the properties, which resulted in bringing out values of £7000, £16,550, and £25,000, shewing a margin for this loan of £16,550, reporting further that he was of opinion that the properties "would greatly increase in value."

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The surrender value of the policy of insurance was considerably less than £500.

In the meantime, however, on 27th November 1874, Mr A. G. Millar, the eldest son of the second family, had addressed a letter to the trustees in these terms:—"It is as well to make known to you in this form that I and the rest of our family strongly object to £12,000 of our father's estate being lent to my brother William on his property in the High Street, and on the personal security of his father-in-law, Mr Walker. There are already four bonds over it, although they are not over the same parts of the property. . . . I protest for myself and the rest of the family against this investment. The property is thus burdened altogether for £44,000, and it is plain to anybody that there is not a shilling of margin in the security. You will please therefore to understand that the investment is made not only against our wishes, but against our objections, and that we will look to the trustees for the £12,000 if it should be lost in whole or in part by the insufficiency of the security."

The trustees made no answer to this letter, and the only reference to it in their minutes was an entry of 6th January 1875, viz., "There was read to the trustees a letter addressed to them by Mr A. G. Millar, dated 27th November last."

Again, on 13th January 1880, Mr A. G. Millar wrote to the trustees in these terms:—"Fully more than five years ago I wrote a letter to you on behalf of the other members of the family and myself, of which a copy is enclosed. It called attention to the risk of lending a large sum of money to Mr Millar on security which was plainly insufficient. During the long period that has since elapsed no endeavour has been made to realise the investment, or any part of it. The depression of trade and in the value of property renders it still more insecure, and I beg again to call the attention of the trustees to it, and to renew the protest then made. I think it advisable that the trustees, for their own sake as well as for the trust, should make some arrangement for the reduction of this debt. As soon as a meeting is called, and a decision arrived at, I shall be glad to hear the result." This letter was considered at a meeting of the trustees held upon the same day (13th January), and the minute recorded that the trustees instructed their agent "to reply that they had carefully considered the security before they gave the loan, and were satisfied with it, that the interest had always been regularly paid, and that they saw no reason for disturbing it at present."

In 1884 Mr William Millar became insolvent. He had previously assumed a son into partnership. The estimated dividend on the company estate was 8s. 8d., and 2d. on his individual estate. The trustees had taken no obligation from the new firm. Mr Walker also became insolvent, his estate paying about 5s. 9d. per pound. The prior bondholders took possession of the heritable subjects, and it appeared that there was little or no prospect of any balance remaining after satisfying their claims.

On 28th February 1885 Mr Mackinnon was appointed judicial factor on the trust-estate, two of the trustees having resigned, and the sole remaining trustee being in bad health, and unable to attend to business.

Mr Mackinnon, on 24th July 1885, raised an action against John Knox and others, being the survivors of the trustees and the representative of one deceased, concluding for declarator that they were bound to repay the

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sum of £10,000, or such other sum as should be found to be lost to the estate in consequence of this loan, and for payment of that sum.

The pursuer averred,—“The pursuer is advised that the defenders are bound to make good to the trust-estate the said sum of £10,000. The securities upon which the trustees lent the said sum of £12,000 were of such a nature that the trustees were guilty of breach of trust in investing the said trust-funds upon them. The said investments were manifestly insecure and liable to result in loss, and the borrowers could not have obtained loans in the open market upon such securities as were taken by the trustees. It was illegal and *ultra vires* of the trustees to invest the said sums upon said securities. Further, the said sum of £12,000 was lent to Mr William Millar for his accommodation, and not with a view to the interests of the trust-estate. The said trustees were also guilty of neglect and violation of their duty, in that they took no steps to realise the said sum of £12,000, although the value of house property in Glasgow had fallen long before the insolvency of Mr William Millar and Mr Walker, and although the beneficiaries under the trust pressed them to realise the said sum, on the ground that the security was plainly insufficient. The defenders deny their liability to make good the loss sustained by the trust-estate, and the present action has been rendered necessary. The pursuer offered to transfer the said securities to the defenders upon payment of the sums lent, but the offer was declined.”

The defenders answered,—“The trust-deed is referred to. Admitted that the defenders deny liability. The correspondence between the parties is referred to. *Quoad ultra* denied. Explained that in the whole matters alleged the said trustees acted with the advice of skilled valuers and with all reasonable and proper care and prudence in the interest of the trust-estate, and that the present position of the loans is due entirely to causes for which neither the said trustees nor the defenders are responsible.”

The pursuer pleaded;—The trust-estate having sustained loss by the illegal and improper actings of the defenders John Knox and Gavin Miller, and of the deceased Robert M'Cowan, the said two first-named defenders, and the defender Robert W. M'Cowan, as representing the said deceased Robert M'Cowan, are jointly and severally liable in reparation.

The defenders pleaded;—(5) The sums in question not having been illegally and unwarrantably invested upon insufficient security, the defenders should be assoilzied. (6) The whole actings of the trustees in the matters alleged having been legal and proper, and within their powers, and warranted by the trust-deed, they should be assoilzied. (8) The trustees being by the trust-deed entitled to lend on such heritable or personal security as they should think proper, and having in the *bona fide* and proper discharge of their duty agreed to give the loans in question, they should be assoilzied.

A proof was allowed. It appeared that in 1874 the balance at Mr William Millar's credit in the firm's books was £7992. The average turn-over of the business, from 1872 to 1880, was £87,300, the highest year being that ending 31st January 1874 when it was £102,463, and the lowest 1879 when it was £65,463. He was generally reputed in Glasgow to be worth £12,000 to £20,000. As regarded Mr Walker's position the following evidence was given. Mr Bruce, agent for the Clydesdale Bank, deponed,—“Mr Andrew Walker was a customer of the bank. He kept an account at my branch. He was a draper at the corner of Candleriggs and Trongate. He occupied a single flat up a stair. His business was a club trade business,—that is, he supplied parties with goods which they paid by weekly instalments. I would not say that his business was small, and I would not say it was large; it was an ordinary business. In 1872 his

turnover at the bank was £2060, and the average balance at his credit about £200. In 1873 his turnover was £3363, and the average balance at his credit about £300. In 1874 his turnover was £1406, and the average balance at his credit £300. (Q.) What sort of overdraft would you have given him? (A.) He never asked one, but judging from the account, he could not have asked more than £100 or £200." On the other hand, Mr Runcy, of the Union Bank, deponed that on Mr Walker being offered to them as a cautioner for £5500,—“We got a report as to Mr Andrew Walker's sufficiency. The report is entered in our books, and is to the effect that he was possessed of large means, and was quite sufficient for all his engagements. I cannot give the date of that report. It was got at the time we accepted his guarantee. It was before June 1884.” Cross.—“I believed the report was received from the Clydesdale Bank in the ordinary way. Our bank asked a report from the Clydesdale Bank.” Mr Knox, one of the defenders, deponed,—“I had known Mr Walker, Mr William Millar's father-in-law, a good many years. He was reputed in 1874 to be worth between £30,000 and £40,000, and some people said more. I believed him to be worth that. I knew he had a large property called Hartwood, and a place in Linlithgowshire called Murrayfield. I had no doubt that he was good for a loan of £12,000.” Hartwood had been bought in 1856 for £13,000. Mr Walker was proprietor of three-fourths of it, and it was subsequently believed to contain shale, and to have largely increased in value. In the circular issued to creditors on Mr Walker's bankruptcy it was valued at £18,000. It was reported to the trustees by their agent that Mr Walker was worth £30,000 or £40,000.

Mr A. G. Millar and Mr Knox were examined as to the remonstrances addressed to the trustees by the former.*

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* Mr A. G. Millar deponed,—“I was aware that the purchase of the property was not carried through by the Whitsunday term. I ascertained afterwards, at the November term, that the transaction had been settled. I wished to know at that time what the trustees had done with the £25,000, and I went to Mr M'Cowan's office to see the books. Although Mr M'Cowan had been assumed as a trustee he still continued to act as factor. I had no knowledge at that time as to what had been done with the price. I saw the books in Mr M'Cowan's office, and observed an entry of £12,000 as lent to my brother William over the property in High Street. I had no knowledge of the loan prior to that. Mr M'Cowan was not a lawyer, merely an accountant. I could not get any information in Mr M'Cowan's office as to what security had been given for the £12,000. I accordingly went to the office of Mr Black, the agent of the trust, and asked him, but he said he had no authority to give me any information. He did not give me any information. I afterwards met Mr Gavin Miller and asked him, and he would not give me any information either. He refused to give me any information. I then went to my agent, Mr Clark, and accompanied him to the office of Sasines, where he examined the records. We found the bond for £12,000 on the record, shewing the properties which were held in security. The conduct of the trustees did not appear to me satisfactory when I saw how the £12,000 stood, and in consequence my agent drafted a letter for me to address to the trustees. The letter was written on behalf of myself and the other members of the family. I obtained their concurrence to the letter when I sent it. From the examination of the records which I made along with the agent, I thought the loan of £12,000 was a very precarious investment for the trustees to make. I do not recollect receiving any answer, either written or verbal, to the letter which was sent to the trustees at that time. During the next few years I was not in the way of meeting Mr Knox much, but I frequently met Mr Gavin Miller. I often complained to him about the position of this security. I used to tell him that I thought it very

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On 19th May 1886 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the sum of £12,000* was lent by the trustees of the deceased John Millar to his son William Millar on unsubstantial and insufficient security, contrary to the law and practice of trust administration: Therefore decerns against the defenders for payment of the said sum on receiving from the judicial factor an assignation to the securities libelled."†

foolish to keep this investment of £12,000, more particularly when it had been laid aside as an investment for my mother's annuity."

Mr Knox deponed,—“It was not suggested by anyone prior to the granting of the loan that there was any doubt about it. (Q.) Was Mr A. G. Millar's letter of 27th November 1875 the first suggestion of doubt on that subject? (A.) I have no recollection of that letter at all. I do not know by whom that letter would be received. If it was addressed to the trustees it would go in ordinary course to Mr Black. The factor on the estate at that time was Mr M'Cowan. Mr M'Cowan is dead.” Cross.—“Mr M'Michael's report of December 1874 was got by the trustees, and engrossed by their orders in the minute-book. (Q.) Can you say why Mr M'Michael was employed to value all these properties in December 1874? (A.) It would be to satisfy ourselves that we were justified in giving the loan. (Q.) Why had you occasion to have doubts at that time as to the sufficiency of the loan? (A.) I do not know that we had any doubts, but we might wish to make ourselves doubly sure. (Q.) Seeing the sequence of these events, have you any doubt that you knew of the letter of November 1874 from the family, and that you instructed Mr M'Michael to value the properties in consequence? (A.) It is very possible that may be. The letter of 27th November 1874 states the objection of the family to the £12,000 loan to Mr William Millar. (Q.) Can you explain why the trustees, seeing there was that objection on the part of the family, did not call up this objectionable loan? (A.) The reason was that the trustees did not consider it objectionable. They knew very well there was a strong feeling in the family, and I think the feeling in the trustees' mind was that the family wished to call up the loan in order to injure William.”

* It was admitted in the Inner-House that his Lordship had erred in giving decree for this amount, not having taken into account the dividends received from Mr Millar's and Mr Walker's estates.

† “NOTE.— . . . The offer of Mr William Millar, which is dated 7th May 1874, bears that the settlement is to take place that month. But it does not appear that the trustees, after accepting the offer, took any steps towards enforcing this condition, and the settlement was allowed to lie over until Martinmas.

“This is not a favourable circumstance for the case of the trustees. The unexplained default in payment, where the sale was for an immediate settlement, ought to have suggested to the trustees that Mr William Millar was not in circumstances to fulfil an obligation for such a sum, and that he needed time to obtain the money by borrowing. When Martinmas came it turned out that Mr Millar had arranged to borrow as much as he could get in the open market on the security of this property, namely, £17,000. In a letter, dated 31st October 1874, addressed to Mr George Black as agent of the trustees, Mr William Millar proposed to borrow from the trustees not the difference between that sum, £17,000, and the price, £25,000 (which would be only £8000), but the sum of £12,000, offering as security the margin of value of his purchase from them, and the margins of his other High Street properties, which were already bonded, apparently, for as much as could be obtained in the open market. This proposal ought to have alarmed the trustees very much.

“And here I pause to observe, that Mr George Black, the gentleman to whom this strange, and, I should say, alarming proposal was addressed, was also Mr William Millar's agent, the person who assisted him in his purchases, and arranged the first loans for him. Very likely the letter addressed to Mr Black as agent for the trustees was written by himself in his capacity of agent for Mr Millar; and it is in evidence, in answer to a question put by myself, that the

The defenders reclaimed, and argued;—It was said that this loan was an imprudent transaction, and was besides that corrupt as being to a favoured debtor. But to infer personal liability upon trustees, the conclusion which the pursuer here desired to reach, the transaction must be imprudent in the sense that no prudent man would entertain it, and the alleged corruption—*i.e.*, the charge that the trustees had lent to William

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trustees were advised by Mr Black that they were in safety to accept the loan. This is another illustration of the consequences of the odious practice (on which I have so often had occasion to comment) of the same agent acting for trustees who trust to him for advice, and also for a private party having an adverse interest.

"No neutral person conversant with the law could or would have advised these trustees to accept Mr Millar's offer. It was accepted, however, unconditionally, without even the stipulation invariably inserted by companies who lend on second class securities, that the debt should be reduced by periodical instalments.

"In 1884 Mr William Millar became insolvent, and there is at present no prospect of the recovery of the £12,000 lent to him from the trust-estate, and the loss to the trust is estimated at £10,000. I have stated the more important facts of the case, and I must now state the conclusion at which I have arrived, which is, that the defenders are liable to replace the funds lost to the estate, they receiving from the trustees an assignation to the securities in case these may eventually produce a reversion.

"It is a very unpleasant duty on the part of the Judge the enforcing personal liability against the holders of offices of trust, but I do not see how this result can be avoided in the present case, unless trustees are to be made absolutely irresponsible for their actions.

"The question of the reasonableness of the loan must be carefully distinguished from that of the sale. The beneficiaries demanded a sale, and were willing that their elder brother should be the purchaser, though it is plain that they used no influence with the trustees on his behalf, and were quite willing that the property should be put up to auction. I think that the trustees acted properly in accepting Mr William Millar's offer of £25,000, but, having done so, they should have kept him to his bargain. If Mr Millar had dealt openly with them, and had said, 'I have no money to complete the purchase; my capital is all locked up in other property, and I ask you to lend me the reversion of the price over what I can borrow in the market,' the case would have been very different. The trustees might then have consulted their constituents, and with their approval might have lent the balance of the price, or postponed the payment of the price, stipulating for periodical instalments and a security title. In the worst case they would have got back their own property unencumbered on repaying the £17,000 to the heritable creditor from whom they received it.

"I do not say that this is a kind of transaction which trustees ought to enter into on their own responsibility, but it would have been a fair family arrangement, and the trustees might have asked an indemnity from such of the beneficiaries as were able to give it.

"But the actual case is that Mr William Millar gets the property at the price of £25,000, borrows £17,000 upon it, whereof he only pays £13,000 to the trustees, and remains their debtor for £12,000, giving them in exchange a conveyance to the reversion, and other securities of the like unsubstantial character. Why did the trustees not insist on receiving, at least, the entire proceeds of the £17,000 loan? I asked that question of the trustees themselves, and of counsel. No explanation was or could be given. The truth is that the £12,000 lent by the trustees, wholly on margins, was an accommodation to Mr Millar, and not an investment of trust-funds in the ordinary course of business. When the true character of the transaction is discovered, if I have rightly judged it, there can be little doubt as to the legal result.

"Trustees are not entitled to accommodate their friends, or the members of the trustor's family, with the funds entrusted to their care. In such a case

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imprudent in that sense. If the transaction was sound, it mattered not that the trustees had preferred him to other borrowers that might have been found in the open market. Now, was the loan imprudent? What were its elements? First, there was heritable security, which left a margin of £4500 on M^r Michael's valuation, and of £2600 on Graham's. The trustees had just got a sum of £25,000 for the property No. 20 High Street, and were entitled to take that as its value. That price was obtained in a rising market, and could, they were entitled to believe, be obtained again. The next element was William's personal credit. He was the sole partner in a business which was going on profitably, from which his stepmother retired with a profit of £14,000, the turnover in which had come to be £100,000 annually, having increased from £9000 in 1847 to £45,000 in 1863. William in 1874 was worth at least £12,000. Then there was the personal security of Walker, who was believed by the trusteer himself to be worth £40,000, and whose credit was good. The dividends on the estates of William Millar and Walker amounted to 14s. 6d. per pound. Then there was the policy on William's life, and the share which he would himself take of the sum lent to him, making the loan so much the less. A loan so secured could not be said to be such as any prudent man would reject at once. Now, if the security was good, the motive alleged against the trustees, viz., that they gave the loan to oblige one of the family, was praiseworthy. It was right and proper that trustees administering such a trust should do something to help the son of their old friend, if they did not exceed their powers. No one would question the propriety of it if they had carried the whole family with them. It was said they had been warned by the other beneficiaries, and had paid no heed to the warning, and that that put them in bad faith, and induced a belief that they were favouring the debtor corruptly at the expense of the trust. But they believed the objection to be dictated by malice in family matters, with which they desired to have no concern. What possible reason had the trustees to favour William? There were reasons why the trustees, in the interests of this trust, should lend to him. There was £4000 of trust money already in his hands. It would be disastrous to the trust to let him be put out of the shop where he had the means of making money, and let him be sold up. It was desirable to keep his credit and business up. It was said that the bias of the trustees had been indicated in their desire to sell to him for £19,000. But the true reading might be—let it be so assumed—that they believed that

clauses of indemnity have no application. There is such a clause in this trust-deed, and also a power to lend on real and personal security. The trustees had in addition to the property the personal guarantee of a gentleman of the name of Walker, who was said to be the owner of mineral property of fabulous value. Under other circumstances the fact of collateral security being given would be an element of more or less importance. But it does not, in my judgment, alter the complexion of the present case. Because, in accepting Mr Millar's offer, the trustees were not, as I conceive, trying to get the best security for a sum to be invested, but were simply lending the trust money to accommodate Mr Millar, taking such security as he could offer.

"To test this, let me ask the question, why did not the trustees, or Mr Black on their behalf, say to Mr Millar,—'No, we will lend you the £17,000 on a first bond, and you may go into the market and raise the £12,000 on what you offer, as "unexceptionable security"?' The answer is, they knew that Mr Millar could not have got the £12,000 from any source but the trust, and they would not have lent him the money out of their individual funds on the security offered. . . ."

to be the true value. If it were, and William were willing to pay £25,000, it was desirable to facilitate a transaction by which the trust gained £6000. [LORD JUSTICE-CLERK.—That is quite true, if you made sure that your price would be paid, but if the security you took for payment was bad your trust has no advantage.]

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As to the powers of the trustees.—The deed gave them the amplest powers. They were fettered only by their duties, not by any want of power. Personal security was always assumed to mean the security of a personal bond,¹ although it had only once been so decided.² The same understanding prevailed in England.³ The cases quoted on the other side were cases where truly there had been no investment at all, but an advance of money to a person against whom it was intended by the trust-deed to protect the beneficiary.

Argued for the pursuer;—The whole course of the trust management shewed that the trustees sided with William against the trust; they acted on his behalf and as his agents. The first indication of that was that they desired to sell to him for £19,000, when they knew that they could get £25,000, which they eventually did get, after having been forced by the younger children to raise their price. Then, according to Mr A. G. Millar's evidence, they refused to give any information as to this loan, and took no notice at all of his letter of remonstrance. [LORD YOUNG.—As regards what you say about the sale, the market was in an inflated condition. Now, were the trustees not entitled to give effect to an honest belief that it was in such a condition, and give the property to the son of their old friend at what they thought was its real value?] No. The duty of a trustee was to do the best for the trust; to make the most of it for the trust. Whatever trustees' powers might be in the way of selling by private bargain, or facilitating family arrangements, the interest of the trust must always be in their view, and when other beneficiaries were pressing them to realise to the best value all difficulty as to their proper course disappeared. There could be no question as to their duty. After receiving A. G. Millar's letter they made no effort to reduce the loan. William would at that date have been able to pay them, if not the whole, at least part. They must have known how bad William's personal security was. They knew that he bought the property for £25,000, and bonded it for £17,000 and then for £12,000. His father-in-law, Walker, the club draper, was said to be in good repute because he had a property where there might be shale to the value of £25,000. The security was such as no body of prudent trustees would look at for a moment, even if it were within their powers.

But it was not within their powers. The meaning of the clause in the deed was to give them power to invest on other than heritable security if a temporary occasion required it, or if they could get no other. They must always take the best security they could get, and here it was not said there was any scarcity of heritable security. Such an investment as this, if taken at all, should only have been taken at a higher rate of interest. Such an authority as this deed gave had been held not to protect an advance in the nature of an accommodation for family reasons,⁴ and trustees would not be protected in accommodating one who was "not a

¹ *Seton v. Dawson*, Dec. 18, 1841, 4 D. 310, Lord Moncreiff, at p. 328, 14 Scot. Jur. 115.

² *Per Lord Fraser, Ordinary*, in *Lamb v. Cochran and Others*, March 23, 1883, 20 S. L. R. 575.

³ *Pickard v. Anderson*, 1872, L. R., 13 Eq. 608.

⁴ *Langston v. Olivant*, April 21, 1807, G. Cooper's Reps., p. 33.

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favourable but a favoured debtor."¹ There was some authority for maintaining that power to invest on personal security meant on the security of personal property.²

At advising,—

LORD JUSTICE-CLERK.—We have considered the question raised in this case very carefully, because it is one of great importance, not only to the law, but also to the parties concerned. The action has for its object to make certain family trustees responsible for a loan which is said to have been made on insufficient security to one member of the family. The Lord Ordinary has explained very fully the grounds on which he has come to the conclusion that they are responsible, and I find myself compelled, after having gone very carefully into the facts and circumstances of the case, to come to the same conclusion. My opinion is that these trustees lent the money in question "on unsubstantial and insufficient security, contrary to the law and practice of trust administration." The security was, in my opinion, not one on which the trustees were entitled, in a fair exercise of their powers of administration, to invest the trust-funds.

The history of the matter is short enough. The trustees held the estate belonging to the late John Millar, a merchant in Glasgow, who left a widow and children of two families. One of the children, William, was a son of the first marriage, who carried on a large drapery business in Glasgow, in which he had invested a large amount, and which was undoubtedly a very flourishing concern at the date of this transaction. William Millar himself was reputed to be worth £15,000, and the turn-over in his business was certainly very large. Part of the premises in which he carried on his business was held by him on lease from the trustees, and in 1874 the question arose whether that lease should be continued. The beneficiaries other than William opposed this, and pressed for a sale, on the ground that the property market in Glasgow was then in a highly favourable state for sellers. The trustees were averse to the sale, for William Millar had a large interest to prevent the premises going into other hands. They took the opinion of counsel, and were advised that they must sell, but they set about this sale, as I think, not very willingly. They had had a valuation of £19,000, and they subsequently got a valuation of £25,000. I myself should have thought that the latter was rather an exaggerated value, but a valuation to that amount was obtained.

The next step of the trustees was to enter into negotiations for a sale by private bargain. They had power to do so, and they were quite entitled to take into account that William Millar had a peculiar interest in the property. William offered £25,000, and that was accepted, after communication with the beneficiaries, who consented to William becoming the purchaser on the express condition that the price should be settled in the ensuing May.

Up to that time there was no ground for any adverse criticism of what the trustees did. But there was one condition they were bound to have in view. They were bound to be reasonably satisfied that William Millar was able to pay this price. Now, I fear that from the beginning it was plain that William was not able, in any solid or satisfactory sense, to pay it. William Millar, after his offer had been accepted, but before the disposition was executed, had set

¹ *Per* Lord Mackenzie in *Ross v. Allan's Trustees*, Nov. 13, 1850, 13 D. 44, 23 Scot. Jur. 1.

² *Cf.* *M'Laren on Wills and Succession*, ii. 327.

about obtaining a loan over the property he had thus purchased. He obtained from another source a loan of £17,000, and he then addressed a letter to the trustees, on 31st October 1874, in these terms:—"In reference to the recent purchase of property at 20 High Street from my late father's trustees for £25,000, I have arranged for a loan of £17,000; and as my father's trustees will have a good deal of money to lend, I beg leave to make application through you to them for the loan of £12,000 sterling, tendering to them the following unexceptionable heritable and personal security—all to be arranged at Martinmas term." Then follows a list of securities, all of which consist of properties already burdened to a considerable extent. There are also a life policy and a certain share of a sum of £10,000.

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That appeal was made on 31st October, and on 2d November the trustees agreed to grant the loan. They did not communicate with the beneficiaries on this subject, although they had taken them along with them in the matter of the sale.

They took the loan then as proposed with the collateral personal security of a Mr Walker, who was in business in Glasgow. The investments have turned out, after a lapse of ten years, wholly insufficient. The question for our decision is, whether the trustees were entitled so to deal with the trust-property, and the price of it?

I am very clearly of opinion, with the Lord Ordinary, that there was no justification whatever for the trustees so dealing with the money of the trust. There was nothing to be gained by the trust-estate by taking these postponed securities and lending the money on them, and the personal security of two Glasgow traders. There was no difficulty in lending the money otherwise, and the only excuse for making this investment was that William Millar was unable otherwise to implement his purchase at the price of £25,000. I think then that no other conclusion was possible. If that transaction had been shewn to be necessary for the trust-estate, if the trustees had had to take second-class securities, because there were no others available, or if it had been shewn to be for the advantage of the trust-estate otherwise to make this investment, I should have been glad to have given effect to every possible presumption so as to free these gratuitous trustees. But I see no ground for either of these contentions, and indeed neither of them has been maintained.

I do not think it necessary to go further into the case, for the Lord Ordinary has clearly explained the grounds on which he has proceeded, and I agree with his Lordship. I think it was very unfortunate that the beneficiaries were kept in the dark as to what was going on between the acceptance of William's offer and this transaction. It is plain that when the beneficiaries came to know of it they were very indignant, and intimated a strong dissent. In these circumstances, I cannot avoid the conclusion at which the Lord Ordinary has arrived.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

THE COURT delayed pronouncing an interlocutor to allow the parties to adjust the amount of the deductions which admittedly fell to be made from the sum decerned for by the Lord Ordinary.

DONALD MACKENZIE, W.S.—C. & A. S. DOUGLAS, W.S.—Agents.

No. 9.

THE ALLIANCE HERITABLE SECURITY COMPANY, LIMITED, AND JAMES POLLARD (Liquidator thereof), Petitioners.—*Alison*.

THE HERITABLE PROPERTY TRUST, LIMITED, Respondents.

Nov. 2, 1886.
Alliance Heritable Security Co. Limited.

Company—Winding-up—Application to Court—Where name of company struck off register by Registrar of Joint Stock Companies.

1ST DIVISION.
B.

ON 16th October 1886 the Alliance Heritable Security Company, Limited, a creditor of the Heritable Property Trust, Limited, presented a petition for the winding-up of the latter, stating that it had suspended business for more than a year, and that it was unable to pay its debts.

When the case was called on 2d November, counsel for the petitioners stated that, three days after the petition had been presented, the Registrar of Joint Stock Companies had struck "the Heritable Property Trust, Limited," off the register, and that notice of this had been published in the *Gazette* of 19th October; that (under sec. 7 of the Companies Act, 1880) the effect of this would be to dissolve the company as at that date, unless a winding-up order were granted on the present petition, which would draw back to 16th October. The company could not be restored to the register except on an application to the Court by the company or by one of its members. Sequestration being incompetent,¹ the petitioners, as creditors, had no remedy but a winding-up order.

THE COURT granted the petition, and appointed a liquidator.

T. F. WEIR, S.S.C., Agent.

No. 10. SOCIETY OF WRITERS TO HER MAJESTY'S SIGNET, Petitioners (Appellants).
—*D.-F. Mackintosh—Murray*.

Nov. 3, 1886.
Society of Writers to the Signet v. Commissioners of Inland Revenue.

COMMISSIONERS OF INLAND REVENUE, Respondents.—*Lord-Adv. Macdonald*
—*Sol.-Gen. Robertson—A. J. Young*.

Revenue—Customs and Inland Revenue Act, 1885 (48 and 49 Vict. cap. 51), sec. 11—Duty leviable on property belonging to corporate bodies—Exemptions—Library belonging to law society.—The Customs and Inland Revenue Act, 1885, imposed in respect of all real and personal property vested in any body corporate or unincorporate a duty at the rate of £5 per centum upon the annual value, income, or profits, after deducting therefrom "all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property," but exempted from duty "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

Held that a building belonging to and occupied as a library by the Society of Writers to the Signet did not fall within the exemption.

Held that the income of the Society of Writers to the Signet was exempt from duty to the extent of £105 per annum, appropriated by contract to the perpetual endowment of a chair of conveyancing in a university.

Held further, that the exemption under the same section of "property acquired by or with funds voluntarily contributed to any body, corporate or unincorporate, within a period of thirty years immediately preceding," was solely applicable to property acquired by funds gratuitously given, and did not cover property acquired by monies paid by those entering the Society as a necessary condition of their obtaining admission.

Held that deductions fell to be made from the annual value and income, before assessment, of (1) land-tax, and the owner's proportion of rates; (2) premium of insurance on the subjects assessed; (3) reasonable remuneration to the trea-

¹ *Standard, &c. Co. v. Dunblane, &c. Co.*, Dec. 12, 1884, 12 R. 328.

sure for drawing the income belonging to the Society; (4) an allowance for No. 10. repairs.

THE SOCIETY OF WRITERS TO HER MAJESTY'S SIGNET were assessed by the Commissioners of Inland Revenue, under sec. 11 of the Customs and Inland Revenue Act, 1885 (48 and 49 Vict. c. 51),* for the year ending 5th April 1886 for the sum of £55, 4s. 6d., being 5 per cent upon the sum of £1104, 8s. 10d. The Commissioners stated that this sum had been arrived at in the following manner:—

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"Gross annual value of real estate,	.	.	.	£250	0	0
Dividends,	.	.	.	909	19	10
						<hr/>
						£1159 19 10
Less—						
Insurance on building,	.	.	.	£9	11	0
Repairs—10 per cent,	.	.	.	25	0	0
One-fifth treasurer's salary,	.	.	.	21	0	0
				<hr/>		
				55 11 0		
				<hr/>		
Amount assessable,	.	.	.	£1104	8	10"
						<hr/>

The Society presented a petition and appeal against this assessment upon the grounds

1. That the heritable property, which consisted of the buildings occupied as the Society's library, fell within the exemption in subsec. 3 of section 11.

2. That the funds of the Society had entirely accrued within the last thirty years by voluntary payments of entry-money by new members, and fell within the exemption in subsec. 6.

3. That the income of the Society to the extent of £105 paid under contract with the Town-council of Edinburgh as an endowment to the Professor of Conveyancing fell within the exemption in subsec. 3.

4. That the Society were entitled to deduction from the annual value of the whole insurance paid by them on books as well as buildings; and

5. Also to deduction of land-tax, poor and school rates, burgh rates, water rates, property-tax on annual value of buildings.

6. That deduction should also be allowed for the salary of the treasurer

* 48 and 49 Vict. c. 51, sec. 11.—"Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession-duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted that there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate, during the yearly period ending on the 5th day of April 1885, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of £5 per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate, in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property."

Subject to exemption from such duty in favour of property of the descriptions following (that is to say) . . . (3) "Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

(6) "Property acquired by or with funds voluntarily contributed to any body, corporate or unincorporate, within a period of thirty years immediately preceding."

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7. Deduction was also claimed for £117 as the cost of repairs.

The Commissioners, in their answers, stated:—"Of the deductions claimed to be made from the annual value of the real property, the Commissioners allowed £9, 11s., the actual amount of the premium paid on the buildings assessed, and £25, or ten per cent, as a reasonable allowance in name of structural repairs, the sum claimed by the petitioners under this head (£117, 19s. 1d.) admittedly including furnishings and other particulars not connected with the maintenance of the structure. Rates and taxes were disallowed. They are not necessary outgoings. The other items claimed, but not allowed, were not considered to be expenses connected with the management of the structure. As regards deductions claimed in respect of the income derived from invested funds, the treasurer's salary was restricted to one-fifth of the total amount, in view of the limited services required in the management of the structure and in the collection of the dividends. The remaining salaries and wages were wholly disallowed. They are not costs and charges relating to the management of the structure, or payment for which there has been any legal appropriation."

Argued for the petitioners;—The property which was the subject of the assessment clearly fell within the exception of the 3d subsection. It existed for the promotion of education, and for that purpose only, and had been "legally appropriated" thereto. "Legally" simply meant "lawfully." A library was always an instrument tending to the advancement of literature and science. This exemption covered the building and all the deductions which were claimed. The personal property fell under the same rule, because the librarian and other servants were paid out of it. If the Society had possessed a charter there could be little doubt that their whole income would have been exempt from this taxation. The Society was what was known as a customary corporation,¹—it had existed for a very long time, and it was clear that the surviving members would not be entitled to divide the funds.²

Assuming that the above contention was wrong, the personal property fell under the exemption of the 6th subsection. It had been "voluntarily contributed" within the previous thirty years from the fees paid by the entrants or apprentices to the Society, and the Society was bound to its entrants to devote the funds provided by them to the purposes of a library. The word "voluntarily" in this connection implied nothing more than that each contributor was free from any obligation in making his contribution. It did not necessarily mean "gratuitously."

In any case the sum paid to the Professor of Conveyancing fell under this rule. The Society were bound by contract with the town-council to pay the sum in question, not only to the present holder of the chair, but to his successors.

The 11th section provided that "necessary outgoings" were to be deducted in making the assessment. That phrase was borrowed from the Succession-Duty Act, 1853 (16 and 17 Vict. cap. 51), sec. 22. It had been construed in two English cases,³ and in the present instance it covered the

¹ Solicitors v. Writers to the Signet, Feb. 25, 1800, M. College of Justice, Append. I., No. I., affd. 4 Pat. Apps. 326.

² Muir v. Rodger, &c., Nov. 18, 1881, 9 R. 149; Mitchell v. Burness, June 19, 1878, 5 R. 954; Incorporation of Wrights, &c. of Leith, June 4, 1856, 18 D. 981, 28 Scot. Jur. 417.

³ *In re Elwes*, Nov. 25, 1858, 3 H. and N. 719; *In re Earl Cowley*, May 25, 1866, L. R., 1 Exch. 288.

whole salaries of the officials connected with the library. These were costs, charges, and expenses properly incurred in the management of the property. At least, the appellants were entitled to a deduction of their whole rates and taxes, and not of landlord's taxes only, which were all that it was now proposed to allow, and to a larger deduction in the matter of the treasurer's salary than had been allowed. The "receiver's remuneration" was specially excepted under the Act.

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The respondents argued;—The property in question here was primarily for the benefit of the Society, consisting in a large measure of law books connected with the practice of the legal profession. It was not "legally appropriated" for the promotion of education, &c., in terms of the 3d subsection. The term "legally appropriated" implied that the appropriation must be binding, and could not be taken away, and that the property must be mainly, if not exclusively, devoted to the promotion of education, &c.¹ That was not the case here, and the assessment complained of was right.

It might be that the payment of 100 guineas to the Professor of Conveyancing fell to be exempted. It was in a different situation from the other payments.

Looking to the 6th subsection, the term "voluntarily contributed" implied a gratuitous gift, which the payments made by entrants to the Society were not. They were the price of admission to the Society.

"Necessary outgoings" under the leading enactment included nothing beyond the land-tax, the insurance on the buildings, landlord's rates, necessary repairs, and a commission to the treasurer for managing the funds of the Society.

LORD PRESIDENT.—The question raised by this petition and appeal involves the construction of the 11th section of the Customs and Inland Revenue Act of 1885. The leading object of that section is to levy a duty upon property held by collective bodies, whether corporate or unincorporate, which escapes altogether from the succession-duties under the previous Acts. In the case of these bodies succession does not occur, and therefore the opportunity does not arise for the Commissioners of Inland Revenue to charge any duty of the nature of succession-duty against them. It was to remedy that evil, and to prevent these bodies escaping altogether from contributing their proper share, as we may call it, of those duties leviable under the Succession-Duties Acts, that this section was enacted; and the way in which the Legislature directs that these bodies shall be subjected to a duty which shall correspond in a fair and equitable view to what individuals are subjected to under the Succession-Duties Acts is this,—that they shall pay an annual duty at the rate of 5 per cent upon the annual value, income, or profits of their property, accrued to such body in the same yearly period. Whether that is a fair and equivalent duty, as compared with the liability under the Succession-Duty Act, of course we have no reason to inquire, but that is what is substituted for the succession-duty in the case of bodies of this description.

But there are certain exemptions appended to this clause, and the first question for consideration is whether the Society of Writers to the Signet can take the benefit of any of these exemptions. They claim exemption under the third head, which is an exemption of "property which, or the income or profits

¹ The Governors of the Russell Institution v. The Vestrymen of St Giles-in-the-Fields and St George, Bloomsbury, 1853, 18 Eng. Jur. 597.

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whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." Of course, it is under the third and last branch of that clause that the exemption is claimed. It is said that the property which is here sought to be subjected to duty has been legally appropriated and applied for the promotion of education, literature, or science. Leaving out of view in the meantime the meaning of the words "legally appropriated," the question arises whether the property or the income of the property with which we are dealing is applied for the promotion "of education, literature, science, or the fine arts." There may be cases in which property, or the income of property, may conduce indirectly to the promotion of education, literature, science, or the fine arts, and yet which will certainly not fall within this exempting clause. Almost every institution which is created for the purpose of benefiting its members by the creation of a library would in this view fall under that clause of exemption. It would be enough to shew that indirectly the property does promote—does go to the promotion to a certain extent, or in a certain way, of education, literature, or science. But I apprehend that the meaning of this clause of exemption is that the property or income shall be, if not exclusively, yet certainly in the main, and as its chief object, devoted to the promotion of education, literature, science, or the fine arts.

Can that be said to be the case in regard to the Society of Writers to the Signet and their library? People become members of the Society of Writers to the Signet, not for the purpose of studying literature, or the fine arts, or science, nor yet for the purpose of being educated. They become Writers to the Signet for the purpose of making pecuniary gain by a profession, and that is the object of every member of this Society; and everything that the Society has done in its collective capacity in the way of creating a library and other things of that kind is incidental and accessory to that one great object of making professional gain. These institutions, the library, and all the other institutions connected with this Society, are brought into existence because they will help, one way or another, to the attainment of the end for which every member enters that Society, viz., by the exercise of his profession to make pecuniary gain. In these circumstances it appears to me quite impossible to say, that in any substantial sense this money is applied for the purpose of promoting either education, literature, science, or the fine arts. It is applied for the purpose of giving facilities to the members of the Society to exercise their profession, which seems to me to be a totally different object.

But still further it may be questioned on very sound grounds, whether, even if the money was so applied, it is legally appropriated to that purpose—that is to say, whether it is appropriated in such a way as to be legally binding upon the parties so appropriating it, for that is undoubtedly the meaning of the words "legally appropriated" here. I do not question that the Writers to the Signet may be a customary corporation. I think it is pretty well established that they are so, but I do not think that makes much difference in the matter, because if it should be in the interests of the profession, apart altogether from any other consideration, that this money should be applied to a different purpose from the maintenance of the library, either in whole or in part, I doubt very much whether this corporation would be disabled from so applying it, and therefore diverting it from that purpose to which it is alleged to be, within the meaning of the statute, legally appropriated. For these two reasons, therefore, I am of

opinion that this exemption cannot be claimed—first, because the money is not applied for the purposes alleged; and secondly, because it is not legally appropriated to such purposes within the true meaning of the statute. No. 10.

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Another exemption is claimed under the sixth head of exemptions as for "property acquired by or with funds voluntarily contributed to any body, corporate or unincorporate, within a period of thirty years immediately preceding." Now, the money which is said to be voluntarily contributed under this clause of exemption is the money paid by gentlemen entering the Society of Writers to the Signet, as a necessary condition of their obtaining admission. A considerable part of that money is paid, as we know, by apprentices upon signing their indentures, and the rest of it is paid upon their admission as full members of the Society qualified to exercise their profession. Now, can these be said to be funds voluntarily contributed? In one sense, all money paid willingly, without compulsion, is voluntarily contributed; but that certainly cannot be the meaning of this section. When a man pays his debts, if he is an honourable man, he pays them quite willingly, and not as matter of obligation only, but as matter of honour. At all events, he does so quite voluntarily; and everything that is paid under a contract is paid voluntarily, unless some dispute arises about the meaning or effect of the contract. But surely that is not the meaning of the word "voluntarily" in this clause of exemption. There is another meaning of the word which seems much more appropriate, and that is, money gifted—voluntarily contributed—in the sense of being gratuitously given. Which, then, of these meanings are we to take in the present case? I think the meaning of the statute undoubtedly is that, if money be given, presented to the Society in any form—without consideration—by anybody, any property purchased with that money, if it be given within a certain period, shall be exempt from liability. But the monies which are here paid by apprentices and entrants to the Society of Writers to the Signet are not given in that sense. They are given as the price of admission to the privileges of the Society. They are given therefore under a contract, and nothing else. When an apprentice pays his fees upon signing his indenture, he enters into a contract not merely with his master in the indenture, but with the Society. The Society thereby undertakes, upon receipt of that money, to allow him to go on to serve his apprenticeship, and thereafter to be taken upon trials, and admitted as a member of the Society if found duly qualified. That is a contract with the Society; and the obligation of the contract on the one hand is to pay money, and on the other hand to receive, and to admit. In these circumstances, I cannot hold that there is anything voluntary in the case. It is just as involuntary in one sense of the word, as the payment of any money which one is obliged to pay. What would be said with respect to the last sum contributed, the sum paid for full admission into the privileges of this Society? The entrant cannot be admitted without paying that money; but he has got a vested interest in the Society already, by what he has paid when he signed his indenture, and if he does not choose to go on to pay the rest of it, he forfeits that which he has already paid. Is there anything voluntary in the act of the second payment? It seems to me to be about as compulsory as it very well can be, because it is made compulsory upon him either to pay that additional sum or to forfeit what he has already paid. Therefore it appears to me that neither of these classes of exemption applies to the property belonging to this Society in general.

But there is one part of the property appropriated, and legally appropriated,

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to a particular purpose, which I think stands in a different position, and that is the endowment of the chair of conveyancing. I think enough evidence has been given to satisfy the Court, and to satisfy those who represent the Commissioners of Inland Revenue, that this chair is endowed by the Society of Writers to the Signet in such a way that they are bound to keep it up by the agreement with the town-council as then representing the University; for the institution of the chair, as I understand, goes back as far as 1820, or between 1820 and 1830, while the town-council were administrators of University affairs. That seems to me to fall very clearly within the third clause of exemption, as being money legally appropriated and applied for the purpose of education, and therefore I am of opinion that the exemption does apply so far as regards the 100 guineas a-year that is paid as the salary of the Professor of Conveyancing.

With regard to the question of outgoings, I do not think any serious difficulty remains after the discussion we have heard. It is plain enough that the account given in by the petitioners must be very largely modified. They claim in the first place the land-tax, and that is admitted. But they further claim a sum of £36, 5s. 1d. of insurance, and it turns out that the greater part of that consists of insurance of the books and fittings contained in the library, and not of the buildings proper, and I think the result of the argument comes to this, that insurance is to be allowed to the amount of £9, 11s., being that portion of the policies of insurance which is applicable to the buildings.

As regards the salary of the treasurer, which the Society propose to deduct entirely as one of the outgoings, I agree with the argument of the Lord Advocate that that is to be considered merely in the nature of the receiver's remuneration, as it is called in the statute, for the words are "deducting therefrom all necessary outgoings, including the receiver's remuneration." Now, all that the treasurer of this Society has to do as a receiver is to draw the rents, if any, of the heritable property,—of which, I suppose, there are none,—and to receive payment of interests and dividends on the investments of personal estate; and certainly I should say that the allowance proposed for that purpose, somewhere about twenty guineas, as fixed by the Commissioners, is a very fair proportion of the treasurer's salary to be deducted upon that ground. With regard to the rates, all I think it necessary to say is, that they must be landlord's rates which are deducted, and with that direction I suppose the parties can have no difficulty at all in settling what the amount of these should be. The only other question is as to the amount to be deducted for repairs; and there, again, the parties can come pretty much to one, and I think that £25 is a fair amount to be deducted on that head.

These seem to me to be all the points that are raised by this appeal, at least so far as they are now in dispute.

LORD MURE.—I am entirely of the same opinion as that expressed by your Lordship, and I have little to add to what your Lordship has stated.

The question is, what assessment is to be levied from corporations or from "bodies unincorporate" of this description, under the provisions of the statute which subjects them to certain assessments in lieu of succession-duty, from which, up to the date of that statute, they had been exempted. And the first point to be considered is, what are the necessary outgoings of which the statute authorises deduction to be made from the property on which the 5 per cent is appointed to be levied in lieu of the succession-duty assessment. Now, the sums

here claimed as necessary outgoings are very large, but I am of opinion that the items your Lordship has mentioned are all that the petitioners can claim as necessary—viz., insurance on the buildings, landlord's rates, 10 per cent for repairs, and one-fifth of the sum which is stated in the appendix as the treasurer's salary. For the treasurer may fairly, I think, be held to come under the word "receiver" in that part of the statute which describes the receiver's remuneration as a necessary outgoing.

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Upon the larger and more difficult question of legal appropriation, I am very clearly of opinion that the salary of the Professor of Conveyancing falls within the words "legally appropriated and applied for the promotion of education." But I agree with your Lordship as regards those other items of considerable amount which are entered in the list—viz., librarian's salary, hall-keeper, book-carriers, &c.—that these do not come within the exemption of being legally appropriated for purposes of education, literature, or anything of that kind. I think the words "legally appropriated" should be construed as meaning "mainly," if not "exclusively," appropriated in dealing with the question whether the purposes to which the money is said to be applied are such as come within the exemption of the statute.

On the question of voluntary contribution, I cannot see how it can be predicated of contributions made by entrants or apprentices, which they are obliged to pay as a condition of their admission to the Society, that they are voluntary contributions in the sense of the words of the statute. As your Lordship has explained, there are certain contract obligations entered into between the entrants and the Society, but nothing in the sense of voluntary contributions which the entrants may or may not make upon their admission.

LORD SHAND.—There can be no doubt that the Society of Writers to the Signet is one of those bodies which have been made liable to assessment for duty under this statute. It appears to me, from what has fallen in the course of the arguments and what we know of the Society, that there is little doubt it is a corporation by custom although not by charter. But whether incorporate or unincorporate, it is, within the language of the statute, "a body corporate or unincorporate," having property which is subject to assessment, and the first question which is raised and has to be decided is, as your Lordship has pointed out, the question whether the property of the Society, of considerable amount and value, is exempted from duty under either of the two branches of the exempting clause which have been quoted in the case. The first of these is to the effect that property or income of property legally appropriated and applied for any purpose connected with the promotion of education, literature, science, or the fine arts, shall be exempt. I entirely agree with your Lordship that in this case that exemption cannot take effect. The Society is possessed of property, and is annually receiving income from that property, as well as from entrants and persons about to become Writers to the Signet, but the purpose for which that property is held is, I think, a purely professional one. The object of this Society is the maintenance of a permanent body of professional men, with recognised privileges,—privileges which are of importance, and which were perhaps some years ago more extensive than they are now,—and the object which any one joining the Society has in view is not education, or the promotion of education, literature, or science, but that he shall become a member of the Society, in order to the practice of his profession as a Writer to the Signet. That being

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so, I agree with your Lordship in thinking that the possession and use of the library, of which so much has been said, is merely an accessory or means of promoting the main object, and is not the main object for which this body exists; and therefore I think this clause of exemption will not apply. The Lord Advocate quoted a case¹ in which the words of the statute were not, as we have here, "legally appropriated and applied" for any purpose, but "instituted exclusively" for any purpose. The absence of the word "exclusively" might very properly and reasonably justify the argument, that if it could be shewn that substantially the purpose for which this Society existed and held its property and effects was for the promotion of education, literature, or science, then it should have the benefit of the exemption. But I do not think that even substantially that is the purpose for which the Society exists, and therefore I am of opinion that under that clause the petitioners can take no benefit.

I agree with your Lordship also in the opinion you have expressed as to the meaning of the words "voluntarily contributed." In the one sense of the word "voluntarily," of course anyone who enters into a fresh contract of his free will is voluntarily undertaking something to which he was not bound previously. That perhaps will not apply strictly to the case of a man paying a debt, for if he does not pay that voluntarily he may be made to pay it, but certainly in the case of anyone entering into a new contract it may in one sense be said that it is a voluntary act on his part; but if the argument which has been maintained here were to take effect it would apply to every sum which the Society during the last thirty years has received under a contract voluntarily entered into by someone else. Apprentices voluntarily agree to pay so much money, but in return for certain advantages. If the Society had a hall to let, and someone voluntarily agrees to give them a rent for that hall, the return there given is a return for value received. The Society has money to invest. Another party voluntarily agrees to give so much money in return for the use of that capital. In each of these cases you simply have a fresh contract,—voluntarily entered into, no doubt,—but in each of these cases you have a return given for advantages which the Society on the other hand confers. I am very clearly of opinion that the words "voluntarily contributed" here cannot cover cases of that kind, but are intended to cover and will cover only proper donation, and seeing there is nothing of donation in the payment of money by the Society's apprentices, I am clearly of opinion that the exemption will not apply.

In reference to the payment to the Professor of Conveyancing, I think there can be no doubt. It is not necessary in this case to define, and I refrain from defining, what I should say is necessarily implied in the words "legally appropriated." It is enough in this case that as regards the incumbent of the chair of conveyancing the Society has appointed a sum of 100 guineas per annum for the maintenance of that chair, and is paying that year after year; and that being so, that sum was certainly legally appropriated and applied for the promotion of education.

As to the deductions under the head of outgoings and the like, I have nothing to add to what your Lordship has said.

LORD ADAM.—I concur.

THE COURT pronounced this interlocutor:—"Find that the real and personal property of the petitioners mentioned in the appeal,

¹ *Governors of Russell Institution*, 18 Eng. Jur. 597.

the gross annual value of which amounts to £1159, 19s. 10d. No. 10.
sterling, is liable to the duty on property of bodies corporate
and unincorporate under the Customs and Inland Revenue Act, Nov. 3, 1886.
1885: Find that the annual value of the real property for the Society of
year ending 5th April 1885 is £250, and that the income or Writers to the
profits of the personal property for the same year is £909, 19s. Signet v. Com-
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10d.: Find that the annual payment of £105 granted by the peti- Inland Re-
tioners under contract for the perpetual endowment of the Chair venue.
of Conveyancing in the University of Edinburgh is to be allowed
as legally appropriated and applied for the promotion of education:
Find that there should be included in the necessary outgoings to
be deducted, in reference to the annual value of the real property,
the sum of £13, 18s. 7d., being the land-tax and the owner's pro-
portion of the rates chargeable in respect of such real property:
Find that the sum of £21 proposed by the Commissioners of In-
land Revenue to be deducted as receiver's remuneration is reason-
able: Find that the deduction for insurance and repairs is to be
limited to such part of the sums claimed as is applicable to the
real property, and accordingly that the sum to be deducted for in-
surance is £9, 11s., and that the sum of £25, being ten per cent
on the annual value of the real property, is a reasonable allowance
for repairs: Find in accordance with the foregoing findings,"
&c.

MACKENZIE, INNER, & LOGAN, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

GEORGE F. G. FENTON LIVINGSTONE, Petitioner.—*Mackay—H. Johnston.* No. 11.
JOHN N. E. FENTON LIVINGSTONE, Respondent.—*D.-F. Mackintosh—Low.*

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Alimentary provision—Diligence—Excess over suitable aliment.—A testator directed his trustees to pay certain proportions of the residue of his estate to his grandchildren on their attaining twenty-five years of age, but, in the event of any beneficiary so conducting himself as not to merit the approbation of the trustees, they were empowered to restrict the provision in his favour to a liferent alienary, and it was provided "that it shall not be in the power of the party or parties whose shares have been so restricted to a liferent to sell, assign, dispone, or convey away his or their said liferent, but the same shall be applied for his or their alimentary use alienary, nor shall it be in the power of his or their creditors to attach the said liferent by arrestment, poinding, or other legal diligence, all of which are hereby excluded." *Held* that the alimentary provision was only protected from the diligence of creditors to the extent of a reasonable provision, regard being had to the station and circumstances of the beneficiary, and that *quoad excessum* it was open to diligence.

Aliment—Amount—Reasonable provision.—The beneficiary under a testamentary trust enjoyed the income of £26,000, which amounted to about £875 per annum, as an alimentary provision from which the diligence of creditors was excluded. He was twenty-six years of age, unmarried, and was subject to no incapacity, mental or physical. He was the second son of a landed proprietor, and, in the event of his surviving his mother, would succeed to an estate. He had no other source of income than the alimentary provision above mentioned. *Held* that, in the circumstances, £500 per annum would be a suitable provision for the beneficiary, and that the balance of the income was open to the diligence of his creditors.

By the fifth purpose of his trust-disposition and settlement, dated 13th January 1868, the late William Waddell, of Easter Moffat, W.S., directed his trustees to convert the residue of his estate into money, and to invest the same in their names as trustees, and to hold the same for behoof of

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No. 11. his three younger grandchildren, viz., John, George, and Charles Fenton Livingstone (the last of whom died in minority without issue), or the survivor or survivors of them, equally, share and share alike, payable upon their respectively attaining twenty-five years of age.

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This bequest was subject to the following declaration:—"And I do hereby declare that in case any of my said three grandsons shall marry or otherwise conduct themselves so as not to merit the approbation of my said trustees, or a majority of them accepting and surviving at the time, the provisions hereby made in favour of my said grandchildren so marrying or acting shall only belong to them in liferent for their liferent use allenarly, and to their issue or heirs in fee; but it is hereby declared that a regular minute must be entered in the sederunt-book of the trustees, expressing their disapprobation of the conduct of any of my said grandchildren, to restrict them to a liferent as aforesaid, and the capital or fee of the provision or share of such of my said grandsons as shall be so restricted to a liferent shall continue to be held by my said trustees during the lifetime of the party so restricted to a liferent, the interest or annual proceeds (less the expense of management) being only payable to the party or parties so restricted to a liferent; and it shall not be in the power of the party or parties whose shares have been so restricted to a liferent to sell, assign, dispone, or convey away his or their said liferent, but the same shall be applied for his or their alimentary use allenarly, nor shall it be in the power of his or their creditors to attach the said liferent by arrestment, poinding, or other legal diligence, all of which are hereby excluded; and I declare that until the provisions herein contained in favour of my said three grandsons are paid and made over to them they shall not acquire any vested interest therein."

On 21st September 1885 Mr Waddell's trustees, at a meeting specially convened, on the narrative of the above power, resolved to record their disapprobation of George Fenton Livingstone's conduct, and to restrict the provisions in his favour under the trust-disposition and settlement to a liferent. This they accordingly did by a minute then executed, under which it was declared that the said provisions should only belong to George in liferent for his liferent use allenarly, and to his issue in fee.

George attained the age of twenty-five years on 1st October 1885.

His share of his grandfather's estate amounted to about £26,000, the income of which, after deduction of expenses, &c., was on an average £875. He had no other means of subsistence than the income of this fund, and belonged to no profession.

On 7th January 1886 John F. Livingstone raised an action against his brother George for payment to him of two sums of £500 and £5000 respectively, alleged to have been advanced by the pursuer to his brother, but not for alimentary purposes.

Arrestments on the dependence of this action were laid on on 7th January 1886 in the hands of the trustees, whereby it was sought to attach the income payable to George by the trustees.

On 30th June 1886 George presented a petition to the Court for recall of these arrestments. The facts stated above were not in dispute.

The petitioner stated "that the said arrestments are inept to attach the income of funds held in trust, and declared by the truster to be an alimentary provision for the liferenter, and not attachable by his creditors by arrestment, poinding, or other legal diligence."

The respondent stated;—"The petitioner attained the age of twenty-five on 1st October 1885; he is unmarried, and is subject to no incapacity, physical or mental. In these circumstances, the respondent submits that

the said alimentary liferent (the interest of £26,000) is exorbitant and excessive, and that the arrestments should not be recalled, in so far as the said liferent exceeds a reasonable aliment." No. 11.

It was further stated that in the event of the petitioner surviving his mother he would succeed to the landed estate of Easter Moffat. Nov. 5, 1886. *Livingstone v. Livingstone*.

Argued for the petitioner;—(1) The clause under which this annuity was declared to be strictly alimentary was very stringent, and if it were possible to do so at all, there was no doubt that here the testator had set apart this estate from the diligence of the petitioner's creditors. It was doubtless laid down by Bell in his Commentaries¹ that an alimentary provision could only be protected "so far as it exceeds not a moderate aliment," but there was no authority for that dictum. The point had never been expressly decided, and there was no principle on which a granter's power of dealing with his own property could be so limited.² No doubt the interposition of trustees or of some third party to hold the fund was necessary, but, if that were supplied, the testator's intention ought to rule. There was a distinction between a fund declared to be merely alimentary, and one which was protected by a declaration that it should not be assignable, arrestable, &c., as here. An alimentary fund might be arrestable at the instance of an alimentary creditor, but the debts here were not of that class. The only case in which an alimentary fund had been restricted in the way here suggested was *Blackwood v. Boyd*,³ but there the testator had tried to exclude the *universitas* of his estate from diligence, which went much further than the present case; and further, there was no trust interposed there. In bankruptcy alimentary provisions were not attached.⁴ Again, this debt was incurred at a date prior to the time at which the petitioner had right to the annuity, and in such a case it had been decided that creditors could not touch it.⁵ (2) If it was open to the Court to consider the question of amount, there was no ground for saying that the amount was exorbitant.⁶

Argued for the respondent;—It was laid down by all the institutional writers that an alimentary provision was only protected to the extent of a suitable maintenance, taking the station and circumstances of the annuitant into consideration.⁷ The principle on which the rule rested was that where the purpose of the testator was purely to aliment that purpose was fulfilled by giving the annuitant a sum suitable to his condition in life. The rule had been recognised in a long course of decisions, in all of which the Court ordered inquiry into the circumstances of the annuitant,⁸ and though there was only one case in which the aliment was restricted (*Blackwood v. Boyd*), the fact of inquiry being instituted proved

¹ Bell's Com., 5th edit. i. 128, 7th edit. i. 124; cf. also Ersk. iii. 6, 7.

² Hunter v. Hunter's Trustees, March 10, 1848, 10 D. 922, 20 Scot. Jur. 326.

³ *Blackwood v. Boyd*, 1677, M. 10,390.

⁴ Goudy on Bankruptcy, 319; Bankruptcy Act, 1856, sec. 102, 176.

⁵ *Monypenny v. Earl of Buchan*, July 11, 1835, 13 S. 1112, 7 Scot. Jur. 505; *Harvey v. Calder*, June 13, 1840, 2 D. 1095, 12 Scot. Jur. 520.

⁶ *Lewis v. Anstruther*, June 11, 1852, 14 D. 857, 24 Scot. Jur. 514, and Dec. 17, 1852, 15 D. 260, 25 Scot. Jur. 172.

⁷ Stair, iii. 1, 37; Erskine and Bell, *ut supra*.

⁸ *Adamson v. Kirkcaldy*, 1622, M. 10,365; *West Nisbet v. Morrison*, M. 10,368; *Monypenny v. Earl of Buchan* (see Lord Corehouse's interlocutor, p. 1113); *Harvey v. Calder*, see note 5; *Lewis v. Anstruther*, see note 6; *Bell v. Innes*, May 26, 1855, 17 D. 778, 27 Scot. Jur. 403; *Drew v. Drew*, Nov. 17, 1870, 9 Macph. 163 (Lord Justice-Clerk's opinion, p. 166), 43 Scot. Jur. 62.

No. 11. that the Court recognised their power of restriction if they deemed it advisable. (2) To a person in the position of the petitioner an income of £875 was excessive. £500 a-year would be ample aliment for a bachelor.

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At advising,—

LORD PRESIDENT.—This is a petition for recall of arrestments on the ground that the fund which has been arrested is alimentary, and is not subject to the diligence of creditors.

The petitioner had an interest under the will of his maternal grandfather, Mr Waddell, which amounted to a capital sum of about £26,000. Under that will, however, the trustees had power given to them, if any of the beneficiaries should so conduct themselves as not to satisfy the trustees, to express and record their disapprobation in a minute, and to restrict the right of the beneficiary to a liferent alienably, and thereafter it was not to be in the power of the liferenter “to sell, assign, dispone, or convey away his or their said liferent, but the same shall be applied for his or their alimentary use alienably, nor shall it be in the power of his or their creditors to attach the said liferent by arrestment, poinding, or other legal diligence, all of which are hereby excluded.”

Now, no doubt this clause is a very sufficient protection, in the ordinary way, of a liferent—it makes the fund strictly alimentary; but the respondent, the arresting creditor, says that the amount of the liferent “is exorbitant and excessive, and that the arrestments should not be recalled in so far as the said liferent exceeds a reasonable aliment.” To this the petitioner replies that there is no law for restricting a liferent of this kind, and that it cannot be reduced so as to let in the diligence of creditors to a certain extent; and further, that in any event the liferent here is not in excess of a reasonable sum, considering the petitioner's station in life.

Now, this raises a very general question, and if we could deal with it as an open question in the law of Scotland, it would require very careful attention. But it seems to me established that a liferent alimentary may be restricted so as to leave the liferenter an adequate amount, and allow the rest to be attached, notwithstanding any declaration in the deed by which it is conferred.

This doctrine is laid down by Lord Stair in very distinct terms in treating of arrestments, where he says (iii. 1, 37),—“It is also a competent exception that the thing arrested is a proper aliment, expressly constituted, and not exceeding the measure of aliment.” It is thus made very distinct that according to the view of that eminent institutional writer it is a good answer to the plea that diligence is excluded from an alimentary fund, that the measure of aliment is in excess of what is necessary for the station of life in which the liferenter is placed. Two old cases are alluded to by Lord Stair in this passage. The first is the case of *Adamson v. Kirkcaldy* (M. 10,365). In that case a multiple poinding was raised for the purpose of determining a competition arising on arrestments, a creditor having arrested an alimentary liferent of a bond for £400 for a debt due by the husband of the person enjoying the alimentary liferent. The wife alleged that she should be preferred on the ground that the bond was given for the aliment of her and her bairns, and the Lords, “considering the meanness of the sum, the quality of the woman, and the number of her seven bairns, found the sum mean enough for their aliment, and that no part of it could be subject to her husband's debt.” There we have an adjudication so old as 1622 on the

question whether the amount secured to the liferenter was or was not more than enough for the aliment of the woman and her children. No doubt the Court held that it was not more than enough, but they could just as well have decided that it was more than enough. In short, they adjudged on the very question which we now have before us.

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The other case mentioned by Lord Stair in his reports is *Blackwood v. Boyd* (1677, M. 10,390). There the Court decided the other way, and let in diligence to a certain extent, and restricted the amount of the aliment. The arrester there answered,—“That albeit aliments so expressly constituted by persons who are noways obliged, when only sufficient for entertainment of the party according to their quality, have been sustained against that party's other debts, but for aliment; yet here the liferent reserved is in favour of the disponent's apparent heir, and of his whole estate, which were of dangerous consequence to allow, especially seeing the estate doth far exceed a sober aliment in three or four thousand merks yearly; and if in anything it was restricted, the pursuer's debt being very small, it would have effect. The Lords repelled the defence in respect of the reply.” The result was thus, that the apparent heir, who had an alimentary provision of a considerable amount, was found to be open to diligence in so far as the aliment was in excess of a reasonable sum. That case is directly in point, and it is assumed in subsequent decisions that if an alimentary income exceeds a reasonable provision, considering the recipient's station in life, it can be restricted by the Court.

Though in recent times cases do not seem to have occurred in which the Court has restricted an alimentary fund in this way, yet it seems always to have been taken into account whether the amount was excessive or not. One very remarkable case was before the Court which affected the amount of aliment to be allowed to Lord Buchan, viz, the case of *Harvey v. Calder*, 2 D. 1095. There one question was whether £1800 a-year was more than sufficient aliment for a peer, and it was held that it was not, but if the Court had been of a different opinion they would undoubtedly have restricted the sum.

In that state of the law the question comes to be, whether the amount of the income here is more than sufficient for the aliment of a person in the station and circumstances of the petitioner. I understand that all your Lordships are of opinion that it is excessive, and therefore that while the petitioner is entitled to protection to the extent of £500 a-year the rest of the fund is open to diligence.

LORD MURR.—I have no difficulty in concurring in the statement just made of the law applicable to this point. I think that the older cases are quite distinct to the effect that an alimentary fund can be restricted by the Court when it is in excess of the annuitant's requirements, and in all the opinions in the later cases the same rule is plainly admitted. I further agree that the amount of the annuity here is excessive, and concur in thinking that £500 a-year would be a suitable aliment for the petitioner.

LORD SHAND.—I concur. I am not satisfied that the precise point here to be decided has ever before been the subject of direct decision, or that there is any decision going directly to shew that the Court has ever restricted the amount of an alimentary fund, and held the balance to be open to diligence, the only case referred to by your Lordship being attended with various specialities. How-

No. 11. ever that may be, we have the authority of Lord Stair and a stream of authorities where the question has arisen, and in all of these cases, without exception, the Court has entertained the inquiry as to whether the amount of the annuity was excessive or not. If the argument of the petitioner here had been sound the Court would in all these cases have refused inquiry, but the fact is that in all inquiry was made, and that is to my mind conclusive of the view that in the opinion of lawyers the Court had power to restrict an alimentary annuity if they thought fit. This rule seems to me to rest on principle, for so far as a fund is directed to be paid to an annuitant which is in excess of a reasonable aliment, it is difficult to distinguish the excess from any other sum which is altogether in the power of the annuitant. Here we have a trust, and it may very well be that it would have been sufficient if the testator had said that there should be forfeiture of the excess of the aliment if the beneficiary contracted debt, &c., and that the surplus should fall into residue. Or, again, he might have provided that if diligence was used against the fund it should have been in the power of the trustees themselves to restrict the annuity, and that the annuitant should forfeit the excess on the trustees executing a minute to that effect. No such provision has, however, been made; there is no clause of forfeiture, and the annuitant has a right to a considerable sum, £400 or £500 a-year in excess of what we consider a reasonable aliment, and I do not see how that excess can be distinguished from his general funds. In coming to this decision I think we are only giving effect to a stream of decisions in that direction.

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LORD ADAM.—I concur with your Lordship in the chair, and do not wish to give any opinion on any matter beyond the case with which we are now dealing.

THE COURT recalled the arrestments to the extent of £500 per annum, and *quoad ultra* refused the prayer of the petition.

A. P. PUEVES, W.S.—JOHN BELL, W.S.—Agents.

No. 12. ELGIN COUNTY ROAD TRUSTEES, Pursuers (Respondents).—
D.-F. Mackintosh—Low.
Nov. 10, 1886. THE REVEREND JOHN BRODIE INNES, Defender (Reclaimer).—*Balfour—*
Elgin County *C. J. Guthrie.*
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v. Innes.

Road—Road trustees—Title to sue—Barbed wires.—A proprietor of lands bordering a public road is not entitled to erect a barbed wire fence along the road, where such fencing is dangerous to persons or bestial using the road, and road trustees have a good title to sue an action against the proprietor for the purpose of having him ordained to remove the fence.

1ST DIVISION. THE ELGIN COUNTY ROAD TRUSTEES, acting under the Elgin and Nairn Roads and Bridges Act, 1863, brought this action against the Reverend J. Brodie Innes, of Milton Brodie, in the county of Elgin, concluding for declarator "that the erection of fences composed wholly or partly of barbed or pointed wire extending along the side of a public road is illegal, and" for removal accordingly of "the barbed or pointed wires from a fence lately erected by him on his property on the side of the public road leading from Forres by Kinloss to Burghead, in the county of Elgin, extending said fence from a point near the east end of the wood of Blackstab, on the north side of said road, eastwards; and" for interdict against his "placing, or causing to be placed, any fences composed, in whole or in

Lord M'Laren.
M.

part, of such barbed or pointed wire alongside the public roads or highways in the county of Elgin under the management of the pursuers." No. 12.

The pursuers stated that at a certain place on the north side of the public road leading from Forres to Burghead the defender had recently placed a fence composed, in whole or in part, of four barbed wires. "Said fence separates the public road from the defender's property aforesaid, and the same is on the level of the road, and in no way separated therefrom. With reference to defender's answer, it is explained that the fence now consists of five outer and two inner wires, but originally all the wires were on the side of the posts next the road. It is denied that the two barbed wires at the top, which have been shifted from the outside since the present proceedings were threatened, are accessible only to persons or animals within the defender's own lands, and explained that these wires are only separated from the two outside plain wires running parallel with them by split posts of only $2\frac{1}{2}$ inches in diameter, which are placed at a distance of nearly 14 feet from each other, and that consequently these two plain wires cannot resist anything coming in contact with them from also coming in contact with the two inner barbed wires; also explained that each barbed wire has four barbs or points, except the second wire from the top, which has two points. Denied that the intervening space of ground betwixt the fence and the road is the property of the defender. Also denied that the wire-netting is any protection from the barbs or points." They further stated that the barbed wire was highly dangerous and injurious to the lieges using the road, as well to travellers as to horses or bestial. "While said fence exists it is impossible to use the road for the ordinary purposes of traffic with safety, and the said fence constitutes an obstruction of the said road. The pursuers accordingly called on the defender to remove the said barbed wires, but this he refuses to do, whereby the present action has become necessary."

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The defender stated,—“Explained that the fence stands entirely on the defender's ground. At no part of the road in question is there a less distance than 23 feet between fence and fence, and at no part of the road is it possible for persons or animals keeping to the road to come in contact with the fence. Between the fence and the road there is an intervening space or verge of about 3 feet which belongs to the defender. The present fence was erected to replace a fence which stood nearer the road. . . . Explained further, under reference to the said plan, that the fence consists of five outer and two inner wires, the former being on the outside and the latter on the inside of the posts. Of the five outer wires, the two nearest the top are plain, the two below are barbed, and the lowest is plain. The two outer barbed wires are partially covered by wire netting, as shewn in the plan produced. The two inner wires are both barbed, but they are accessible only to persons or animals within the defender's fields.”

The defender pleaded (1) that the pursuers had no title to sue, and (2) that their averments were irrelevant, and insufficient to support the conclusions of the summons.

On 30th January 1886 the Lord Ordinary (M'Laren) before answer remitted to C. R. Manners, C.E., Inverness, “to inquire and report as to the alleged objections to the wire fencing libelled, reserving consideration of the pursuers' motion for a proof, in the event of it appearing from the report that the case involved matters of fact or of professional opinion which ought to be investigated by a proof or trial.”

Mr Manners reported as follows:—“This fence forms part of the enclosure fence of a young plantation upon the estate of Milton Brodie, is erected on the north side of the public road leading from Forres, by

No. 12. Kinloss, to Burghead, and is about five miles distant from each of these two places. . . . Between the fence in dispute, and at the east end thereof, and the fence at the south side of the road, the width is 25 feet,

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but from the east end of the fence in dispute, the fence continuing eastward (which is of plain wires) curves outward, so that at about 10 yards beyond the east end of the fence in dispute the width between the fences is only 23 feet 6 inches. . . . The general width of the gravelled roadway is 17 feet or thereby, and at each side of the gravelled roadway there is a grass border or verge. This border or verge on the north side of the road, and alongside of the fence in dispute, is practically level with the roadway, and in fact forms a grass path of about 4 feet wide at the side thereof; and whether this intervening space or verge between the gravelled roadway and the fence, or any part of it, belongs to the defender or not, there is nothing to prevent cattle, sheep, or other animals, or persons from walking along this verge or from coming in contact with the fence. The total length of the fence in dispute, and as measured along the roadside, is 109 lineal yards or thereby. It was lately erected by the defender, practically on the same line as, and to take the place of, an ordinary plain wire fence, which was, I understand, first erected about twenty-three years since. The posts of this fence are of wood, half round in section, and measuring about 5 inches by $2\frac{1}{2}$ inches, the sawn or split side being next the plantation. They are placed at rather irregular distances apart, but may be taken to average some 14 feet to 15 feet. The strainers are of wrought iron. The wires are seven in number, five of which are on the outer or road side of the posts, and two on the inner or plantation side; of the outer wires the two upper and the bottom ones are plain and the two intermediate ones are barbed, each barb having four prongs or points. The two wires on the inner side of the fence are both barbed, the upper one having four and the lower one two prongs or points. The barbs having four points are about 6 inches apart on the wires, and those with two points are about 4 inches apart. On the outer or road side of the fence, and between the bottom plain wire at or near the ground level, and the upper barbed wire, and tied to them, there is wire-netting, the mesh or holes of which measure about $1\frac{1}{2}$ inches across . . . The fence is practically on the road-level, and is not erected on any mound or elevated ground. The upper plain wires on the outer or road side of the fence to some extent form a protection against the barbs of the inner wires, but in consequence of the posts being so far apart, and their thickness (which separates the outer and inner wires) being only 2 inches, this protection is not so great as would be the case were the posts placed at the usual distances of from 6 to 7 feet, and should any horse or other heavy body lean or press against the outer wires (except near the posts) the barbs would, I have no doubt, take effect. At the east end of the fence there is a length of 12 feet between two strainers, along which there are no plain wires or other protection against the barbs. With regard to the two outer barbed wires, I am of opinion that the wire-netting forms little or no protection against the barbs, and should cattle, sheep, or other animals be pressed against or come in contact with the fence they would in all probability be injured. If this fence had been near a town or village, I am further of opinion that these two outer barbed wires would have been dangerous, inasmuch as the dresses of females, or even the coats of men walking along the grass verge or border of the road might be blown against the barbs and torn by them; in the position of this fence, however, at a considerable distance from any town or village the risk of such damage or injury is greatly reduced."

The Lord Ordinary (M'Laren), on 11th March 1886, pronounced the

interlocutor:—"The Lord Ordinary finds that the facts are sufficiently No. 12.
ascertained by the said report, and that no order for proof is necessary: Nov. 10, 1886.
Finds, in terms of said report, that in consequence of the unusual distance Elgin County
of the posts of the fence in question, there is reasonable ground for apprehension of injury to passengers and animals from the barbed wires, and Road Trustees
in respect the defender declines to avail himself of the suggestion of the v. Innes.
Lord Ordinary that additional posts should be placed between the existing posts, decerns and ordains the defender to remove the barbed or pointed wires from the said fence: Finds it unnecessary to dispose of the conclusions for declarator and interdict, and decerns: Finds the pursuers entitled to expenses," &c.

The defender reclaimed, and argued;—(1) The pursuers had no title to sue. It must be taken that the fence was entirely in the defender's ground, and in such circumstances statutory authority to interfere with it was necessary. Such statutory authority was given by the 94th section of the Turnpike Roads Act, 1832 (1 and 2 Will. IV. cap. 43), providing for the erection by the trustees of parapet walls, fences, &c. in certain circumstances, and by the 102d section of the Roads and Bridges (Scotland) Act, 1878. If any such power as was claimed in this action had been contemplated, it would have been found in these Acts.

(2) On the merits, the wires complained of, so far as on the inside of the posts, were *in suo*, and could not be objected to. As regarded the outer wires, it must be taken that they were on the defender's own land. Accordingly, if the pursuers were to succeed it must be on the analogy of the case of houses, walls, or other buildings above seven feet high and suchlike, which were dealt with in section 91 of the Turnpike Act 1832. But these cases depended not on the law of obstruction but on that of neighbourhood. The presence of a coal-pit unfenced, and thus tending to accident, might certainly give rise to an action of damages, so might the barbs in the present case; but that was a very different thing from an action to have them removed, particularly where they were on the defender's own soil. The defender was prepared to increase the number of the posts, but would not undertake to do more. After all the fence was no worse than a thick blackthorn hedge which might be trimmed under sections 88 and 89 of the Turnpike Act, 1832. There was no legislation dealing with the present question, therefore a proprietor must be left to himself, subject to claims of damages at common law. Further, the facts stated by the reporter were not admitted, and the case ought to be sent to proof.

The pursuers' argument sufficiently appears from the opinions of the Judges.

LORD PRESIDENT.—The first question which is raised in this case is an objection to the title to sue. The pursuers are the Elgin County Road Trustees, incorporated under the Elgin and Nairn Roads and Bridges Act, 1863, under which these gentlemen are vested with the administration and management of all the highways in the county. Assuming that the fence here complained of is a source of danger to persons travelling along the road, and also to cattle, horses, and sheep, I think there is no doubt that the pursuers have a good title to raise an action for the purpose of putting down the fence, not by reason of any express power granted in their Act of Parliament, but upon the general rule of law that trustees always have a good title to defend the subject of their trust, and as the subject here is a public road I think they have a good title at common law to put down everything which may interfere with the convenient and safe use of that road. I am therefore for repelling that objection.

As regards the merits of the question, these are of a somewhat novel character,

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because barbed wire fences have only come recently into use, and are undoubtedly of new construction, and dangerous to those who try to climb over them. But the question is whether they are a source of danger, not to an intruder, but to persons lawfully travelling along this road, including in that term horses, cattle, and sheep. If the barbed wire fence were of the ordinary construction, I think there cannot be much doubt that it would be a very dangerous erection on the side of a public road. It would be quite otherwise if the road ran through a cutting, and a fence of the kind I have mentioned were erected on the top of the cutting, or if the fence were placed at the foot of an embankment, the road running on the top of it, or if the fence were masked, so that the source of danger was removed. But all these conditions have no application in the present case, for here the barbed fence is on the level of the road, and is not masked, for I attach no importance to the contention that it is erected on the defender's own land. Everything outside the fence, I do not say is dedicated to the use of the public, because I think the defender would be entitled to use his own property, so far as consistent with the maintenance of the road by the trustees; but the fence being on the road, and placed there by the defender as dividing his property from the road, so long as it remains there, everything outside it is abandoned by him for the time being. It must be dealt with, therefore, on the same footing as if it were on the very line of the boundary between the road proper and the property of the defender. Placed in such a position, I am very clearly of opinion that the fence is dangerous, and if there were nothing more in the case, I should be inclined to agree with the Lord Ordinary, and to order its removal.

But there is a specialty in the case as regards the two barbed wires which run near the top of the posts on the inside of them next the plantation. On the outside of the posts on the side next the road there are two plain wires which, if kept tight, would probably prevent accidents from the two upper barbed wires which I have mentioned. But in the present condition of the fence, the plain wires will not act, because they yield to pressure, so that any one leaning against them would bend them, so as to bring himself in contact with the barbed wires on the other side. But this result might be avoided by adding to the number of posts. At present these are from fourteen to fifteen feet distant from one another, and it is thus impossible to make the wires so tight that an object pressing against them would not run the risk of coming in contact with the barbed wires on the other side. If the defender does not offer to erect these additional posts, and so to put the plain wires into a state of perfect tension, and maintain them so, I am of opinion that these two upper barbed wires, although placed on the inside of the posts, must, nevertheless, be removed.

With regard to the other two barbed wires, they are undoubtedly in such a position that any person leaning up against the fence, or any animal scratching itself against it, would be seriously injured. I cannot listen to the argument that there is at the lower part of the fence, several inches from the ground, a screen of wire netting. It is contended that by this screen the length of the barbs is reduced, but they are not thereby rendered innocuous, nor is the fence thereby put into such a condition that it will do no injury to cattle leaning against it or the like. In all the circumstances I think these barbed wires must also be removed, and in arriving at these conclusions I am proceeding on the facts admitted on record, and on these additional facts which are placed before us by the reporter. I do not attach weight to the deductions which he draws

from these facts, but I find that the circumstances are sufficiently set forth in the record and report to enable me to decide the points which have been raised.

A demand for proof has been made, and I do not say that under certain circumstances, had the facts been less clear, I should not have acceded to it, but I do not see that there is any necessity for proof, and I think the defender is in a somewhat unfavourable position in asking for it, because if he was dissatisfied with the Lord Ordinary's interlocutor making the remit, he ought to have objected to it at the time. He ought then to have reclaimed, which he had an opportunity of doing under the 2d section of the Act of Sederunt of 10th March 1870, which extended the provisions of the 28th section of the Court of Session Act of 1868, "so far as these import an appointment of proof, or a refusal or postponement of the same." The Lord Ordinary's interlocutor of 30th January was clearly within these last words, and the 28th section of the Act provided, in direct terms, that such an interlocutor should be final, unless a reclaiming note was presented against it within six days. The defender ought then to have insisted on his right. At the same time I do not think we should be shut out from appointing a proof to be held now. That is matter for the discretion of the Court, but it seems to me that the facts are sufficiently before us to enable us to come to a conclusion.

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LORD MURK.—We have been asked to allow a proof in this case as regards certain questions both of fact and of opinion. On that point I had at first some difficulty, because I was under the impression that the interlocutor remitting the case to a reporter could not have been reclaimed against at the time. I am, however, now satisfied, having regard to the provisions of the statute and the Act of Sederunt, that it might have been reclaimed against, and, as this was not done, it is, I think, now too late to go back upon it. Because when a remit of this description has been made, even where there is no consent, and a party does not object, but allows it to be carried out, it has, I conceive, been long settled that he loses his opportunity of insisting on a proof *prout de jure*. It is not now, therefore, in my opinion, open to the reclamer to insist upon a proof.

But it is still open to the Court to order a further report upon the facts, and as to the effect of the network upon the wire, and I am individually of opinion that the view which has been expressed by the reporter upon this is not free from question. I am disposed to think that the network may afford a sufficient protection from the barbed wires, and I should have desired to have some more detailed information upon that matter.

As regards the upper wires, I think the remedy which is proposed by your Lordship, of having additional posts, is sufficient, and that what you have now proposed in that respect should be carried out.

LORD SHAND.—I entirely concur in the opinion of your Lordship in the chair, and in all the observations which you have made. I think the facts have been fully and quite accurately ascertained by the mode of inquiry which has been adopted by the Lord Ordinary. The reporter has visited the ground; he has examined the fence and the position of the wires and the nature of the barbs to which exception has been taken; and the Court is now quite able to form an opinion upon these facts. I do not understand that the reclamer disputes any one of the facts stated by the reporter—he only disputes the inferences from them; and, so far as relates to these inferences, I lay the report aside, and arrive

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at a result for myself from the facts. In regard to what has been said as to the propriety of the remit, so far as I am concerned, I have no doubt of it, and if the interlocutor ordering the remit had been reclaimed against, I should have been of opinion that the Lord Ordinary had adopted a common-sense method of dealing with the case, and the best way of reaching the facts. I should have much deprecated that the parties should have gone to proof at large upon the question what is the particular form and construction of the fence.

As to the title to sue, I have no difficulty. The verge on the road side of the fence may be on the defender's property, but it seems to me that the fence has been so placed that we must hold that the ground between it and the public road has been dedicated, if not permanently, at least temporarily, to the public use. It is clear that the road trustees, who are the guardians of the road, and in that capacity find a fence which is a danger to persons or to cattle and sheep using the side of the road or leaning against the fence, have an interest to sue for its removal. The ground of action in this case being the existence of such a danger, I have no doubt the pursuers have a good title to sue.

On the merits of the case, I agree with your Lordship upon both points. In the ordinary case a fence is kept up for the purpose of defending the land beyond it from intruders. But the present fence is not merely defensive; it is also offensive. One purpose which the barbs serve is to protect the fence itself, by being a source of danger to passers-by. I am of opinion that no one is entitled to place what is dangerous to the public or to cattle and sheep on the side of the public road, either for the purpose of defending his lands or his fence. Looking to the length of the space between each post—from fourteen to fifteen feet—any person leaning against the defender's fence would find himself injured by the two barbed wires which are on the inside. I therefore think that the outside plain wires must be kept firmly stretched so as to prevent the risk of damage from the inside wires, and that this must be done by adding to the number of posts by which the wires are supported.

I am equally clear in regard to the barbed wires which are not on the top, but on the outside, of the fence, pointing towards the road, and which about outside the wire-netting which is said to be a protection against them. If there were no wire-netting I do not see that anything could be said in defence of these wires. But the wire-netting is said to mask the barbs, and perhaps it is true that it diminishes the extent to which the barbs will do injury. On the other hand, I am not altogether sure that the masking may not make matters worse, as it acts as a blind to the real danger, and may mislead. Upon the facts as ascertained, I think the only condition on which the defender can be permitted to retain his fence is that he shall place these two wires on the inside, where they would be protected by the posts, which, I have already said, must be added to, with the outside wires attached to them.

I think we should allow the defender an opportunity, first, of putting up additional posts, to which the outside wires are attached, and second, of putting the two outside barbed wires on the inside if he so thinks fit. Failing the implementation of these two conditions, I think we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM.—The placing of additional posts is not the only remedy which must be applied, as the Lord Ordinary seems to think. I think further that the two barbed wires on the outside of the fence must be taken away from their

present place. If they are put on the inside and guarded as the upper ones are, No. 12.
this would probably be quite satisfactory.

The defender having agreed by minute to erect the additional posts, and to remove the outside barbed wires to the inside of the fence, the Court, on 18th November following, pronounced an interlocutor dismissing the action, and finding the pursuers entitled to expenses.

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TODD, MURRAY, & JAMIESON, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

ACCOUNTANT OF COURT, Reporter.—*Moncreiff.*

No. 13.

THOMAS BENNET CLARK (Crumpton's *Curator Bonis*), Compearer.—
G. W. Burnet.

Nov. 12, 1886.
Accountant
of Court v.
Crumpton's
Curator Bonis.

Judicial Factor—Curator Bonis—Trust—Investment—Trusts Amendment Act, 1884 (47 and 48 Vict. c. 63).—A *curator bonis*, being a trustee in the meaning of the Trusts Amendment Act, 1884, is entitled to invest the funds in his hands as curator in the purchase of the stocks and in the loans authorised as trust investments by that Act, notwithstanding that the registration of his name as holder of these stocks cannot by the practice of the Bank of England, where a large number of these stocks are transferable, be qualified by any entry to shew the character in which he holds them, the Bank of England declining to take cognisance of trusts.

Trust—Investments—Trusts Amendment Act, 1884 (47 and 48 Vict. c. 63), sec. 3.—Observations on the expression “approved by the Court of Session” with reference to the investments authorised as trust investments by the Trusts Act, 1884.

Observed (*per* Lord Adam) that stocks approved of in a particular application for approval were not thereby pronounced to be eligible in all cases or in any other case than that before the Court.

THOMAS BENNET CLARK, C.A., Edinburgh, was in 1884 appointed *curator bonis* on the estate of William Thomas Crumpton, then a lunatic, and incapable of managing his own affairs. In his accounts for the period from June 1884 to September 1885 the curator took credit for two sums invested by him, viz., a sum of £699, 2s. 6d. invested in the purchase of £700 Inscribed 4 Per Cent Stock of the Government of Queensland, and a sum of £800 invested in the purchase of £800 Inscribed 4 Per Cent Stock of the Government of New Zealand. The curator inserted this note in his account:—“These two investments have been made under the powers granted to curators and others by the Trusts (Scotland) Amendment Act, 1884. By the decision of the Court in the case of *Orr (Maclean's Trustee)* on 20th December 1884 (12 R. 529), these and other colonial stocks were duly approved by the Court.”

The Accountant reported the investments for the consideration and judgment of the Court, not feeling himself entitled to pass them without obtaining authority to do so. He explained the difficulties and objections to the investments as follows:—“1. In the Colonies, as well as in England, trusts are not recognised, and consequently a purchase of Colonial Government Stock must be registered either in the personal name of the ward or in the personal name of the factor or curator; and the first of these forms is not available where a transfer has to be accepted, as neither a lunatic nor a minor ward can sign a transfer. In the event, however, of registration in the ward's name, the stock cannot be realised during the life of a lunatic ward, nor in case of a minor, until he reaches majority, for Colonial officials will not recognise the title of a judicial curator or factor appointed by the Court of Session. 2. The alternative is to take transfer and effect registration in the factor's per-

1st DIVISION.
Lord Trayner.
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sonal name. This is the form that has been adopted in this case, and the vouchers for the investments made consist of two receipts apparently granted by the sellers in favour of 'Thomas Bennet Clark,' for the prices paid in each case. And 3. of certificate by the chief accountant of the Bank of England (where the stocks were transferable, the bank acting as agents for the Colonial Governments), dated 27th April 1886, that said sums of £800 New Zealand Consolidated 4 Per Cent Stock, and £700 Queensland 4 Per Cent Stock were, at the close of the previous day, standing in the name of the factor, Thomas Bennet Clark. On the above-mentioned receipts the curator has written the following declaration:—'I hereby declare that the stock in this certificate is held by me as *curator bonis* for William Thomas Crumpton. (Signed) THOMAS BENNET CLARK.' The stocks having been registered in the personal name of the curator, they will be entirely under his control, and can be realised by him at any time without authority of the Court, and without the knowledge of the Accountant until the next period of audit, when new certificate from the Bank of England would be required. 4. As the certificate by the Bank of England bears no reference to the ward or his estate, a factor would have it in his power to make several investments of similar amount in the same stocks for different factories, and to produce in each case a certificate by the bank, although, in fact, there had been but one investment. There would be no means of identifying the stock as belonging to one factory and another. Farther, it is for the consideration of the Court how these investments in the personal name of the curator will stand. 1. In the event of the bankruptcy of the curator. The question arises here, what is the legal effect of the declaration of trust written on the receipts? That 'declaration' is only on the receipts, which, it is understood, are of no value, except as acknowledgments of the prices paid. The Bank of England would give no effect to the declaration, and would not look farther than to the identity of the party in whose name registration has been made. They would not acknowledge the right of the ward, or of anyone representing the ward. The stocks and dividends, therefore, could only be realised either by the curator himself, though bankrupt, or by the trustee for his creditors, and possibly the latter might challenge the legal validity of the declaration of trust, and claim the amount as part of the bankrupt's estate. In any view, there would be much complication and expense in recovering for the ward or his estate. In the ordinary transactions in the factories under the Accountant's supervision, he has invariably declined to recognise declarations of trust, in respect that they do not carry to a ward, or to the factor acting for him, a completed title to the securities to which they apply. 2. In the event of the death of a curator. Should that occur during the life of the ward, the latter could not, in any direct form, make good his right. The stocks would have to be given up by the curator's executor as part of his estate, and be included in the probate taken out in England by the executors, and possibly executors might decline to take probate to the stocks, in respect that they did not belong to the executry. Should this occur, how could the ward recover? In any view, expensive procedure would be required at the risk of the ward. The Accountant considers that the investments referred to are eligible in themselves, apart from the special objections now reported."

Lord Trayner, to whom the Accountant's report was submitted, by interlocutor, dated 25th May 1886, appointed the report to be printed and boxed to the Judges of the First Division. His Lordship stated in a note that he did so because the questions raised were very important, and the Accountant desired to have them authoritatively settled.

The curator appeared, and argued ;—The objections of the Accountant applied to consols, a class of investment that was certainly permitted. There was no hard and fast rule in the matter, and the Court had recognised that curators' powers must be made elastic enough to suit the changes in the market.¹ The Court had approved of an investment where the curator's name stood on the register without qualification.² The investments here proposed had been sanctioned by Lord Adam in *Orr's* case,³ and by the terms of the Trusts Act of 1884 a *curator bonis* was in *pari casu* with a trustee.

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The Accountant's argument appears from his report already given.

After the argument the Lord President said that this was an important matter, and that the Court before disposing of it would consult the other Judges, so that the judgment might form a rule of practice.

At advising,—

LORD PRESIDENT.—Mr Thomas Bennet Clark, who was appointed *curator bonis* to William Thomas Crumpton, has in the administration of the curatorial estate made two investments, one of £800 of New Zealand Consolidated Stock, and the other of £699 of stock of the Government of Queensland. When Mr Clark's accounts were presented to the Accountant of Court containing the statement of these investments, it occurred to the Accountant that a question of considerable importance was raised which he ought to report to the Court. Accordingly he did report to the Junior Lord Ordinary, before whom such reports come. He also considered the question to be important, and reported to us; for the same reason we have had a consultation with the rest of the Court, and we are now to state the result.

The curator says that these two investments have been made "under the powers granted to curators and others by the Trusts (Scotland) Amendment Act, 1884," and he refers to the case of *Orr*, decided by my brother Lord Adam in the Outer-House (12 R. 529). Now, the Trusts Act of 1884 has in its second section this definition of the word "trust." "'Trust' shall mean and include any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise." "Trustee" is defined as including "tutor, curator, and judicial factor"; and, again, the section proceeds, "'judicial factor' shall mean any person judicially appointed factor upon a trust-estate, or upon the estate of a person incapable of managing his own affairs, factor *loco tutoris*, factor *loco absentis*, and *curator bonis*."

This is a case of a *curator bonis*, and therefore it appears to me that within the meaning of that Act the curator here is a trustee, and the estate under his management is a trust. That being so, the question is, whether under the third section of the Act he is authorised to make the investments he has made.

That section provides that trustees may invest their funds on certain stocks there mentioned, or in loans on the security of certain stocks. The present investments fall, I think, under the 7th head of the stocks that may be purchased, viz., "East India Stock, stocks or other public funds of the government of any colony of the United Kingdom approved by the Court of Session, and also bonds or documents of debt of any such government approved as aforesaid,

¹ *Grainger's Curator*, Feb. 23, 1876, 3 R. 479.

² *Accountant of Court v. Geddes*, June 29, 1858, 20 D. 1174.

³ *Orr (Maclean's Trustee)*, Jan. 9, 1885 (decided Dec. 12, 1884), 12 R. 529.

No. 13. provided such stocks, bonds, or others are not payable to the bearer." The investments before us are public funds of the government of a colony of the United Kingdom, and, if they are approved by the Court of Session, they may be lawfully taken as investments for trust-funds.

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Now, the Accountant does not say that these are bad investments, nor is it anywhere stated that they are not good as security for the money that is invested. We may take it then that they have been "approved by the Court of Session." But the Accountant has suggested a number of difficulties which apply not only to these investments, but also to a large class of stocks which undoubtedly otherwise form most eligible investments for trust-funds. These difficulties all arise from one source, viz., that the Bank of England will not receive a trustee as holder of stock, but will only recognise individuals, and will not add any condition or qualification of the right of the parties whose names stand in their books as holders of stocks.

If we were to give effect to this objection the result would be that in trusts under the Act of 1884 the Court would not be able to authorise investments in Bank of England Stock or in any public funds of the United Kingdom. In short, consols would be forbidden as an investment. That is a result quite contrary to the provisions of the Act of 1884. I quite agree with Lord Adam's judgment in *Orr's* case, but, independently altogether of that judgment, we could not disapprove of investments such as the present without going in the face of the Act of 1884. I do not think it is necessary therefore to go into the details of these objections. They would be of great force if we were at liberty to do otherwise than follow out the directions of the statute. As it is, I think we must sustain these investments.

LORD MURE concurred.

LORD SHAND.—I am entirely of the same opinion. I think it is sufficient for the disposal of this case to say that if we were to sustain the Accountant's objections the result would be to deprive estates under judicial management of an enormous number of eligible investments. That result might be highly prejudicial to them, for factors would then be restricted to other investments which may be open to more or less serious objection.

I need only add that I think it will be quite proper for the Accountant to continue his practice of earmarking the certificates of the factories under his supervision.

LORD ADAM.—I concur. I only wish to add that I did not intend to decide, and did not decide, in the case of *Maclean* that the stocks then approved of were eligible in all cases or in any other case than the one then before me. It is obvious that these stocks may vary from time to time as eligible investments. All I applied my mind to was the question of whether they were eligible in the particular circumstances of the case. I make that observation because I understand that the practice following upon that decision has been inconsistent with this interpretation of it.

Moncreiff.—The Accountant would desire to know whether application is to be made for approval in each case as it arises, or if he is to consider that a particular investment once approved of by the Court is an eligible investment?

LORD PRESIDENT.—The Accountant has up to this time decided whether in-

vestments are eligible. Nothing that we decide in this case will interfere with his judgment on that matter. No. 13.

LORD MURE.—The Accountant will sanction investments approved of by the Court so long as they continue eligible.

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THE COURT remitted to the Accountant to sustain the investments reported by him for the consideration of the Court.

MILLAR, ROBSON, & INNES, S.S.C.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

EARL OF GLASGOW, Petitioner (Reclaimer).—*Rankine—Dundas.*
COUNTESS OF GLASGOW AND OTHERS, Compearers (Respondents).—
Murray—W. C. Smith.

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Entail—Disentail—Valuing of debts and provisions—Deductions from rental^{1st Division.}
before ascertaining provisions—Rutherford Act, 1848 (11 and 12 Vict. cap. 36),
sec. 6.—The 6th section of the Rutherford Act, 1848, enacts that where an heir of entail applies for authority to disentail he shall produce to the Court an affidavit setting forth the particulars of all debts or provisions affecting or that may be made to affect the fee of the estate or the heirs of entail, "and it shall be lawful for the Court to order such provision as may appear just to be made for such debts or provisions, or for the protection of the parties in right of the same, before granting the authority sought for in such application, or as the condition of granting the same."

In a petition for disentail *held* in estimating the amount of security to be made prior to disentail, in respect of certain Aberdeen Act provisions, by the petitioner in favour of his wife and children, that (1) the rental of the year of disentail must be taken in place of the rental of the year of the granter's death, but that (2) deductions ought not to be made therefrom in respect of terminable rent charges, or in respect of a subsisting annuity in favour of the widow of a former proprietor; and (3) that in computing the amount of security to be granted for the annuity to the petitioner's wife no account should be taken of the children's provisions, nor any account of the widow's annuity in computing the security to be made for the children's provisions, and that security must be granted for the children's provisions to the maximum amount chargeable, although at the date of the disentail there were only two in existence.

THE EARL OF GLASGOW, as heir of entail in possession of the entailed ^{1st Division.}
lands of Kelburne and others in Ayr and Bute, under a deed of entail, Lord Ordinary
dated prior to 1st August 1848, presented a petition for disentail of these on the Bills
lands under the Rutherford Act, 1848, and succeeding Acts, calling the (Shand).
three next heirs of entail, who all lodged consents to the disentail. B.

No answers were lodged to the petition, and the instrument of disentail having been produced, the Lord Ordinary (Trayner) remitted to Mr John Galletly, S.S.C., in the usual course, to inquire whether the procedure had been regular.

A schedule and affidavit was produced to the reporter, in terms of section 12, subsection 5, of the Entail Amendment (Scotland) Act, 1875, from which it appeared that the only unsecured debts or provisions of the nature referred to in that section were (1) an obligation by the petitioner in his antenuptial marriage-contract to grant in favour of his wife, Lady Glasgow, a bond of annuity, binding himself and the succeeding heirs of entail to pay to her an annuity of £3000; and (2) an obligation in the contract of marriage, and a bond of provision following upon it, to pay to the children of the marriage who should be alive at his death, and should not succeed to the estate, if one child, one year's free yearly rent of the estates; if two children, two years' free yearly rent; and if three

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or more children, three years' free yearly rent or value, all in terms of the Aberdeen Act (5 Geo. IV. cap. 87), secs. 1 and 4.

Mr Galletly reported that drafts of two deeds had been submitted, one in favour of the Countess, who was now fifty years of age, and the other in favour of trustees for the petitioner's two children,—both being daughters, and not entitled to succeed to the entailed estate,—the one Lady Gertrude J. G. Boyle or Cochrane, wife of the Honourable Thomas Cochrane, and the other Lady Muriel Boyle, who was unmarried, and in her fourteenth year. The petitioner was in his sixty-first year.

There were also certain terminable rent charges affecting the estate, amounting to £877, 5s. 3d.

The rental of the estate was stated at £8953, 12s. 5d.

He further reported that the following two questions had arisen on which the Lord Ordinary's judgment was desired:—“(1) Whether the whole annual payment on account of the rent charges should not be deducted in fixing the amount of the annuity and children's provisions, or whether it is properly dealt with in the rental produced, or, if not, how it should otherwise be dealt with? and (2) whether the annuity to the Countess, or interest on the actuarial value of the annuity, should not also be taken into account in fixing the amount of the children's provisions?”*

It appeared that there was an annuity also affecting the estates in favour of the Dowager-Countess of Glasgow (now eighty-six years of age), £1500 of which was allocated upon the estates now being disentailed. The petitioner did not propose to deduct this.

After counsel had been heard for the petitioner and for his two daughters, who appeared, the Lord Ordinary on the Bills (Shand), on 21st August 1886, pronounced an interlocutor finding, in terms of Mr Galletly's report, that the procedure had been regular and proper; approving of the instrument of disentail, and granting warrant for its being recorded; ordaining the petitioner to execute the two deeds, one a bond of annuity in favour of Lady Glasgow for £2984, 11s. 9d., and the other a bond and disposition in security over the fee and rents of the estate in favour of trustees for the two children for £26,860, 17s. 3d., “said bond of annuity and disposition in security, and said bond and disposition in security, containing declarations *in gremio* that the said annuity and provisions shall, on the death of the petitioner, be restrictable, in terms of the provisions of the Aberdeen Act, and decerns: Remits to Mr Galletly to revise and adjust the drafts of the said bonds, and to see the same executed and recorded as aforesaid, and to certify that that has been done: Supersedes extract of this interlocutor until the said bond of annuity and disposition in security, and bond and disposition in security, have been so recorded, and a certificate to that effect by Mr Galletly has been lodged in process.”†

* The 6th section of the Rutherford Act (11 and 12 Vict. cap. 36) bears,—
“Be it enacted that where any heir of entail . . . shall apply to the Court of Session under this Act . . . he shall make and produce in such application an affidavit setting forth that there are no entailers' debts or other debts, and no provisions to husbands, widows, or children affecting or that may be made to affect the fee of the said entailed estate or the heirs of entail, or if there are such debts or provisions, setting forth the particulars of the same, . . . and it shall be lawful for the Court to order such provision as may appear just to be made for such debts or provisions, or for the protection of the parties in right of the same, before granting the authority sought for in such application, or as the condition of granting the same . . .”

† “NOTE.—The question raised by the reporter arises under the 6th section of the Entail Amendment Act, 11 and 12 Victoria, chapter 36, which provides

The petitioner reclaimed.

When the case was called the Court remarked that Lady Glasgow was

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that in cases of disentail and the like 'it shall be lawful for the Court to order such provision as may appear just to be made' for debts or provisions which affect, or may be made to affect, the fee of the estate or the heirs of entail, or for the protection of the parties in right of the same. In the present case it is necessary, in authorising the disentail of the estates held by the petitioner, that provision be made to secure the annuity to which the present Countess of Glasgow is entitled under the obligation contained in her antenuptial contract of marriage with the petitioner, and also to secure the provisions in favour of the younger children of the marriage, of whom there are two in life, viz., Lady Gertrude J. G. Boyle or Cochrane, who is of full age, and Lady Muriel Boyle, in minority, under the obligation in favour of younger children in the petitioner's contract of marriage and the relative bond of provision mentioned by the reporter. The annuity and provision must be secured by bonds and dispositions in security so as directly to affect the fee of the estate; and the question which arises between the parties is as to the amounts for which the deeds in favour of the Countess of Glasgow and the younger children respectively are to be granted. The annuity and provisions have been granted under the powers contained under sections 1 and 4 of the Aberdeen Act, under the former of which the widow is entitled only to one-third of the free yearly rent or free yearly value of the estates after the deductions mentioned in the Act; while under the latter the children are entitled at the utmost, in the case of three children, to three years of the free yearly rents or free yearly value of the estate, also after making the deductions specified in the statute. In both cases the rental to which the statute refers in fixing the measure of the widow's and children's provisions is that of the year in which the heir of entail may die and his successors take up the estate. In the case of a disentail such as is now to be carried out, it becomes impossible literally to take the rule of the Aberdeen statute. The property goes into other hands, and may be sold and subdivided into many parcels, and it would be unreasonable to suppose that the rental in the hands of purchasers or successors fifteen or twenty years hence should, after a disentail, form the measure of the provisions to the widow and children of the heir disentailing. There is, I think, no alternative but to take the rental of the year of the disentail as the rule.

"The petitioner further contends, however, that the burdens which affect the estate in the year of the disentail ought also to be taken into view in fixing the deductions from the rental; and his counsel has maintained that in the case of the annuity secured to the Countess of Glasgow there should be deducted—first, the interest on the children's provisions, and second, the amount which the petitioner has this year to pay in respect of rent charges under the improvement statutes, and certain bonds of annual rent enumerated in the statement produced, amounting in all to £877, 5s. 3d. The Countess of Glasgow was not represented by counsel; but the Court is charged with the protection of her interests under the section of the Entail Amendment Act already referred to.

"Again it was maintained that in like manner, in fixing the amounts to be secured for the children's provisions, there ought to be deducted from the rental—first, the amount of the annuity to the Countess of Glasgow, and second, the amount of the annual rent charges and annual rents just referred to. The counsel for the younger children maintained that none of these deductions ought to be made.

"In disposing of this question it is not necessary—and I do not think it would be competent—for me even to attempt to settle the ultimate rights of parties. All that can now be done or that ought now to be done is to order "such provision as may appear to be just" for ultimately meeting the obligations in favour of the Countess of Glasgow and the younger children above referred to. If, however, I had to decide the question I should certainly hold that the proposed deductions from the rental, which would seriously cut into the annuity and provisions, ought not to be allowed. It is true that the dis-

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not represented by counsel. They accordingly appointed a curator *ad litem* to her, and the same counsel who appeared for the children were instructed on her ladyship's behalf.

Argued for the petitioner;—The Aberdeen Act did not contemplate the case of a disentail. In computing the security to be made for these Aberdeen Act provisions it was therefore conceded that the rental of the year of disentail must be taken instead of that of the year of the granter's death as the basis of computation. It followed that the burdens subsisting as at the date of disentail ought to be deducted in estimating the free rental. The following deductions should therefore be made, (1) the amount of rent charges at present burdening the estate; (2) an annuity of £1500 in which the Dowager-Countess was infest, and which the Lord Ordinary alluded to in his note as not insisted on in the Bill-Chamber;

entail renders it necessary to take the rental of the year of disentail as the measure of liability to start with. It does not, however, by any means follow that the burdens of that year must also be taken as deductions. There is a necessity to take the rental. There is no such necessity to take the year of disentail with reference to the burdens; and it appears to me that it would be most unreasonable that the heir of entail disentailing the estate should be thereby entitled not only to the advantage of acquiring the estate in fee-simple, but also to accelerate the date at which the deductions from the rental should be made to the serious prejudice of the creditors, the widow and younger children of the heir of entail. If it were so a disentail would have the remarkable effect of reducing the amount of certain debts on the estate. In the present case I observe the petitioner shrinks from carrying his argument to its full extent, for he does not propose to deduct the annuity now affecting the estates or the heirs of entail, in favour of the Dowager-Countess of Glasgow, amounting to upwards of £3000 [£1500 of this only was allocated on the estates now being disentailed]; while, if his argument be sound, he would be entitled to deduct that sum or a considerable portion of it, although it is understood the annuitant is upwards of eighty-six years of age. It appears to me that as a condition of authorising this disentail provision ought to be made to secure over the estate the utmost amount which the widow or children may yet have as a claim against the estates.

"In that view, first, as regards the present Countess of Glasgow, if she outlive her children there may be no deduction on account of their provisions; and if her husband, the petitioner, now sixty-one years of age, should live to the age of eighty-one or eighty-two, the whole rent charges and annual rents now existing would be paid off. I am therefore of opinion that in making provision for the Countess's annuity neither interest on the children's provisions, nor rent charges, or annual rents, ought to be taken into view; and this being so, the amount for which provision must be made in the bond and disposition in security in her favour must be £2984, 11s. 9d., being one-third of the rental of £8953, 12s. 5d., after deducting interest on the debts secured on the fee of the estate.

"In like manner as regards the children, if their mother predeceased them the annuity could of course form no deduction from the rental, and the same observations already made as to the rent charges and annual rents applies in their case also. The provisions must, therefore, be made by a bond and disposition in security in their favour for the sum of £26,860, 17s. 3d., being three years of the said rental of £8953, 12s. 5d.

"In taking this course as regards the possibility of the Countess of Glasgow predeceasing the petitioner, I understand that I am proceeding on the view to which Lord Kinnear, after full consideration, gave effect in the case of *Falconer Stewart* of Binny, for authority to record instrument of disentail, reported in the S. L. R., vol. xx. p. 867.

"The deeds to be now granted will contain provisions or conditions *in gremio* that the said bonds of annuity and provisions shall on the death of the petitioner be restrictable in terms of the provisions of the Aberdeen Act."

(3) in computing the amount to be secured in respect of Lady Glasgow's annuity, the interest on the children's provisions; and (4) in computing the security to be made for these provisions, the amount of Lady Glasgow's annuity should be deducted.¹

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At all events the matter was in the discretion of the Court, who would not throw any undue burden on the estate, while protecting the interests of the wife and children, and it would be fair, as regarded the rent charges, to deduct interest on the capitalised sum with which the petitioner might, under the Entail Act of 1882 (sec. 6, subsec. 4), have charged the fee of the estate, though he had not chosen to do so. And as regarded the widow's annuity and the children's provisions, a remit should be made to an actuary to estimate the amount of security which in the whole circumstances would probably be sufficient. It would be unjust to burden the estate with an amount of security which could not be really required. For instance, the probability of further issue of the petitioner's marriage was exceedingly remote; and again, Lord Shand had ordained security to be made for a variety of contingencies, all of which could not possibly occur, as for example, Lady Glasgow could not both survive and predecease her issue. The case of *Falconer Stewart*,² cited by the respondents, was distinguishable, because there the disentailing proprietor and his wife were much younger.

Argued for Lady Glasgow and the children;—Though it was necessary to take the rental of the year of disentail instead of that of the grantor's death as the basis of computation, it was not necessary, and would not be just, to deduct the burdens then subsisting in a question of this sort. The Court was not here deciding the ultimate rights of parties. It was a question of security, and the Court should order "such provision as may appear just to be made" (section 6 of Rutherford Act). The power of disentailing was a privilege, but ought not to be exercised to the effect of giving the disentailer advantage over his creditors. The principle laid down by Lord Shand was sound,—viz., that as a condition of authorising the disentail provision ought to be made to secure over the estate the utmost amount which the widow or children may yet have as a claim against the estates.³ This was a statutory question, and the interest of Lord Glasgow's creditors ought not to be taken into account.

At advising,—

LORD PRESIDENT.—In disposing of the matters decided by Lord Shand's interlocutor we must be guided by the 6th section of the Entail Amendment Act (11 and 12 Victoria, cap. 36), which provides that where an heir of entail proceeds to disentail an estate under the immediately preceding sections, provision shall be made for ascertaining whether there are any entailers' debts, or other debts affecting the estate, or provisions for husbands, wives, or children affecting or that may be made to affect the fee of the entailed estate, or the heirs of entail; and if there be any such provisions, then the enactment is, that it shall be lawful for the Court to order such provision as shall be just to be made for such debts or provisions, or for the protection of the parties in right

¹ Brodie v. Brodies, Dec. 6, 1867, 6 Macph. 92, 40 Scot. Jur. 56; Baroness Gray, July 14, 1870, 8 Macph. 990, 42 Scot. Jur. 600; Lord Lovat v. Fraser, June 30, 1885, 12 R. 1179.

² July 7, 1883, 20 S. L. R. 867.

³ Irving v. Irving, Feb. 22, 1871, 9 Macph. 539, 43 Scot. Jur. 306; Duke of Roxburghe v. Russell, June 28, 1881, 8 R. 862; Christie v. Christia, Dec. 10, 1878, 6 R. 301 (Lord Shand at p. 309); Boyd v. Boyd, July 5, 1851, 13 D. 1302; Macdonald v. Lockhart, Dec. 19, 1835, 14 S. 785, 8 Scot. Jur. 110.

N^o. 14. of the same, before granting the authority asked for in such application, or as a condition of granting the same.

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gow.

These are very general words, and they must be read so as to give full effect to the apparent object of this section of the statute, that there shall be a security created for provisions which shall do full justice to the beneficiaries. As Lord Shand has expressed it in the note to his interlocutor under review, it is a condition of authorising the disentail that provision be made to secure over the estate the utmost amount to which the widow or children may, at the death of the husband and father, have a direct claim as against the estates.

Now, the provisions over the estate in the present case, which require to be secured, are, in the first place, an annuity to the present Countess of Glasgow, and, in the second place, a bond of provision in favour of younger children, or of children who do not succeed to the entailed estate, and the provision for them is one year's rent if there is one child, two years' rent if there are two children, and three years' rent if there are three or more children.

The first thing to be ascertained, of course, is what is the rental of the estate; and in dealing with provisions and burdens such as those before us, the ordinary rule is that the rent of the estate is to be taken as at the death of the granter of the provision, the heir of entail who was in possession. But in a case like the present it is quite obvious that that rule cannot be followed. The granter of the provision is still alive, and is the heir in possession disentailing the estate in virtue of the powers of this statute. Some other period must therefore be taken at which the rental of the estate is to be ascertained, and in accordance with our practice the Lord Ordinary has taken the date of the disentail,—I mean the date of the order disentailing,—and to that no objection is made by anybody.

But it is quite obvious that in considering what deductions are to be made from that year's rent, the same rule cannot apply, because the burdens which affect the estate at present are obviously burdens which may not, and probably will not, as regards some of them, affect the rents of the estate, when these provisions come to be paid off. There is, for example, the annuity to the Dowager-Countess, who is a very old lady, and in all human probability will not survive until these provisions become payable on the death of the present Earl of Glasgow. In like manner it may be very doubtful whether the rent charges which at present affect the estate, and which are not of a permanent character, but only for a term of years, may not have ceased to be payable before the death of Lord Glasgow. And again the question arises whether we are to assume in the case of Lady Glasgow's annuity, that her two present children will then be surviving, or whether there may not be three then existing instead of two, and whether, therefore, in ascertaining the rent of the estate at that time, the provisions in favour of the children will require to be taken into account before fixing Lady Glasgow's annuity, and correspondingly whether it is to be taken for granted that Lady Glasgow will survive her husband, and that in fixing the children's provisions Lady Glasgow's annuity will have to be taken into account and form a deduction.

Now, as regards all of these things, I think we must carry out the principle that there may be a sum to be paid which will consist of the prescribed amount of the rent of the estate at the death of Lord Glasgow unaffected by any one of these annual payments at the time that Lord Glasgow's provisions come into operation. It is not only very possible, but very probable, that the Dowager

Lady Glasgow's annuity will have come to an end. It is also very possible, No. 14.
 and in some degree probable, that those rent charges will have ceased to affect Nov. 12, 1846.
 the estate and the rents of it; and it may be—and I say nothing about the Earl of Glas-
 probability as regards them—that when Lady Glasgow's annuity comes to be Gow.
 fixed, there will be no children of the marriage surviving, in which case the
 children's provisions could not be taken into account in fixing the amount of her
 annuity. In like manner, as regards the provisions of the children, we must
 take into account the same considerations as regards the Dowager's annuity and
 the rent charges. We must also take into account that when their provisions
 come to be fixed there may be no burdens affecting the estate in the shape of
 an annuity to their mother, the present Countess. I therefore come to the
 conclusion with the Lord Ordinary that we must take all these into account
 and refuse to give any deduction for the present, either for the Dowager's annuity
 or for the rent charges, or other provisions made by the present heir of entail in
 possession.

There is no doubt that there is some inconvenience, and perhaps apparent
 hardship, in placing upon the estate so large an amount of burden as this
 necessarily entails. This may lead to some embarrassment in settling the price
 of the estate as between the seller and the purchaser in the event of the disen-
 tailing heir selling the estate. But such difficulties may be overcome by the
 seller and purchaser settling on the footing of an actuarial value of the burdens
 left on the estate in accordance with our judgment. But be that as it may, I
 am clearly of opinion that a burden must be laid on the fee of the estate in
 terms of the 6th section of the statute, which shall be sufficient to meet every
 claim arising at the death of the disentailing heir in the most unfavourable view
 for his successors.

For these reasons I am entirely of opinion with the Lord Ordinary that the
 sums mentioned in his interlocutor must be the sums to be inserted in the
 bonds to be granted—of course with a declaration in both bonds that the annuity
 and provisions shall be restrictable upon the death of the petitioner, in terms of
 the Aberdeen Act.

LORD MURE—I quite agree with your Lordship. In the circumstances of
 this case I see no other course that can well be taken but that which the Lord
 Ordinary has adopted.

The date of fixing the amount of provisions and deductions in ordinary cases
 under the Aberdeen Act is the date of the death of the heir in possession, and
 it is quite easy then to ascertain the rental according to which the provisions
 are to be calculated, and what the facts are which require to be taken into
 consideration in fixing these deductions. In the case of a disentail the date of
 the death of the heir must still, I think, be taken as the period for fixing the
 deductions, because that is in compliance with the express provision of the
 Aberdeen Act. But as regards the rental a different rule requires to be applied.
 Because, as the Lord Ordinary has pointed out, the effect of the disentail may lead
 to the removal of the estate from the heir altogether, and place it in the hands of
 other persons, and in that case it cannot be expected that the rental in the hands
 of purchasers fifteen or twenty years after the disentail should “form the measure
 of the provisions to the widow and children of the heir disentailing.” His Lord-
 ship has accordingly held that the rental of the year of the disentail must be

No. 14. taken as the rule, and in that I concur, and indeed I do not understand that there is any serious dispute about that.

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gow.

But the question remains, what are the deductions which fall to be made in the view that the annuitants and children may not be in life at the date of the death of the petitioner, and that certain rent charges now in existence may then have ceased? On that subject I need say no more than that I agree in the views and contingencies so fully explained by your Lordship and the Lord Ordinary. I think the view adopted by the Lord Ordinary, and given effect to in his interlocutor, that the "bond of annuity and disposition in security and said bond and disposition in security shall contain declarations *in gremio* that the said annuity and provisions shall, on the death of the petitioner, be restrictable, in terms of the Aberdeen Act," is quite safe and satisfactory, and is the only course that can with propriety be adopted at present.

LORD SHAND.—I have had the benefit of the renewed argument which took place at your Lordships' bar, and I retain the opinion to which I gave effect in the Bill-Chamber, and have nothing to add to the reasons which I there gave in the note to the interlocutor which has been submitted to the review of your Lordships.

LORD ADAM.—This is a petition for authority to record an instrument of disentail of the estate of Kelburne, and the 6th section of the Entail Act of 1848 says that, in authorising such instrument of disentail to be recorded, we are to make such provisions as may be just for all debts or provisions affecting the estate, or for the protection of the parties in right of the same. That is the duty laid upon us. Now, I agree that it would not be just to make provision for anything less than the maximum amount of provisions to which these parties, the possible widow and children, may become entitled. I think, if an heir of entail for his own purposes wishes to disentail an estate, it is only just that the provisions existing at the time of the disentail in favour of his widow and children should be secured over the estate, so that they shall suffer no prejudice by the disentail. Now, in this case, the maximum to which the widow may become entitled depends upon the number of children, and upon whether there are any, and, if so, how many, surviving at his death. If there are no children surviving, the maximum will of course be larger than if there were children, and I think it would be manifestly unjust to provide for the widow upon any other terms than those which would arise were the children to predecease him. No one can say whether that will be so or not, and therefore I think it would be unjust to fix her annuity on any other footing.

In regard to the children, I think the case is exactly the same. The children may survive, and there may be no widow, the result of which would be that their provisions would be increased, and so it would not be just to them either to proceed on any other footing than that that may be the case.

Then, again, the case becomes more involved by the fact that there are at present rent charges over the estate, at least of a temporary character, which might affect the amounts of both the widow's annuity and the children's provisions. But here, again, these are charges that may never require to be taken into account at all.

So that it all comes to this, that, if the widow predeceases, of course no sum is necessary for her at all, and, on the other hand, if the children predecease, then, of course, no sum is necessary for them either. No one can say how all this

will turn out, and therefore I am of opinion that we must provide for each of these contingencies, and allow for the maximum. There may be apparent hardship in this, but it seems to me that the hardship is more apparent than real, because the heir of entail would arrange terms of sale with a purchaser, not on the footing that the whole sums which are now to be secured will ultimately become a charge on the estate, but by an actuarial calculation as to what the probable sum is that will come to be charged on the estate, and thus allow a settlement to take place at once, instead of postponing it till the petitioner's death.

Upon the whole matter I concur with your Lordship and the Lord Ordinary.

THE COURT adhered to the Lord Ordinary's interlocutor.

J. & F. ANDERSON, W.S.—TODD, MURRAY, & JAMIESON, W.S.—HOPE, MANN, & KIRK, W.S.—Agents.

No. 14.

Nov. 12, 1886.

Earl of Glasgow.

ROBERT RICHARDSON AND ANOTHER (Horsbrugh's Trustees), Pursuers
(Respondents).—*Gloag—Murray.*

No. 15.

Nov. 12, 1886.

Horsbrugh's
Trustees v.
Welch.

RALPH DALYELL WELCH, Defender (Reclaiming).—*M^r Kechnie—Kennedy.*
Warrandice—Trust—Personal liability of trustee.—A person infest as trustee in certain heritable subjects, after consenting to certain bonds being granted over them by his author, which were duly recorded, granted a bond and disposition in security for a new loan which he acknowledged to have received, and bound himself to repay "as trustee." In security of the personal obligation he disposed the subjects "as trustee," and the bond further contained this clause—"I grant warrandice."

In an action by the last bondholder upon the clause of warrandice against the representative of the trustee, held that the trustee was personally bound in warrandice from fact and deed, and was liable for loss arising from the prior bonds to which he was a consenter.

Question, whether he was not personally liable in absolute warrandice.

ON 23d December 1872 the late Mr Charles Welch, afterwards Welch 1st Division.
Tennant, granted a bond and disposition in security for £375 over the Lord Trayner.
lands of Hallfields belonging to him, in favour of a Mr Brody who, in B.
February 1876, assigned it to Mr Robert Richardson and another, the marriage-contract trustees of Mr and Mrs William Horsbrugh.

The bond in question proceeded upon the narrative that, under a bond of relief and disposition, dated 30th December 1858, William Wright of Hallfields and others had disposed to Mr Welch, for the purposes therein mentioned, the lands and others therein described, in which the latter was afterwards duly infest, and empowered him to borrow such sum or sums of money from time to time as might be necessary to enable him to execute the purposes of that deed, and to grant bonds for money so borrowed, "binding the said William Wright and others, their heirs and successors, and the estate thereby conveyed." The bond proceeded,—“Whereas it is necessary, in order to enable me to execute the purposes of said deed, that I should borrow the sum after-noted: Therefore I, as trustee foresaid, grant me to have instantly borrowed and received from Robert John Brody . . . the sum of £375 sterling, which sum I, as trustee foresaid, bind myself and my successors to repay . . . at Whitsunday 1874 . . . and the interest of the said principal sum at the rate of £5 per centum per annum . . . And in security of the personal obligation before written, I, as trustee foresaid, and empowered as aforesaid, dispose to and in favour of the said Robert John Brody,” the lands of Hallfields as there described. The bond farther contained this clause,—“I grant warrandice.”

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Two prior bonds for £5000 and £1300 over Hallfields had been granted by Mr Wright in 1870, to which Mr Welch had been a consenting party. The creditors in the first bond having entered into possession of the subjects, Horsbrugh's trustees sued the executor and general donee of Mr Welch for the amount contained in their bond, and interest thereon from Whitsunday 1884. They sought to enforce this personal liability on various grounds, all of which were dealt with by the Lord Ordinary, but it is only necessary here to refer to the single ground on which the Inner-House proceeded.

The pursuers founded upon the warrandice clause in the bond above quoted, and maintained that in respect of it Mr Welch's representative was personally liable for the amount of the bond.

The Lord Ordinary (Trayner), on 29th March 1886, found that the defender was liable to the pursuers in the sums sued for, *quoad ultra* continued the case, and granted leave to reclaim.*

* "NOTE.— . . . 7th and last of the grounds on which the pursuers ask decree. The bond now held by the pursuers contains the clause,—‘I grant warrandice,’ and in respect of that clause the pursuers maintain that the defender as Mr Welch's representative is personally liable for the amount of the bond, the property over which it was granted having been carried off by a prior bondholder. The facts upon this part of the case stand thus: On 14th May 1870, Mr Wright borrowed £5000 on the security of Hallfields, and in the bond and disposition in security granted for that loan the dispositive clause runs thus:—‘And in security of the several personal obligations before written, I, the said William Wright, with consent of Charles Welch, writer in Cupar, and I, the said Charles Welch, for all my right and interest in the premises, and we both dispoise to and in favour of,’ &c. Mr Welch is no party to the personal obligations in that bond, or to the clause of warrandice, or to anything but the disposition, and that in the terms I have quoted. That bond was duly recorded, and (although not admitted by the pursuers) I hold it sufficiently proved, supported by all the probabilities of the case, that the pursuers were aware, when they took the assignation to the bond they hold, that the £5000 bond was a burden on the estate of Hallfields, preferable to theirs. I do not doubt that the pursuers, or their agents, saw the search of incumbrances over Hallfields, which disclosed the existence of the £5000 bond. The question thus arises—What is the effect of the warrandice granted by Mr Welch? The form of the clause, as used in the bond in question, is statutory, and has a statutory meaning (31 and 32 Vict. cap. 101, sec. 119). ‘The clause of warrandice shall be held to import absolute warrandice as regards the lands and the title-deeds thereof, and warrandice from fact and deed as regards the rents.’ On the mere words of the clause, therefore, as interpreted by statute, Mr Welch is bound in absolute warrandice as regards the lands. There is no doubt that the lands have been taken possession of by the holders of the £5000 bond, who are drawing the rents; and there is another bond for £1300, granted by Mr Wright on 18th July 1870, over Hallfields, to which Mr Welch was a consenter, in the same terms as he consented to the £5000 bond, which is still undischarged, and preferable to the pursuers' bond. It is not said by the defender that the estate of Hallfields will, when sold, yield a price sufficient to pay off all the heritable burdens, while the pursuers aver that it will not. At all events, in the meantime, the lands, so far as affording any security for principal, loan, or interest, have been carried off from the pursuers. In these circumstances, I am of opinion that there has been a breach of warrandice, for which the defender, as representative of Mr Charles Welch, is liable. He must either make good the lands as a security for the pursuers' £375, or pay the amount.

“It was urged by the defender, however, that, looking to the whole scope and tenor of the bond held by the pursuers,—that as it plainly was granted by Mr Welch as a trustee and for trust purposes, the clause of warrandice should be read and construed as if it had been expressed thus:—‘I, as trustee foresaid,

The defender reclaimed, and argued;—The warrandice clause only warranted the title, and did not cover the subjects conveyed. It did not imply an obligation to purge prior incumbrances. There was that distinction between the present case and a case of sale. This was illustrated by the civil law. In the contract of sale under the civil law there was an obligation to purge prior incumbrances, but in the contracts of *pignus* and *hypotheca* there was no such obligation. If this was so under the civil law, it was presumably so also in the law of Scotland.¹ But assuming this was not so, it was only “as trustee” that Mr Welch bound himself in the warrandice clause; and these qualifying words must be imported into it. The clause did not stand alone, and the rest of the deed, the clause imposing the personal obligation, and the dispositive clause, must be looked to in construing it. A trustee’s warrandice was not absolute, but only from fact and deed.

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The respondents argued;—No distinction could be drawn between the effect of a clause of warrandice in an absolute disposition and in a bond and disposition in security.² It was said that the words “as trustee” must be read into the warrandice clause, with the result that the trust-estate only was bound in absolute warrandice, and that, so far as Mr Welch was personally concerned, the warrandice was only from fact and deed. Assuming this was so, Mr Welch had been a consenting party to

grant warrandice,’—and that a trustee’s warrandice was not absolute, but only from fact and deed. It is not free from doubt whether the pursuers are bound to read the clause otherwise than as really expressed, or whether any meaning can be applied to that clause other than the statutory meaning. But the pursuers argued, that if this concession was made to the defender, the result was not affected. It remains still the fact that it is the deed of Mr Welch under which the lands have been carried off. That he was merely a consenter in the terms above given, I do not regard as material, for his consent was, I should think, necessary to the carrying out of the £5000 transaction. At that date Mr Welch was infeft in the lands in security of a right of relief, and also for certain trust purposes. His consent was necessary to the £5000 bond, in order that it might rank preferably to any right he had, and it is improbable that the lender of the £5000 would have taken a security postponed to Mr Welch’s rights. But Mr Welch consented to the £5000 being ranked preferably to the trust purposes, and the bond now in question was granted in fulfilment of trust purposes; and accordingly it must be held that Mr Welch by his deed had done something to lessen the security of those who lent money to the trust on the trust-estate. Mr Welch might easily have protected himself by excepting from the warrandice granted to the pursuers all the then existing burdens. But how does it appear that the pursuers’ cedent or the pursuers would have accepted a security or lent their money on these terms? Taking it, as I do, that the pursuers knew of the existence of the £5000 bond, they were still entitled to rely on the warrandice to this effect, that if the prior bond carried off the estate, the personal liability involved in the warrandice would then arise, so that even then they had some security for the repayment of their loan. I am of opinion, therefore, that upon this ground the pursuers must prevail. They must, however, if required, assign their bond to the defender, so that he may obtain payment out of Hallfields, should it turn out that the proceeds of that estate are sufficient to meet the whole burdens upon it. As this has not been offered on record, I have meantime only pronounced a finding that the defender is liable to make payment of the sums sued for without pronouncing decree therefor. . . .”

¹ Leith Heritages Co. v. Edinburgh and Leith Glass Co., June 7, 1876, 3 R. 789; Campbell v. Gordon, Feb. 21, 1840, 2 D. 639, 12 Scot. Jur. 360, affd. 1 Bell’s Appa. 428.

² Macalister v. Macalister’s Trustees, Feb. 28, 1866, 4 Macph. 495, 38 Scot. Jur. 231.

No. 15. the two previous loans for £5000 and £1300 granted over the estate; and the warrandice clause having created a personal contract between him and the respondents, he was liable for the consequences of his own acts.¹ The only appearance of authority against this result was the case of *Gordon v. Campbell*,² which was a very special case. The law would not be stretched further than it was in that case.

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LORD PRESIDENT.—The Lord Ordinary has found that “the defender is liable to the pursuers in the sums sued for.” These sums amount to £375, which was advanced by the pursuers upon a bond and disposition in security over the estate of Hallfields, with interest thereon. I think the Lord Ordinary has come to a sound conclusion, and I am prepared to adopt his Lordship’s ground of judgment. Supposing the clause of warrandice were to be read as if it had expressed in so many words, “I grant warrandice as trustee, and as trustee only,”—meaning thereby that the lands were warranted against fact and deed—I should still have thought that the defender was liable, because, as Mr Gloag has said, warrandice from fact and deed infers a protection against eviction by reason of the granter’s own act or omission, past or future. In consenting to the execution of the previous bonds for £5000 and £1300, Mr Welch created securities, the holders of which had it in their power to evict the holder of the subsequent bond and disposition in security. I do not think a bond and disposition by Wright would have been effectual without Welch’s consent, but even if that were doubtful, no creditor would have advanced the two sums I have named without Mr Welch’s consent being given to the transaction, and accordingly Mr Welch, by his act and deed, did co-operate with Mr Wright in effecting the securities.

So far I agree with the Lord Ordinary, and I do not think it necessary to consider the larger question, whether the clause of warrandice is binding on Mr Welch personally,—that is, whether he undertook the warrandice obligation *qua* trustee only, or whether he was personally liable to make good the security. I have strong doubts whether he would escape personal liability upon that ground. But I merely wish to guard myself against any possibility of being supposed to have decided anything which conflicts with the application of the doctrine I have repeatedly had occasion to enunciate in regard to the personal liability of trustees.

* LORD MURE concurred.

LORD SHAND.—If the clause of warrandice in the present case had been expressly qualified by the words and “I as trustee foresaid grant warrandice,” I am not satisfied that it would necessarily have followed that there was no absolute warrandice on the part of Mr Welch. We know that in partnership questions trustees have been found personally liable although partners solely *qua* trustees; and in addition to the cases which occurred in connection with the Western and City of Glasgow Bank liquidations, there have been numerous cases in which it has been found that trustees undertaking obligations—*prima facie* in their trust capacity only—will thereby incur personal liability as, *e.g.*, where trustees acting as such employ builders, contractors, or others to do work

¹ Lumsden v. Buchanan, June 22, 1865, 3 Macph. (H. of L.) 89.

² June 13, 1842, 1 Bell’s Appa. 428.

on the trust-estate. So, too, in cases of loan—unless when the obligation is expressly specially guarded, as in the case of *Gordon v. Campbell* (1 Bell's Appa. 428), a personal obligation will be created—and so also as regards obligations by acceptance of bills.

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But upon the other ground the limited warrandice which it is admitted was undertaken plainly implies warrandice from fact and deed, not only as regards future acts and deeds, but also as regards the past. I do not doubt that the previous transactions to which Mr Welch was a consenting party amounted practically to a creation of prior and preferable claims against the subject of the security. So that on this ground I think the pursuers are entitled to succeed in the present question.

LORD ADAM concurred.

THE COURT adhered, and remitted to the Lord Ordinary to proceed further with the cause. On 19th November following the Lord Ordinary gave decree in terms of the conclusions of the summons, but with a declaration that on payment of the sums decreed for the pursuers should grant the defender an assignation of the bond.

MACANDREW, WRIGHT, ELLIS, & BLYTH, W.S.—J. B. DOUGLAS & MITCHELL, W.S.—Agents.

WILLIAM HARVIE, Petitioner.—*Ure.*

No. 16.

WILLIAM ROSS AND THOMAS ROSS, Respondents.—*C. J. Guthrie—A. S. D. Thomson.*

Nov. 18, 1886.
Harvie v. W. and T. Ross.

Interdict—Procedure—Breach—Patent.—A, the holder of a patent, obtained interim interdict against B to prevent infringement. B did not object to the validity of the patent, but immediately thereafter assumed his son, C, as a partner with a view to manufacturing articles which A alleged were in infringement of his patent. A thereupon presented a petition and complaint against B and C for breach of interdict. B and C averred that the articles manufactured by them did not constitute an infringement, and further C challenged the validity of A's patent. *Held* (in conformity with *Dudgeon v. Thomson and Donaldson*, 3 R. 604 and 974, and 4 R. (H. L.) 88), (1) that it was competent to bring C into the process, though the interdict was not directed against him personally, and (2) that C was not entitled to a proof of his averments regarding the validity of the patent.

By deed of assignment, dated 26th December 1883, William Harvie acquired exclusive right to certain letters-patent dealing with improvements in apparatus and valves for regulating the supply of water to water-closets, &c.

1st DIVISION.
B.

The patent was originally the property of William Ross, brassfounder, Glasgow, but subsequently through successive assignations came into the possession of Harvie.

In April 1886, Harvie brought a suspension and interdict against William Ross to have him prevented from manufacturing certain articles which he alleged to be in infringement of his patent, and on 12th May interim interdict was granted by Lord Trayner, Ordinary, "in respect that the respondent has failed to find caution" (for profits) as appointed by a previous interlocutor.

On 18th October Harvie presented a petition and complaint against William Ross, and Thomas Ross, his son, in respect William Ross had continued to manufacture the articles alleged to be in infringement of the patent. The petition further stated;—"He (William Ross) has also, for

No. 16. the purpose of evading the interdict now standing against him, assumed as a partner his son Thomas Ross, who is now actively engaged in pushing the sale of the said valves in Glasgow and elsewhere. The said Thomas Ross is well aware of the said interdict, and of the fact that the valves sold by him and his father are made and sold in infringement of the complainer's patents, and in breach of the said interdict. The said Thomas Ross has thus been and is knowingly and wilfully aiding and abetting the said William Ross in breaking said interdict. The manufacture and sale of valves and apparatus by the said William Ross and Thomas Ross is still continued in breach of said interdict, and to the great prejudice of the petitioner."

Nov. 13, 1886.
Harvie v. W.
and T. Ross.

The petitioner prayed the Court to find that the two respondents had been guilty of contempt of Court and breach of interdict.

William and Thomas Ross lodged separate answers.

William Ross did not raise any question as to the validity of Harvie's patent, but alleged that the articles manufactured by his firm of William Ross & Sons did not constitute an infringement of the patent.

Thomas Ross admitted in articles 1 and 2 of his statement of facts that he was on 14th June 1886 taken into partnership with his father with a view to manufacturing the articles alleged to constitute an infringement of Harvie's patent, but denied that they constituted such an infringement. In articles 3 to 7 of his statement he went on to challenge the validity of Harvie's patent on several grounds, *e.g.*, prior publication, prior use, &c.

He pleaded, *inter alia*;—(2) The valves and apparatus in question being manufactured by the firm of William Ross & Son, the petition ought to be dismissed so far as directed against this respondent. (3) No interdict ever having been obtained by the petitioner against this respondent, the petition and complaint ought to be refused so far as directed against him. (4) The petition and complaint ought to be refused in respect that the letters-patent founded on by the petitioner are invalid on certain specified grounds. (5) Assuming the letters-patent to be valid, the petition should be refused, because the respondent has not infringed the said letters-patent, or manufactured any articles which are interdicted under the said interim interdict.

Argued for the petitioner;—The proof to be allowed should be limited to proof as to whether the articles manufactured by William Ross & Son were in infringement of the patent, and Thomas Ross ought not to be allowed a proof of his averments against the validity of the patent. Such a plea afforded no answer to a petition for breach of interdict and contempt of Court. It was quite competent to try the question of infringement in a petition and complaint; there was nothing in the case of *Dudgeon v. Thomson*¹ to shew that the House of Lords thought that an objectionable or incompetent course. Further, it was competent to bring Thomas Ross into the process though no interdict had been granted against him. He admitted that he had been taken into partnership with his father simply to manufacture these articles, and that he was aware of the interdict having been granted against his father. That state of facts brought him directly under the rule which had been applied to the respondent Donaldson in the case of *Dudgeon v. Thomson*.

Argued for the respondents;—Proof ought at all events to be allowed to shew that the manufacture of these articles did not constitute an infringement. But further, as regarded the son, the petition ought to be dismissed; though he was admittedly in partnership with his father he was

¹ *Dudgeon v. Thomson and Donaldson*, March 17, 1876, 3 R. 604, and July 5, 1876, 3 R. 974, July 10, 1877, 4 R. (H. L.) 88.

working for his own interest, and ought to be allowed to proceed until No. 16. personally interdicted. He ought further to be allowed to attack the validity of the patent as, if it turned out that he was right in thinking that the patent was bad, that would affect materially the view to be taken of his conduct. Nov. 13, 1886.
Harvie v. W.
and T. Ross.

LORD PRESIDENT.—I am of opinion in this case that the complainer is entitled to a proof of his averments, and that William Ross is entitled to a proof of his, and that Thomas Ross is entitled to a proof of his averments in articles 1 and 2 of his answers, but not of those in the remaining articles.

The first question raised is as to the competency of trying this question in the form of a petition and complaint for breach of interdict, and I cannot say that I have any doubt on that point. The question is really, no doubt, whether the patent has been infringed, but also there is the question whether by so infringing the patent the respondents have committed a breach of interdict. The facts on which the decision of both these questions rests are the same, viz., whether the patent has been infringed, and there seems to me to be nothing in the decision in the case of *Dudgeon v. Thomson* to give ground for supposing that the House of Lords thought that there was any objection to trying such a question by way of a petition and complaint for breach of interdict.

The House of Lords no doubt thought in that case that we had gone wrong, because, after the interdict was granted and before the petition and complaint for breach of interdict was presented, the patentee had lodged a note of disclaimer and alteration, and the effect of that was to bar him from objecting to an infringement of the patent as it originally stood. There is, however, nothing of that kind here.

Then the position of Thomas Ross here, as being a party acting in combination with his father, and as his partner, seems to me to be exactly the same as the position of Donaldson in the case of *Dudgeon v. Thomson*, for there Donaldson was assumed as a partner in exactly the same way as Thomas Ross was assumed as a partner here. The case of *Dudgeon* on that point is therefore precisely in point, and it is quite competent to bring Thomas Ross into this process though the interdict was not directed against him personally.

As regards William Ross, he does not raise any question as to the validity of the patent, and he could not do so, as he himself was once owner of the patent and assigned it to someone else, who in turn assigned it to the complainer. The son, however, does raise a question as to the validity by articles 3-7 of his averments, and the next question is, is he entitled to a proof of those articles? I apprehend he is not. The father was interdicted. He was not in a position to raise any question of the validity of the patent, and he cannot do so now, but the complaint against the son is not only that there has been an infringement of the patent, but that he has committed a breach of interdict by aiding and abetting his father in infringing. Now, I do not think that Thomas can be heard when he challenges the validity of the patent as an answer to that complaint, and therefore I think we should remit to the Lord Ordinary to take such a proof as I have proposed.

LORD MURE.—I concur in thinking that a proof should be allowed to the limited extent proposed by your Lordship. I have looked into the observations of the Lord Chancellor in the case of *Dudgeon*, and I find there nothing to lead

No. 16. me to suppose that the House of Lords thought that such a process as the present was an improper one to try the question we have raised here. As regards
 Nov. 13, 1886. the question whether Thomas Ross can be brought into the process, I think the
 Harvie v. W. position of Donaldson in the case of *Dudgeon* is precisely in point. I therefore
 and T. Ross. concur in the course proposed by your Lordship.

LORD SHAND.—The simple question raised here is whether the respondent, having been interdicted from manufacturing a certain patented article, has in defiance of the order of the Court gone on manufacturing it. The sole issue that can be raised in that process is whether, assuming the patent to be valid, there has been an infringement of it. In a question with William Ross it is clear that is the only issue, but there is also the question as regards Thomas Ross, whether he is excluded from raising an objection to the validity of the patent. Now, he is not carrying out an independent manufacture of the article but he was assumed as a partner simply with a view to carrying out the manufacture of the articles which are alleged to constitute an infringement. If the complainer does not succeed in shewing that Thomas Ross knowingly assisted his father in infringing the patent then he will fail in his complaint, but if he does succeed then Thomas Ross cannot be entitled to shew as an answer to the complaint that the patent is invalid. But Thomas Ross has not even averred that he has been carrying on an independent manufacture, but admits that he is carrying on the business in conjunction with his father. If that is so, I cannot see how he can attack the patent on any of the usual grounds. The simple question therefore that must go to proof is, has there been an infringement of the patent, assuming it to be valid?

LORD ADAM.—As regards the father, William Ross, the only question is whether, assuming the patent to be valid, there has been an infringement of it. As regards the son Thomas, the only question is whether he has aided and abetted his father in infringing the patent in the knowledge that there was an interdict standing against such infringement. I therefore concur in the course proposed to be taken here.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel on the petition and complaint and answers, find the petitioner and William Ross entitled to a proof of their averments, and the respondent, Thomas Ross, to a proof of his averments in articles 1 and 2 of his statement of facts: Repel the 2d, 3d, and 4th pleas in law for the said Thomas Ross: Remit to Lord Kinnear, Ordinary, to try the cause before himself without a jury."

THOMSON, DICKSON, & SHAW, W.S.—J. STEWART GELLATLY, S.S.C.—Agents.

No. 17. SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY, LIMITED, AND OTHERS, Petitioners.—*Murray—W. C. Smith.*

Nov. 16, 1886. DUNCAN MACPHERSON, Respondent.—*Sol.-Gen. Robertson—Asher—Cosens.*
 Scottish Rights of Way and Recreation Society, Limited, &c. v. Lord Ordinary without a jury *refused.*
 Macpherson.

THIS case was reported *supra*, p. 7. The pursuers presented a petition for leave to appeal to the House of Lords against the judgment in that case. They stated that "the petitioners are advised that, according to the inveterate practice of your Lordships' Court, sanctioned by the House

2D DIVISION.
 Lord Kinnear.
 M.

of Lords, such cases are tried on issues by a Lord Ordinary and a jury. No. 17.
 The greatly increased cost and uncertainty of an inquiry by means of proof before a Lord Ordinary, subject to appeal on questions of fact to the Inner-House of the Court of Session and to the House of Lords, gives the petitioners a material interest in the observance of the practice of your Lordships' Court; and as the petitioners the said society are charged with the public interest in this case, and in other similar cases, they deem it their duty to obtain the judgment of the House of Lords upon the question of procedure."

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After hearing counsel for the petitioners,—

LORD JUSTICE-CLERK.—This is a novel application. The question we considered when the case originally came before us was whether the interlocutor of the Lord Ordinary appointing the case to be tried upon issues by a jury should be adhered to, or whether it was more desirable that it should be tried without a jury before his Lordship. That was a question that certainly admitted of two opinions, and we took the opportunity of consulting our brethren upon it, with the result that we ordered the case to be tried without a jury.

I need not detail the reasons which led us to that result. In disposing of the case we did not lay down any rule that could be applied generally; the case was determined on its own circumstances merely. We are now asked to allow an appeal against that procedure judgment to the House of Lords. I am of opinion that there is no good ground for granting that motion.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD M'LAREN.—If this had been a question whether cases of this kind should or should not be appropriated to jury trial, it would have been a very proper question for an appeal to the House of Lords. But it being admitted that this is a question for your Lordships' discretion, I am quite sure that the House of Lords would not interfere with that discretion, and therefore it would be no benefit to the pursuers, but the reverse, to allow the case to go there.

THE COURT refused the prayer of the petition.

ANDREW NEWLANDS, S.S.C.—TAIT & CREIGHTON, W.S.—Agents.

JOHN GORDON, Pursuer (Reclaimer).—*Pearson—Shaw.*
 BRITISH AND FOREIGN METALINE COMPANY AND OTHERS, Defenders
 (Respondents).—*D.-F. Mackintosh—Macfarlane.*
 WILLIAM BRUCE THOMPSON, Defender (Respondent).—*C. S. Dickson.*

No. 18.

Nov. 16, 1886.
 Gordon v.
 British and
 Foreign Meta-
 line Co. &c.

Reparation—Judicial slander—Malice—Relevancy.—In an action for damages for judicial slander the pursuer must aver facts and circumstances from which the jury may reasonably infer malice.

Averments of facts and circumstances which were held relevant to support an issue for judicial slander.

Scott v. Turnbull (11 R. 1131) considered.

Reparation—Judicial slander—Partnership.—A company or a private partnership may be sued for damages for judicial slander, notwithstanding that malice must be proved against the defenders.

Reparation—Judicial slander.—Held (rev. judgment of Lord M'Laren) that an action of damages for judicial slander is relevant although the matter alleged to be libellous formed the whole subject-matter of the original action.

Process—Summons—Defenders—Partnership.—An action was brought against a descriptive firm and the individual partners thereof, "as such partners and as

No. 14. of the same, before granting the authority asked for in such application, or as a condition of granting the same.

Nov. 12, 1886.
Earl of Glas-
gow.

These are very general words, and they must be read so as to give full effect to the apparent object of this section of the statute, that there shall be a security created for provisions which shall do full justice to the beneficiaries. As Lord Shand has expressed it in the note to his interlocutor under review, it is a condition of authorising the disentail that provision be made to secure over the estate the utmost amount to which the widow or children may, at the death of the husband and father, have a direct claim as against the estates.

Now, the provisions over the estate in the present case, which require to be secured, are, in the first place, an annuity to the present Countess of Glasgow, and, in the second place, a bond of provision in favour of younger children, or of children who do not succeed to the entailed estate, and the provision for them is one year's rent if there is one child, two years' rent if there are two children, and three years' rent if there are three or more children.

The first thing to be ascertained, of course, is what is the rental of the estate; and in dealing with provisions and burdens such as those before us, the ordinary rule is that the rent of the estate is to be taken as at the death of the granter of the provision, the heir of entail who was in possession. But in a case like the present it is quite obvious that that rule cannot be followed. The granter of the provision is still alive, and is the heir in possession disentailing the estate in virtue of the powers of this statute. Some other period must therefore be taken at which the rental of the estate is to be ascertained, and in accordance with our practice the Lord Ordinary has taken the date of the disentail,—I mean the date of the order disentailing,—and to that no objection is made by anybody.

But it is quite obvious that in considering what deductions are to be made from that year's rent, the same rule cannot apply, because the burdens which affect the estate at present are obviously burdens which may not, and probably will not, as regards some of them, affect the rents of the estate, when these provisions come to be paid off. There is, for example, the annuity to the Dowager-Countess, who is a very old lady, and in all human probability will not survive until these provisions become payable on the death of the present Earl of Glasgow. In like manner it may be very doubtful whether the rent charges which at present affect the estate, and which are not of a permanent character, but only for a term of years, may not have ceased to be payable before the death of Lord Glasgow. And again the question arises whether we are to assume in the case of Lady Glasgow's annuity, that her two present children will then be surviving, or whether there may not be three then existing instead of two, and whether, therefore, in ascertaining the rent of the estate at that time, the provisions in favour of the children will require to be taken into account before fixing Lady Glasgow's annuity, and correspondingly whether it is to be taken for granted that Lady Glasgow will survive her husband, and that in fixing the children's provisions Lady Glasgow's annuity will have to be taken into account and form a deduction.

Now, as regards all of these things, I think we must carry out the principle that there may be a sum to be paid which will consist of the prescribed amount of the rent of the estate at the death of Lord Glasgow unaffected by any one of these annual payments at the time that Lord Glasgow's provisions come into operation. It is not only very possible, but very probable, that the Dowager

Lady Glasgow's annuity will have come to an end. It is also very possible, No. 14.
 and in some degree probable, that those rent charges will have ceased to affect Nov. 12, 1886.
 the estate and the rents of it; and it may be—and I say nothing about the Earl of Glas-
 probability as regards them—that when Lady Glasgow's annuity comes to be GOW.
 fixed, there will be no children of the marriage surviving, in which case the
 children's provisions could not be taken into account in fixing the amount of her
 annuity. In like manner, as regards the provisions of the children, we must
 take into account the same considerations as regards the Dowager's annuity and
 the rent charges. We must also take into account that when their provisions
 come to be fixed there may be no burdens affecting the estate in the shape of
 an annuity to their mother, the present Countess. I therefore come to the
 conclusion with the Lord Ordinary that we must take all these into account
 and refuse to give any deduction for the present, either for the Dowager's annuity
 or for the rent charges, or other provisions made by the present heir of entail in
 possession.

There is no doubt that there is some inconvenience, and perhaps apparent
 hardship, in placing upon the estate so large an amount of burden as this
 necessarily entails. This may lead to some embarrassment in settling the price
 of the estate as between the seller and the purchaser in the event of the disen-
 tailing heir selling the estate. But such difficulties may be overcome by the
 seller and purchaser settling on the footing of an actuarial value of the burdens
 left on the estate in accordance with our judgment. But be that as it may, I
 am clearly of opinion that a burden must be laid on the fee of the estate in
 terms of the 6th section of the statute, which shall be sufficient to meet every
 claim arising at the death of the disentailing heir in the most unfavourable view
 for his successors.

For these reasons I am entirely of opinion with the Lord Ordinary that the
 sums mentioned in his interlocutor must be the sums to be inserted in the
 bonds to be granted—of course with a declaration in both bonds that the annuity
 and provisions shall be restrictable upon the death of the petitioner, in terms of
 the Aberdeen Act.

LORD MURE.—I quite agree with your Lordship. In the circumstances of
 this case I see no other course that can well be taken but that which the Lord
 Ordinary has adopted.

The date of fixing the amount of provisions and deductions in ordinary cases
 under the Aberdeen Act is the date of the death of the heir in possession, and
 it is quite easy then to ascertain the rental according to which the provisions
 are to be calculated, and what the facts are which require to be taken into
 consideration in fixing these deductions. In the case of a disentail the date of
 the death of the heir must still, I think, be taken as the period for fixing the
 deductions, because that is in compliance with the express provision of the
 Aberdeen Act. But as regards the rental a different rule requires to be applied.
 Because, as the Lord Ordinary has pointed out, the effect of the disentail may lead
 to the removal of the estate from the heir altogether, and place it in the hands of
 other persons, and in that case it cannot be expected that the rental in the hands
 of purchasers fifteen or twenty years after the disentail should “form the measure
 of the provisions to the widow and children of the heir disentailing.” His Lord-
 ship has accordingly held that the rental of the year of the disentail must be

No. 14. taken as the rule, and in that I concur, and indeed I do not understand that there is any serious dispute about that.

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gow.

But the question remains, what are the deductions which fall to be made in the view that the annuitants and children may not be in life at the date of the death of the petitioner, and that certain rent charges now in existence may then have ceased? On that subject I need say no more than that I agree in the views and contingencies so fully explained by your Lordship and the Lord Ordinary. I think the view adopted by the Lord Ordinary, and given effect to in his interlocutor, that the "bond of annuity and disposition in security and said bond and disposition in security shall contain declarations *in gremio* that the said annuity and provisions shall, on the death of the petitioner, be restrictive, in terms of the Aberdeen Act," is quite safe and satisfactory, and is the only course that can with propriety be adopted at present.

LORD SHAND.—I have had the benefit of the renewed argument which took place at your Lordships' bar, and I retain the opinion to which I gave effect in the Bill-Chamber, and have nothing to add to the reasons which I there gave in the note to the interlocutor which has been submitted to the review of your Lordships.

LORD ADAM.—This is a petition for authority to record an instrument of disentail of the estate of Kelburne, and the 6th section of the Entail Act of 1848 says that, in authorising such instrument of disentail to be recorded, we are to make such provisions as may be just for all debts or provisions affecting the estate, or for the protection of the parties in right of the same. That is the duty laid upon us. Now, I agree that it would not be just to make provision for anything less than the maximum amount of provisions to which these parties, the possible widow and children, may become entitled. I think, if an heir of entail for his own purposes wishes to disentail an estate, it is only just that the provisions existing at the time of the disentail in favour of his widow and children should be secured over the estate, so that they shall suffer no prejudice by the disentail. Now, in this case, the maximum to which the widow may become entitled depends upon the number of children, and upon whether there are any, and, if so, how many, surviving at his death. If there are no children surviving, the maximum will of course be larger than if there were children, and I think it would be manifestly unjust to provide for the widow upon any other terms than those which would arise were the children to predecease him. No one can say whether that will be so or not, and therefore I think it would be unjust to fix her annuity on any other footing.

In regard to the children, I think the case is exactly the same. The children may survive, and there may be no widow, the result of which would be that their provisions would be increased, and so it would not be just to them either to proceed on any other footing than that that may be the case.

Then, again, the case becomes more involved by the fact that there are at present rent charges over the estate, at least of a temporary character, which might affect the amounts of both the widow's annuity and the children's provisions. But here, again, these are charges that may never require to be taken into account at all.

So that it all comes to this, that, if the widow predeceases, of course no sum is necessary for her at all, and, on the other hand, if the children predecease, then, of course, no sum is necessary for them either. No one can say how all this

will turn out, and therefore I am of opinion that we must provide for each of these contingencies, and allow for the maximum. There may be apparent hardship in this, but it seems to me that the hardship is more apparent than real, because the heir of entail would arrange terms of sale with a purchaser, not on the footing that the whole sums which are now to be secured will ultimately become a charge on the estate, but by an actuarial calculation as to what the probable sum is that will come to be charged on the estate, and thus allow a settlement to take place at once, instead of postponing it till the petitioner's death.

Upon the whole matter I concur with your Lordship and the Lord Ordinary.

THE COURT adhered to the Lord Ordinary's interlocutor.

J. & F. ANDERSON, W.S.—TODD, MURRAY, & JAMIESON, W.S.—HOPE, MANN, & KIRK, W.S.—Agents.

No. 14.

Nov. 12, 1886.

Earl of Glasgow.

ROBERT RICHARDSON AND ANOTHER (Horsburgh's Trustees), Pursuers
(Respondents).—*Gloag—Murray.*

No. 15.

Nov. 12, 1886.

Horsburgh's Trustees v. Welch.

RALPH DALYELL WELCH, Defender (Reclaimer).—*McKechnie—Kennedy.*

Warrandice—Trust—Personal liability of trustee.—A person infeft as trustee in certain heritable subjects, after consenting to certain bonds being granted over them by his author, which were duly recorded, granted a bond and disposition in security for a new loan which he acknowledged to have received, and bound himself to repay "as trustee." In security of the personal obligation he disposed the subjects "as trustee," and the bond further contained this clause—"I grant warrandice."

In an action by the last bondholder upon the clause of warrandice against the representative of the trustee, held that the trustee was personally bound in warrandice from fact and deed, and was liable for loss arising from the prior bonds to which he was a consentor.

Question, whether he was not personally liable in absolute warrandice.

On 23d December 1872 the late Mr Charles Welch, afterwards Welch Tennant, granted a bond and disposition in security for £375 over the lands of Hallfields belonging to him, in favour of a Mr Brody who, in February 1876, assigned it to Mr Robert Richardson and another, the marriage-contract trustees of Mr and Mrs William Horsburgh.

The bond in question proceeded upon the narrative that, under a bond of relief and disposition, dated 30th December 1858, William Wright of Hallfields and others had disposed to Mr Welch, for the purposes therein mentioned, the lands and others therein described, in which the latter was afterwards duly infeft, and empowered him to borrow such sum or sums of money from time to time as might be necessary to enable him to execute the purposes of that deed, and to grant bonds for money so borrowed, "binding the said William Wright and others, their heirs and successors, and the estate thereby conveyed." The bond proceeded,—“Whereas it is necessary, in order to enable me to execute the purposes of said deed, that I should borrow the sum afternoted: Therefore I, as trustee foresaid, grant me to have instantly borrowed and received from Robert John Brody . . . the sum of £375 sterling, which sum I, as trustee foresaid, bind myself and my successors to repay . . . at Whitsunday 1874 . . . and the interest of the said principal sum at the rate of £5 per centum per annum . . . And in security of the personal obligation before written, I, as trustee foresaid, and empowered as aforesaid, dispose to and in favour of the said Robert John Brody,” the lands of Hallfields as there described. The bond further contained this clause,—“I grant warrandice.”

1st Division.
Lord Trayner.
B.

No. 15.

Nov. 12, 1886.
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Two prior bonds for £5000 and £1300 over Hallfields had been granted by Mr Wright in 1870, to which Mr Welch had been a consenting party. The creditors in the first bond having entered into possession of the subjects, Horsbrugh's trustees sued the executor and general disponee of Mr Welch for the amount contained in their bond, and interest thereon from Whitsunday 1884. They sought to enforce this personal liability on various grounds, all of which were dealt with by the Lord Ordinary, but it is only necessary here to refer to the single ground on which the Inner-House proceeded.

The pursuers founded upon the warrandice clause in the bond above quoted, and maintained that in respect of it Mr Welch's representative was personally liable for the amount of the bond.

The Lord Ordinary (Trayner), on 29th March 1886, found that the defender was liable to the pursuers in the sums sued for, *quoad ultra* continued the case, and granted leave to reclaim.*

* "NOTE.— . . . 7th and last of the grounds on which the pursuers ask decree. The bond now held by the pursuers contains the clause,—‘I grant warrandice,’ and in respect of that clause the pursuers maintain that the defender as Mr Welch's representative is personally liable for the amount of the bond, the property over which it was granted having been carried off by a prior bondholder. The facts upon this part of the case stand thus: On 14th May 1870, Mr Wright borrowed £5000 on the security of Hallfields, and in the bond and disposition in security granted for that loan the dispositive clause runs thus:—‘And in security of the several personal obligations before written, I, the said William Wright, with consent of Charles Welch, writer in Cupar, and I, the said Charles Welch, for all my right and interest in the premises, and we both dispense to and in favour of,’ &c. Mr Welch is no party to the personal obligations in that bond, or to the clause of warrandice, or to anything but the disposition, and that in the terms I have quoted. That bond was duly recorded, and (although not admitted by the pursuers) I hold it sufficiently proved, supported by all the probabilities of the case, that the pursuers were aware, when they took the assignation to the bond they hold, that the £5000 bond was a burden on the estate of Hallfields, preferable to theirs. I do not doubt that the pursuers, or their agents, saw the search of incumbrances over Hallfields, which disclosed the existence of the £5000 bond. The question thus arises—What is the effect of the warrandice granted by Mr Welch? The form of the clause, as used in the bond in question, is statutory, and has a statutory meaning (31 and 32 Vict. cap. 101, sec. 119). ‘The clause of warrandice shall be held to import absolute warrandice as regards the lands and the title-deeds thereof, and warrandice from fact and deed as regards the rents.’ On the mere words of the clause, therefore, as interpreted by statute, Mr Welch is bound in absolute warrandice as regards the lands. There is no doubt that the lands have been taken possession of by the holders of the £5000 bond, who are drawing the rents; and there is another bond for £1300, granted by Mr Wright on 18th July 1870, over Hallfields, to which Mr Welch was a consenter, in the same terms as he consented to the £5000 bond, which is still undischarged, and preferable to the pursuers' bond. It is not said by the defender that the estate of Hallfields will, when sold, yield a price sufficient to pay off all the heritable burdens, while the pursuers aver that it will not. At all events, in the meantime, the lands, so far as affording any security for principal, loan, or interest, have been carried off from the pursuers. In these circumstances, I am of opinion that there has been a breach of warrandice, for which the defender, as representative of Mr Charles Welch, is liable. He must either make good the lands as a security for the pursuers' £375, or pay the amount.

“It was urged by the defender, however, that, looking to the whole scope and tenor of the bond held by the pursuers,—that as it plainly was granted by Mr Welch as a trustee and for trust purposes, the clause of warrandice should be read and construed as if it had been expressed thus:—‘I, as trustee foresaid,

The defender reclaimed, and argued;—The warrandice clause only warranted the title, and did not cover the subjects conveyed. It did not imply an obligation to purge prior incumbrances. There was that distinction between the present case and a case of sale. This was illustrated by the civil law. In the contract of sale under the civil law there was an obligation to purge prior incumbrances, but in the contracts of *pignus* and *hypotheca* there was no such obligation. If this was so under the civil law, it was presumably so also in the law of Scotland.¹ But assuming this was not so, it was only “as trustee” that Mr Welch bound himself in the warrandice clause; and these qualifying words must be imported into it. The clause did not stand alone, and the rest of the deed, the clause imposing the personal obligation, and the dispositive clause, must be looked to in construing it. A trustee’s warrandice was not absolute, but only from fact and deed.

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The respondents argued;—No distinction could be drawn between the effect of a clause of warrandice in an absolute disposition and in a bond and disposition in security.² It was said that the words “as trustee” must be read into the warrandice clause, with the result that the trust-estate only was bound in absolute warrandice, and that, so far as Mr Welch was personally concerned, the warrandice was only from fact and deed. Assuming this was so, Mr Welch had been a consenting party to

grant warrandice,’—and that a trustee’s warrandice was not absolute, but only from fact and deed. It is not free from doubt whether the pursuers are bound to read the clause otherwise than as really expressed, or whether any meaning can be applied to that clause other than the statutory meaning. But the pursuers argued, that if this concession was made to the defender, the result was not affected. It remains still the fact that it is the deed of Mr Welch under which the lands have been carried off. That he was merely a consenter in the terms above given, I do not regard as material, for his consent was, I should think, necessary to the carrying out of the £5000 transaction. At that date Mr Welch was infeft in the lands in security of a right of relief, and also for certain trust purposes. His consent was necessary to the £5000 bond, in order that it might rank preferably to any right he had, and it is improbable that the lender of the £5000 would have taken a security postponed to Mr Welch’s rights. But Mr Welch consented to the £5000 being ranked preferably to the trust purposes, and the bond now in question was granted in fulfilment of trust purposes; and accordingly it must be held that Mr Welch by his deed had done something to lessen the security of those who lent money to the trust on the trust-estate. Mr Welch might easily have protected himself by excepting from the warrandice granted to the pursuers all the then existing burdens. But how does it appear that the pursuers’ cedent or the pursuers would have accepted a security or lent their money on these terms? Taking it, as I do, that the pursuers knew of the existence of the £5000 bond, they were still entitled to rely on the warrandice to this effect, that if the prior bond carried off the estate, the personal liability involved in the warrandice would then arise, so that even then they had some security for the repayment of their loan. I am of opinion, therefore, that upon this ground the pursuers must prevail. They must, however, if required, assign their bond to the defender, so that he may obtain payment out of Hallfields, should it turn out that the proceeds of that estate are sufficient to meet the whole burdens upon it. As this has not been offered on record, I have meantime only pronounced a finding that the defender is liable to make payment of the sums sued for without pronouncing decree therefor. . . .”

¹ Leith Heritages Co. v. Edinburgh and Leith Glass Co., June 7, 1876, 3 R. 789; Campbell v. Gordon, Feb. 21, 1840, 2 D. 639, 12 Scot. Jur. 360, affd. 1 Bell’s App. 428.

² Macalister v. Macalister’s Trustees, Feb. 28, 1866, 4 Macph. 495, 38 Scot. Jur. 231.

No. 15. the two previous loans for £5000 and £1300 granted over the estate; and the warrandice clause having created a personal contract between him and the respondents, he was liable for the consequences of his own acts.¹ The only appearance of authority against this result was the case of *Gordon v. Campbell*,² which was a very special case. The law would not be stretched further than it was in that case.

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LORD PRESIDENT.—The Lord Ordinary has found that “the defender is liable to the pursuers in the sums sued for.” These sums amount to £375, which was advanced by the pursuers upon a bond and disposition in security over the estate of Hallfields, with interest thereon. I think the Lord Ordinary has come to a sound conclusion, and I am prepared to adopt his Lordship’s ground of judgment. Supposing the clause of warrandice were to be read as if it had expressed in so many words, “I grant warrandice as trustee, and as trustee only,”—meaning thereby that the lands were warranted against fact and deed—I should still have thought that the defender was liable, because, as Mr Gloag has said, warrandice from fact and deed infers a protection against eviction by reason of the granter’s own act or omission, past or future. In consenting to the execution of the previous bonds for £5000 and £1300, Mr Welch created securities, the holders of which had it in their power to evict the holder of the subsequent bond and disposition in security. I do not think a bond and disposition by Wright would have been effectual without Welch’s consent, but even if that were doubtful, no creditor would have advanced the two sums I have named without Mr Welch’s consent being given to the transaction, and accordingly Mr Welch, by his act and deed, did co-operate with Mr Wright in effecting the securities.

So far I agree with the Lord Ordinary, and I do not think it necessary to consider the larger question, whether the clause of warrandice is binding on Mr Welch personally,—that is, whether he undertook the warrandice obligation *qua* trustee only, or whether he was personally liable to make good the security. I have strong doubts whether he would escape personal liability upon that ground. But I merely wish to guard myself against any possibility of being supposed to have decided anything which conflicts with the application of the doctrine I have repeatedly had occasion to enunciate in regard to the personal liability of trustees.

LORD MURE concurred.

LORD SHAND.—If the clause of warrandice in the present case had been expressly qualified by the words and “I as trustee foresaid grant warrandice,” I am not satisfied that it would necessarily have followed that there was no absolute warrandice on the part of Mr Welch. We know that in partnership questions trustees have been found personally liable although partners solely *qua* trustees; and in addition to the cases which occurred in connection with the Western and City of Glasgow Bank liquidations, there have been numerous cases in which it has been found that trustees undertaking obligations—*prima facie* in their trust capacity only—will thereby incur personal liability as, *e.g.*, where trustees acting as such employ builders, contractors, or others to do work

¹ Lumden v. Buchanan, June 22, 1865, 3 Macph. (H. of L.) 89.

² June 13, 1842, 1 Bell’s Appa. 428.

on the trust-estate. So, too, in cases of loan—unless when the obligation is expressly specially guarded, as in the case of *Gordon v. Campbell* (1 Bell's Appa. 428), a personal obligation will be created—and so also as regards obligations by acceptance of bills.

But upon the other ground the limited warrandice which it is admitted was undertaken plainly implies warrandice from fact and deed, not only as regards future acts and deeds, but also as regards the past. I do not doubt that the previous transactions to which Mr Welch was a consenting party amounted practically to a creation of prior and preferable claims against the subject of the security. So that on this ground I think the pursuers are entitled to succeed in the present question.

LORD ADAM concurred.

THE COURT adhered, and remitted to the Lord Ordinary to proceed further with the cause. On 19th November following the Lord Ordinary gave decree in terms of the conclusions of the summons, but with a declaration that on payment of the sums decerned for the pursuers should grant the defender an assignation of the bond.

MACANDREW, WRIGHT, ELLIS, & BLYTH, W.S.—J. B. DOUGLAS & MITCHELL, W.S.—Agents.

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WILLIAM HARVIE, Petitioner.—*Ure.*

WILLIAM ROSS AND THOMAS ROSS, Respondents.—*C. J. Guthrie—
A. S. D. Thomson.*

No. 16.

Nov. 13, 1886.
Harvie v. W.
and T. Ross.

Interdict—Procedure—Breach—Patent.—A, the holder of a patent, obtained interim interdict against B to prevent infringement. B did not object to the validity of the patent, but immediately thereafter assumed his son, C, as a partner with a view to manufacturing articles which A alleged were in infringement of his patent. A thereupon presented a petition and complaint against B and C for breach of interdict. B and C averred that the articles manufactured by them did not constitute an infringement, and further C challenged the validity of A's patent. *Held* (in conformity with *Dudgeon v. Thomson and Donaldson*, 3 R. 604 and 974, and 4 R. (H. L.) 88), (1) that it was competent to bring C into the process, though the interdict was not directed against him personally, and (2) that C was not entitled to a proof of his averments regarding the validity of the patent.

By deed of assignment, dated 26th December 1883, William Harvie acquired exclusive right to certain letters-patent dealing with improvements in apparatus and valves for regulating the supply of water to water-closets, &c.

The patent was originally the property of William Ross, brassfounder, Glasgow, but subsequently through successive assignations came into the possession of Harvie.

In April 1886, Harvie brought a suspension and interdict against William Ross to have him prevented from manufacturing certain articles which he alleged to be in infringement of his patent, and on 12th May interim interdict was granted by Lord Trayner, Ordinary, "in respect that the respondent has failed to find caution" (for profits) as appointed by a previous interlocutor.

On 18th October Harvie presented a petition and complaint against William Ross, and Thomas Ross, his son, in respect William Ross had continued to manufacture the articles alleged to be in infringement of the patent. The petition further stated ;—"He (William Ross) has also, for

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the purpose of evading the interdict now standing against him, assumed as a partner his son Thomas Ross, who is now actively engaged in pushing the sale of the said valves in Glasgow and elsewhere. The said Thomas Ross is well aware of the said interdict, and of the fact that the valves sold by him and his father are made and sold in infringement of the complainer's patents, and in breach of the said interdict. The said Thomas Ross has thus been and is knowingly and wilfully aiding and abetting the said William Ross in breaking said interdict. The manufacture and sale of valves and apparatus by the said William Ross and Thomas Ross is still continued in breach of said interdict, and to the great prejudice of the petitioner."

The petitioner prayed the Court to find that the two respondents had been guilty of contempt of Court and breach of interdict.

William and Thomas Ross lodged separate answers.

William Ross did not raise any question as to the validity of Harvie's patent, but alleged that the articles manufactured by his firm of William Ross & Sons did not constitute an infringement of the patent.

Thomas Ross admitted in articles 1 and 2 of his statement of facts that he was on 14th June 1886 taken into partnership with his father with a view to manufacturing the articles alleged to constitute an infringement of Harvie's patent, but denied that they constituted such an infringement. In articles 3 to 7 of his statement he went on to challenge the validity of Harvie's patent on several grounds, *e.g.*, prior publication, prior use, &c.

He pleaded, *inter alia*;—(2) The valves and apparatus in question being manufactured by the firm of William Ross & Son, the petition ought to be dismissed so far as directed against this respondent. (3) No interdict ever having been obtained by the petitioner against this respondent, the petition and complaint ought to be refused so far as directed against him. (4) The petition and complaint ought to be refused in respect that the letters-patent founded on by the petitioner are invalid on certain specified grounds. (5) Assuming the letters-patent to be valid, the petition should be refused, because the respondent has not infringed the said letters-patent, or manufactured any articles which are interdicted under the said interim interdict.

Argued for the petitioner;—The proof to be allowed should be limited to proof as to whether the articles manufactured by William Ross & Son were in infringement of the patent, and Thomas Ross ought not to be allowed a proof of his averments against the validity of the patent. Such a plea afforded no answer to a petition for breach of interdict and contempt of Court. It was quite competent to try the question of infringement in a petition and complaint; there was nothing in the case of *Dudgeon v. Thomson*¹ to shew that the House of Lords thought that an objectionable or incompetent course. Further, it was competent to bring Thomas Ross into the process though no interdict had been granted against him. He admitted that he had been taken into partnership with his father simply to manufacture these articles, and that he was aware of the interdict having been granted against his father. That state of facts brought him directly under the rule which had been applied to the respondent Donaldson in the case of *Dudgeon v. Thomson*.

Argued for the respondents;—Proof ought at all events to be allowed to shew that the manufacture of these articles did not constitute an infringement. But further, as regarded the son, the petition ought to be dismissed; though he was admittedly in partnership with his father he was

¹ *Dudgeon v. Thomson and Donaldson*, March 17, 1876, 3 R. 604, and July 5, 1876, 3 R. 974, July 10, 1877, 4 R. (H. L.) 88.

working for his own interest, and ought to be allowed to proceed until personally interdicted. He ought further to be allowed to attack the validity of the patent as, if it turned out that he was right in thinking that the patent was bad, that would affect materially the view to be taken of his conduct. No. 16.
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LORD PRESIDENT.—I am of opinion in this case that the complainer is entitled to a proof of his averments, and that William Ross is entitled to a proof of his, and that Thomas Ross is entitled to a proof of his averments in articles 1 and 2 of his answers, but not of those in the remaining articles.

The first question raised is as to the competency of trying this question in the form of a petition and complaint for breach of interdict, and I cannot say that I have any doubt on that point. The question is really, no doubt, whether the patent has been infringed, but also there is the question whether by so infringing the patent the respondents have committed a breach of interdict. The facts on which the decision of both these questions rests are the same, viz., whether the patent has been infringed, and there seems to me to be nothing in the decision in the case of *Dudgeon v. Thomson* to give ground for supposing that the House of Lords thought that there was any objection to trying such a question by way of a petition and complaint for breach of interdict.

The House of Lords no doubt thought in that case that we had gone wrong, because, after the interdict was granted and before the petition and complaint for breach of interdict was presented, the patentee had lodged a note of disclaimer and alteration, and the effect of that was to bar him from objecting to an infringement of the patent as it originally stood. There is, however, nothing of that kind here.

Then the position of Thomas Ross here, as being a party acting in combination with his father, and as his partner, seems to me to be exactly the same as the position of Donaldson in the case of *Dudgeon v. Thomson*, for there Donaldson was assumed as a partner in exactly the same way as Thomas Ross was assumed as a partner here. The case of *Dudgeon* on that point is therefore precisely in point, and it is quite competent to bring Thomas Ross into this process though the interdict was not directed against him personally.

As regards William Ross, he does not raise any question as to the validity of the patent, and he could not do so, as he himself was once owner of the patent and assigned it to someone else, who in turn assigned it to the complainer. The son, however, does raise a question as to the validity by articles 3-7 of his averments, and the next question is, is he entitled to a proof of those articles? I apprehend he is not. The father was interdicted. He was not in a position to raise any question of the validity of the patent, and he cannot do so now, but the complaint against the son is not only that there has been an infringement of the patent, but that he has committed a breach of interdict by aiding and abetting his father in infringing. Now, I do not think that Thomas can be heard when he challenges the validity of the patent as an answer to that complaint, and therefore I think we should remit to the Lord Ordinary to take such a proof as I have proposed.

LORD MURE.—I concur in thinking that a proof should be allowed to the limited extent proposed by your Lordship. I have looked into the observations of the Lord Chancellor in the case of *Dudgeon*, and I find there nothing to lead

No. 16. me to suppose that the House of Lords thought that such a process as the present was an improper one to try the question we have raised here. As regards the question whether Thomas Ross can be brought into the process, I think the position of Donaldson in the case of *Dudgeon* is precisely in point. I therefore concur in the course proposed by your Lordship.

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LORD SHAND.—The simple question raised here is whether the respondent, having been interdicted from manufacturing a certain patented article, has in defiance of the order of the Court gone on manufacturing it. The sole issue that can be raised in that process is whether, assuming the patent to be valid, there has been an infringement of it. In a question with William Ross it is clear that is the only issue, but there is also the question as regards Thomas Ross, whether he is excluded from raising an objection to the validity of the patent. Now, he is not carrying out an independent manufacture of the article but he was assumed as a partner simply with a view to carrying out the manufacture of the articles which are alleged to constitute an infringement. If the complainer does not succeed in shewing that Thomas Ross knowingly assisted his father in infringing the patent then he will fail in his complaint, but if he does succeed then Thomas Ross cannot be entitled to shew as an answer to the complaint that the patent is invalid. But Thomas Ross has not even averred that he has been carrying on an independent manufacture, but admits that he is carrying on the business in conjunction with his father. If that is so, I cannot see how he can attack the patent on any of the usual grounds. The simple question therefore that must go to proof is, has there been an infringement of the patent, assuming it to be valid?

LORD ADAM.—As regards the father, William Ross, the only question is whether, assuming the patent to be valid, there has been an infringement of it. As regards the son Thomas, the only question is whether he has aided and abetted his father in infringing the patent in the knowledge that there was an interdict standing against such infringement. I therefore concur in the course proposed to be taken here.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel on the petition and complaint and answers, find the petitioner and William Ross entitled to a proof of their averments, and the respondent, Thomas Ross, to a proof of his averments in articles 1 and 2 of his statement of facts: Repel the 2d, 3d, and 4th pleas in law for the said Thomas Ross: Remit to Lord Kinnear, Ordinary, to try the cause before himself without a jury."

THOMSON, DICKSON, & SHAW, W.S.—J. STEWART GELLATLY, S.S.C.—Agents.

No. 17. SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY, LIMITED, AND OTHERS, Petitioners.—*Murray—W. C. Smith.*

Nov. 16, 1886. DUNCAN MACPHERSON, Respondent.—*Sol.-Gen. Robertson—Asher—Cosens.*
Scottish Rights of Way and Recreation Society, Limited, &c. v. Macpherson. *Appeal to the House of Lords—Leave to Appeal.*—Leave to appeal to the House of Lords against an interlocutor appointing a case to be tried before a Lord Ordinary without a jury refused.

2D DIVISION. THIS case was reported *supra*, p. 7. The pursuers presented a petition for leave to appeal to the House of Lords against the judgment in that case. They stated that "the petitioners are advised that, according to the inveterate practice of your Lordships' Court, sanctioned by the House

Lord Kinnear.
M.

of Lords, such cases are tried on issues by a Lord Ordinary and a jury. No. 17.
 The greatly increased cost and uncertainty of an inquiry by means of proof before a Lord Ordinary, subject to appeal on questions of fact to the Inner-
 House of the Court of Session and to the House of Lords, gives the peti- Nov. 16, 1886.
 tioners a material interest in the observance of the practice of your Lord- Scottish
 ships' Court; and as the petitioners the said society are charged with the Rights of Way
 public interest in this case, and in other similar cases, they deem it their and Recreation
 duty to obtain the judgment of the House of Lords upon the question of Society,
 procedure." Limited, &c. v.
 Macpherson.

After hearing counsel for the petitioners,—

LORD JUSTICE-CLERK.—This is a novel application. The question we considered when the case originally came before us was whether the interlocutor of the Lord Ordinary appointing the case to be tried upon issues by a jury should be adhered to, or whether it was more desirable that it should be tried without a jury before his Lordship. That was a question that certainly admitted of two opinions, and we took the opportunity of consulting our brethren upon it, with the result that we ordered the case to be tried without a jury.

I need not detail the reasons which led us to that result. In disposing of the case we did not lay down any rule that could be applied generally; the case was determined on its own circumstances merely. We are now asked to allow an appeal against that procedure judgment to the House of Lords. I am of opinion that there is no good ground for granting that motion.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD M'LAREN.—If this had been a question whether cases of this kind should or should not be appropriated to jury trial, it would have been a very proper question for an appeal to the House of Lords. But it being admitted that this is a question for your Lordships' discretion, I am quite sure that the House of Lords would not interfere with that discretion, and therefore it would be no benefit to the pursuers, but the reverse, to allow the case to go there.

THE COURT refused the prayer of the petition.

ANDREW NEWLANDS, S.S.C.—TAIT & CRICHTON, W.S.—Agents.

JOHN GORDON, Pursuer (Reclaimer).—*Pearson—Shaw.*

BRITISH AND FOREIGN METALINE COMPANY AND OTHERS, Defenders
 (Respondents).—*D.-F. Mackintosh—Macfarlane.*

WILLIAM BRUCE THOMPSON, Defender (Respondent).—*C. S. Dickson.*

Reparation—Judicial slander—Malice—Relevancy.—In an action for damages for judicial slander the pursuer must aver facts and circumstances from which the jury may reasonably infer malice.

Averments of facts and circumstances which were held relevant to support an issue for judicial slander.

Scott v. Turnbull (11 R. 1131) considered.

Reparation—Judicial slander—Partnership.—A company or a private partnership may be sued for damages for judicial slander, notwithstanding that malice must be proved against the defenders.

Reparation—Judicial slander.—Held (rev. judgment of Lord M'Laren) that an action of damages for judicial slander is relevant although the matter alleged to be libellous formed the whole subject-matter of the original action.

Process—Summons—Defenders—Partnership.—An action was brought against a descriptive firm and the individual partners thereof, "as such partners and as

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No. 18. individuals," concluding against the defenders, "jointly and severally," for a lump sum of £1000 in name of damages for judicial slander. The condescendence contained no averments of individual fault against any of the partners. **Nov. 16, 1886.** *Gordon v. British and Foreign Metaline Co. & Co.* *Held* (rev. judgment of Lord M'Laren) that the action was an action against the firm only.

2D DIVISION. *Gordon v. Lord M'Laren.* **M.** ON 18th May 1886 John Gordon junior, merchant, Dundee, raised an action of damages, for the wrongous use of arrestments and for judicial slander, against "The British and Foreign Metaline Company, manufacturers of metaline, carrying on business in Dundee, and having its principal office or place of business at No. 74 Commercial Street there, and William Bruce Thompson, engineer and shipbuilder there, William Stiven, accountant there, and David Stewart, iron merchant there, the individual partners of the said company, as such partners and as individuals," and concluding against the defenders, "jointly and severally," for decree for "the sum of £1000," with interest.

The pursuer averred,—(Cond. 2) "The pursuer was for twelve months, from 1st May 1878 to 30th April 1879, in the service of and interested in the profits of the said The British and Foreign Metaline Company, on the terms narrated in the company's minute of 19th April 1878, which is referred to, and during the period from about a year before the said engagement and three months after it, he was the travelling agent of the said company. Since leaving their service, the defenders, the partners of said company, have cherished the strongest feelings of ill-will towards him." (Cond. 3) " . . . The pursuer on 20th October 1885 obtained a judgment from the Second Division of the Court of Session for the sum of £350 in an action he had raised in the Sheriff Court of Perthshire, at Perth, against John Shields of Balhousie Castle, Perth. The defenders having immediately become aware of this, resolved to take that opportunity of gratifying their feelings of malice and ill-will towards pursuer, and their desire to injure him by preventing him obtaining payment of the sum thus decerned for, and by, if possible, ruining his character and credit by means of the expedients after mentioned. They communicated with Mr Shields, requesting him to decline payment of the sum decerned for, and, upon the day following the decree, they threatened the pursuer with an action against him for an account which they alleged he was due, and which had never been mooted between the parties since their accounts were squared and settled shortly after the pursuer leaving their service; and they further threatened that they would use arrestments in Mr Shields' hands, and so prevent the pursuer from obtaining the money due by him. The pursuer, through his agents, at once protested against the arrangement with Mr Shields, and against the threatened proceedings being carried out. The defenders, nevertheless, intimated their determination to proceed, although warned of the great damage which would be caused, while they stated that they would not have pressed such a claim 'but for the fortuitous concurrence of circumstances in Mr Gordon's favour.'" (Cond. 4) "Accordingly, on or about 4th November 1885, the defenders raised an action against the pursuer in the Sheriff Court of Forfarshire, at Dundee, concluding for payment of £125, 0s. 7d. sterling, with interest from the date of citation, which they alleged to be due in respect of an alleged account due to them by the pursuer between 13th January 1879 and 11th December 1880. They further caused arrestments, on or about the 4th day of November 1885, to be used on the dependence of the said Sheriff Court action against the present pursuer to the extent of '£140, less or more,' of the money in Mr Shields' hands due to the pursuer. Although the claim of the present defenders in the said Sheriff Court action was entirely unfounded, the present pursuer's agents, by

letter, dated 27th November 1885, to the present defenders' agents, No. 18.
 offered to allow the sum of £140 to be held under the said arrestment to
 await the result of the said Sheriff Court action, if the present defenders
 would agree to restrict it to £140, so as to enable the present pursuer to
 get up the surplus of £210, but this the present defenders declined to do." Nov. 16, 1886.
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 (Cond. 5) " After sundry procedure in said action the present
 pursuer was, on 10th March 1886, assoilzied from the conclusions thereof,
 with expenses, by judgment of the Sheriff-substitute, which judgment was
 affirmed on 7th April following, when an appeal by the present defenders
 was dismissed, with additional expenses." (Cond. 6) "During the de-
 pendence of the last mentioned Sheriff Court action, the defenders, well
 knowing that they could not succeed therein, and with the view of again
 laying on arrestments in Mr Shields' hands in order to concuss the pur-
 suer into paying them something under the foresaid action at their instance
 against him, on or about 18th December 1885 raised a second action
 against the present pursuer for £500 in name of damages, founding upon
 the grossly untrue allegations made by them as to the present pursuer
 having surreptitiously obtained the secret of their business, and having
 fraudulently made use of an alleged trade-mark, all as after referred to.
 On the dependence of this second action the defenders again used, on or
 about said 18th day of December, arrestments in the hands of the said
 John Shields to the extent of £500. This second action was entirely
 groundless, and was, by interlocutor of date 10th March 1886, dismissed
 by the Sheriff-substitute, with expenses to the present pursuer. The de-
 fenders appealed to the Sheriff-principal, who, by interlocutor of date 8th
 April 1886, adhered to the judgment of the Sheriff-substitute, with addi-
 tional expenses." (Cond. 7) "Neither of said actions was
 raised *in bona fide*, but both were initiated and prosecuted with the sole
 purpose of gratifying the malice and ill-will foresaid, and, if possible, of
 extorting money from the pursuer. The laying-on of the arrestments in
 both actions was also carried out solely from said motives, and with a
 view to injure the character, credit, and reputation of the pursuer. The
 said arrestments were so laid on and continued maliciously and without
 probable cause, and in spite of repeated warnings as to the great loss and
 inconvenience caused thereby; and further, without even the restriction
 already referred to, which would have amply protected their rights."
 (Cond. 8) "In consequence of the defenders' arrestments, and of their re-
 fusal to withdraw or restrict them, Mr Shields was under the necessity of
 raising, on 20th January 1886, an action of multiplepoinding in the Sheriff
 Court of Perth; and, after sundry procedure, he consigned the £350 to
 abide the settlement of the claims of the arresting creditors. After the
 dismissal of both the unfounded actions raised by the defenders, the pur-
 suer made application to the Sheriff Court to get up the money consigned
 in the said action of multiplepoinding, but the defenders maliciously and
 unwarrantably instructed their agents in said action to prevent his getting
 up the consigned fund. In particular, the agent for the defenders, at the
 calling of the said action in the Sheriff Court at Perth on 4th May 1886,
 on the instructions of the defenders, stated to the Sheriff, notwithstanding
 the production of the extract decrees in favour of the pursuer dismissing
 the defenders' actions, 'that other creditors not called in the present
 action' (i.e., the multiplepoinding process) 'are prepared to lodge claims
 immediately.' In respect of this statement the Sheriff ordered all parties
 interested to lodge claims within seven days. In authorising said state-
 ment to be made the defenders acted maliciously, without probable cause,
 from vindictive feelings against the pursuer, and to prevent him getting
 possession of the consigned fund. It was only after considerable further

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trouble that the pursuer was enabled to effect this." (Cond. 10) "In the second action in the Sheriff Court, which, as already averred, was raised solely with the object of extorting money from the pursuer, and of gratifying their malice and ill-will towards him, and of ruining his character, reputation, and credit, it was alleged by the present defenders in their condescendence that the present pursuer, Mr Gordon, 'unwarrantably pried into and obtained insight and information in regard to the secrets of their said invention and manufacture of metaline.' It was further alleged by defenders in said condescendence that 'after leaving their said employment, and in the years 1881, 1882, 1883, and 1884, or during a portion of all or some of these years, the defender fraudulently and illegally represented and held himself out to the public as a manufacturer of the pursuers' invention of metaline, and surreptitiously and illegally used and appropriated or imitated the secret of the pursuers' invention or manufacture of metaline, and also fraudulently and illegally used and appropriated or imitated the pursuers' said registered trade-mark "Metaline." The defenders in said condescendence further alleged as follows:—Amongst others to whom the defender during said years, or some of them, fraudulently and illegally represented himself as a manufacturer of the pursuers' said invention of metaline under the pursuers' said registered trade-mark "Metaline," and also as a seller of such metaline, were the following, viz.:—(Names given). 'The defender also, during said years or some of them, fraudulently and illegally got his name inserted in Slater's Directory for Scotland as a manufacturer and seller of the pursuers' said invention of metaline under their said registered trade-mark. He also fraudulently and illegally advertised himself in the London newspaper *Engineering* as a manufacturer and seller of the pursuers' said invention of metaline under their said registered trade-mark, "Metaline." The defenders further alleged in said condescendence that 'the pursuers by and through the defender's fraudulent and illegal representations as before mentioned, and of his fraudulent and illegal use and appropriation or imitation of their said registered trade mark, "Metaline," and advertising, &c., and unwarrantably infringing the pursuers' rights as before mentioned, sustained serious loss and damage.'" (Cond. 11) "Said allegations were grossly untrue. They are of and concerning the pursuer, and were made by the defenders falsely, calumniously, maliciously, and without probable cause."

The company and two of the individual defenders, Stiven and Stewart, in defence, pleaded;—(1) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (2) The defenders being entitled to use said arrestments, and having done so on reasonable grounds, in good faith, and without malice, should be assoilzied, with expenses. (3) The allegations complained of being relevant and pertinent to the cause in which they were made, and the defenders having made them in *bona fide* belief that they were true, on reasonable grounds, and without malice, the defenders are entitled to decree of absolvitor, with expenses. (4) The pursuer having suffered no loss, injury, or damage, in respect either of the arrestments or the said allegations, the defenders should be assoilzied, with expenses.

The defender Thompson stated (what the pursuer on record denied) that he and Stiven had ceased to be partners of the company on 1st February 1886, and that while he was a partner he had taken no part in managing the company's business, and, besides pleas in the same terms as those of the other defenders, pleaded;—(4) The defender not being responsible for any of the proceedings complained of, he should be assoilzied, with expenses.

The following were the issues proposed by the pursuer, the heading of which was "Issues in the cause in which" Gordon is pursuer and the company and Thompson, Stiven, and Stewart, "the individual partners of the said company, as such and as individuals, are defenders":—

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"(1) Whether, on or about the 4th day of November 1885, the defenders, or one or more of them, maliciously, and without probable cause, used, or caused to be used, against the pursuer, an arrestment in the hands of John Shields of Balhousie Castle, Perth, for the sum of £140, less or more, and caused the same to be continued until on or about the 18th day of May 1886, to the injury and damage of the pursuer. Damages laid at £250.

"(2) Whether, on or about the 18th day of December 1885, the defenders, or one or more of them, maliciously, and without probable cause, used, or caused to be used, against the pursuer, an arrestment in the hands of the said John Shields, for the sum of £500, and caused the same to be continued until on or about the 18th day of May 1886, to the injury and damage of the pursuer. Damages laid at £250.

"(3) It being admitted that the defenders raised an action of damages for £500 in the Sheriff Court of Forfarshire at Dundee at their instance against the pursuer on or about the 18th day of December 1885, and that a record was made up and completed in said action, and it being further admitted that the condescendence annexed to the petition in said Sheriff Court action contains the following passages:—"Then followed the averments in original action as set forth in cond. 10, beginning "After leaving their said employment."

"Whether the said statements, or part thereof, are of and concerning the pursuer, and are false and calumnious, and were maliciously inserted, or caused to be inserted, in the said condescendence, to the loss, injury, and damage of the pursuer. Damages laid at £500."

The Lord Ordinary (M'Laren) disallowed the third issue, and approved of the first and second issues.*

* "OPINION.—The issues which I propose to allow, being the first and second of those given in by the pursuer, are intended to raise the question of the pursuer's right to damages for the illegal arrestment of his funds. They are in the usual form, and under them the pursuer must prove malice and want of probable cause as conditions of his claim to recover damages. The chief question regarding these issues is as to the insertion of the words 'or one or more of them.' The defenders object to these words on the ground that the action is instituted against them jointly and severally. They contend that under an action instituted in this form it would not be competent to obtain a decerniture against one or more of the defenders, but only against the whole body of partners collectively. They further object to the action altogether in so far as instituted against a mercantile firm or copartnery.

"I think that as the arrestments complained of were used by the company and its partners, the pursuer is within his rights in bringing the action against the parties who used the arrestments, designing them in the terms which the defenders used in laying on the arrestments, as descriptive of the character in which they claimed to attach the pursuer's property. I think, also, that the pursuer is entitled to insert the words 'or one or more of them' to meet the possible case of one or more of the defenders establishing that he or they did not authorise the use of the arrestments. The pursuer is not proposing to discharge any of the defenders, or to withdraw his action against any of them; and in these circumstances I think the distinction founded on the circumstance of the action being directed against the defenders 'jointly and severally' is too critical, and is not supported by the authorities referred to.

"The third issue (which I propose to disallow) is intended to raise the question of the pursuer's right to recover damages in respect of allegations

No. 18. The pursuer reclaimed, and argued;—(1) The Lord Ordinary had rightly allowed the first and second issues. The first objection to these issues, and it was urged equally against the third issue, was that as in actions of damages for wrongous arrestment or for judicial slander the defence of privilege was open, such actions would not lie against public companies or private partnerships, seeing that the defence of privilege must be met by proving malice, and malice could not, it was said, be proved against a company or a partnership, which had no mind, no feelings, and consequently no power to act maliciously,—in other words, the plea of privilege in the case of a company amounted to a plea of absolute privilege. But it was conceded that where privilege was not pleadable, an action of damages for slander would lie against a company, and this concession was fatal to the defenders' argument, for malice was as much an element in non-privilege actions as in privilege actions, only in the former it was presumed; and there was no greater anomaly, if it was an

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affecting his reputation made by the defenders in an action instituted against him in the Sheriff Court of Forfarshire.

"The representations made in that action were to the effect that the pursuer had infringed a patent, the property of the defenders, and had also improperly made use of information as to trade secrets which he acquired while in their employment. The claim in the Sheriff Court action was for damages in respect of these alleged wrongs, and there can be no doubt that the description of the alleged wrong was pertinent to the action. The action, however, was dismissed as irrelevant, because, as the Sheriff-substitute explains, it did not appear that there was any subsisting patent, and it was not explained what were the trade secrets which the defender (the present pursuer) had used or disclosed. The case intended to be made under the issue is that there was no real cause of action to justify the Sheriff Court proceedings, and that these proceedings were merely the vehicle of spiteful insinuations against the pursuer's honesty or integrity. However this may be, I am very unwilling to make a precedent for sending to trial an issue of judicial slander where the matter alleged to be libellous is really the whole subject-matter of the action. It is the privilege of any member of the community to submit his supposed claims and grievances to judicial decision, even where these are unfounded, or, it may be, purely imaginary. If the charges are investigated and disproved or dismissed as irrelevant, no injury is done to the reputation of anyone unless to the party whose statements are found to be absurd or untrue. There may be exceptions, but I have difficulty in figuring a case where a defender would be injured by charges from which he successfully defends himself in a court of law. I think also that it is for the public interest that litigants should not be deterred from discussing their claims and grievances in open Court through the apprehension that if unsuccessful an action of damages would lie against them.

"If the issue in question is allowed, it will be difficult to assign limits to such claims. Any person against whom an action of damages for negligence is unsuccessfully maintained may retaliate with an action of judicial slander on the ground that his capacity for the conduct of his business, or his character otherwise, is affected by imputations of inhumanity or want of care in matters affecting the safety of his men. I do not know any instance of an action of judicial slander being sent to trial, except where the slander was extrinsic to the subject or motive of the action. And there is nothing that I can see in the present case to warrant a departure from precedent in this respect. Any annoyance or discomfort which the pursuer may have experienced in consequence of the epithets applied to his conduct in the defenders' pleading is, in my view, no more than a part of the friction incident to public business, which everyone must submit to for the sake of general convenience. I do not enter into the question of the sufficiency of the averments of malice, for I rather incline to the opinion that no action will lie for injury arising from the mere fact of a claim of reparation being made unsuccessfully in a Court of law."

anomaly at all, in presuming a company to be malicious than in proving it to be so. It was said that an action on the ground of fraud would not lie against a company. But the contrary had been held,¹ and although there might be dicta in an opposite direction in *Addie*² and *Houldsworth's*³ cases, all that these cases decided was that a shareholder of a company could not sue for damages on the ground that the company had fraudulently induced him to take shares, and at the same time retain his shares. If he could not or would not rescind the contract to take shares, his only remedy was against the directors personally. Further, companies had frequently been sued for damages for slander.⁴ They acted through their agents or partners, and were responsible for what the agents or partners did in the line of their business. (2) The action was directed against the individual partners as well as against the company. Failure against one of the defenders did not involve failure against the others. In any case, if the company was liable all the partners were liable through it. There was nothing in the pursuer's averments to shew that Thompson was a sleeping partner. That might come out in evidence, and might be held to make a difference; but the issues should stand. (3) The Lord Ordinary was wrong in disallowing the third issue. (a) In the first place, the ground on which he had put his judgment on that branch of it was untenable. He had held that in no circumstances would an action for judicial slander lie where the matter alleged to be libellous formed the whole subject-matter of the original action; in other words, that persons in this country had the absolute privilege of making use of the forms of process to slander their neighbours, if only they took care to make the slanderous statement the subject-matter of the action. It was true that the Lord Ordinary seemed to think the decree of absolvitor in the original action a sufficient redress for any injury that the person slandered might have suffered, and of course if the jury were of opinion that there had been no injury, they would give no damages; but in few cases would a decree of absolvitor be an adequate compensation for having lain for months, it might be, under a painful and unfounded imputation. But (b) the defenders contended that the pursuer must at all events have more than a bare averment of malice—that he must set forth facts and circumstances from which malice was to be inferred. A bare averment of malice was, the defenders conceded, enough in the case of wrongous arrestments, but more, they maintained, was necessary to found an issue for judicial slander. Now, no doubt a rule to this effect had been laid down in *Scott v. Turnbull*,⁵ but when it was applied to individual cases it was not always easy to say what precisely the rule required. If, for example, the pursuer averred not merely that the slanders were malicious, but that they were false to the knowledge of the defenders at the time they put them on record, would that be a sufficient averment of facts and circumstances? or must the pursuer go on to specify the grounds he had for believing that the defenders knew the slanders to be false? If the latter, that would be to impose a heavy burden on the pursuer, by making him virtually set forth an epitome of

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¹ *Mackay v. Commercial Bank of New Brunswick*, March 14, 1874, L. R. 5 P. C. App. 394.

² *Addie v. Western Bank*, May 20, 1867, 5 Macph. (H. L.) 80, L. R., 1 Sc. and Div. App. 145.

³ *Houldsworth v. City of Glasgow Bank*, March 12, 1880, 7 R. (H. L.) 53.

⁴ *Abrath v. North-Eastern Railway Co.*, June 22, 1883, L. R., 11 Q. B. Div. 440; *Whitfield v. South-Eastern Railway Co.*, April 29, 1858, 1 E. B. and E. 115, 27 L. J. Q. B. 229; *Keith v. Outram*, June 27, 1877, 4 R. 958.

⁵ *Scott v. Turnbull*, July 18, 1884, 11 R. 1131.

No. 18. his evidence; if the former, the protection of judicial proceedings, which it was apparently the object of the rule to secure, was as little promoted by a bare averment that the defender knew the slander to be false, as by a bare averment of malice, for the one might as easily be made at random as the other. But at all events the present record satisfied the rule in any reasonable sense of it. What the pursuer averred was shortly this, that the defenders had made use of the forms of legal process to gratify their ill-will towards the pursuer, by putting forward claims that had no foundation, and by doing all they could to prevent the pursuer getting payment of debts due to him. In particular, they had unwarrantably refused to restrict the arrestments, and had impeded the payment of the fund *in medio* in the multiplepinding. The evidence, when it came out, might indeed satisfy the jury that all this had been done without malice on the defenders' part, but there was enough of averment here to shew the sort of case which the pursuer proposed to make—enough to shew that he did not make a random averment of malice—and that was all that the rule of *Scott v. Turnbull*, reasonably read, required.

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Argued for the defender Thompson;—(1) Malice was either a presumption of law—legal malice, or an inference from proved facts—actual malice.¹ The former might reasonably be imputed to a company or partnership; the latter could not—it was absurd to do so, as a company or partnership had no mind.² Consequently an action of damages for judicial slander or for wrongous arrestments would not lie against a company—privilege being pleadable in defence—unless, perhaps, in the improbable case of a company existing for the purpose of slandering and making illegal use of arrestments. So, conversely, a company or partnership having no feelings could not sue an action for slander—except trade slander. The fraud of its agents could not be imputed to a company,³ and malice was exactly analogous. In both cases, however, if the company had profited by the fraud or the malice, action would lie to the extent to which the company was *lucratus*. Here the company had taken no benefit. In the cases in which companies had actually been sued for damages, either there was no privilege,⁴ or there was no interest to take the plea, the partners being liable if the company was not.⁵ The present defender certainly had an interest, as he could be reached only through the company. The pursuer on record made no specific case against him as an individual. (2) If, then, the action was bad against the company, it was bad against all the defenders, as they were sued jointly for a lump sum.⁶ Even if the action was held relevant against the company, the words “or one or more of them” ought to be deleted from the issues. (3) The third issue ought to be disallowed on the ground stated by the Lord Ordinary. At all events, the principle on which the Lord Ordinary had proceeded—the high privilege which on grounds of public policy was

¹ Addison on Torts, 5th edit. p. 27.

² *Stevens v. Midland Counties Railway Co.*, June 22, 1854, 10 Exch. 352, *per* Alderson B., at p. 356.

³ *Addie v. Western Bank*, May 20, 1867, 5 Macph. (H. L.) 80, L. R., 1 Sc. and Div. App. 145; *Houldsworth v. City of Glasgow Bank*, March 12, 1880, 7 R. (H. L.) 53.

⁴ *Whitfield v. South-Eastern Railway Co.*, April 29, 1858, 1 E. B. and E. 115, 27 L. J. Q. B., 229.

⁵ *Abrath v. North-Eastern Railway Co.*, June 22, 1883, L. R., 11 Q. B. Div. 440; *Keith v. Outram*, June 27, 1877, 4 R. 958.

⁶ *Western Bank v. Bairds*, March 20, 1862, 24 D. 859, 34 Scot. Jur. 435; *Taylor v. Macdougall & Sons*, July 15, 1885, 12 R. 1304.

accorded to judicial pleadings—made it incumbent on the pursuer to aver facts and circumstances from which malice would be inferred. This rule was by no means laid down for the first time in *Scott v. Turnbull*.¹ It was well recognised before.² The averments here did not satisfy the rule. They came simply to this, that the defenders had raised two actions against the pursuer; that they had used arrestments on the dependence; and that they had lost the actions. It was not said that the Sheriffs had found the actions to be utterly groundless. In point of fact in the first of them the plea of prescription was sustained, and the present pursuer's oath held negative of the reference. The second was dismissed as irrelevant, as the present defenders did not choose to disclose on record the nature of their trade secret. The refusal to restrict the arrestments used on the dependence of the first action was the only serious evidence of malice, but it was easily explainable otherwise, *e.g.*, there were the expenses besides the actual debt sued for. A bare averment of malice was no doubt sufficient in the case of actions of damages for illegal arrestments, but malice relevantly averred for that purpose, *i.e.*, for the first and second issues, could not be held as relevantly averred for the third. Whether a bare averment that the defenders knew the slanders to be false when they uttered them would be enough, it was unnecessary to inquire; the pursuer made no such averment here.

The other defenders, as having no interest, did not contest the first and second issues; on the third issue they maintained the same line of argument as the defender Thompson.

At advising,—

LORD JUSTICE-CLERK.—In this case the pursuer sues a company for damages on two grounds—the wrongous use of arrestments and judicial slander.

The Lord Ordinary has granted issues on the first of these grounds, but he has refused the proposed issue on the ground of judicial slander.

In regard to the first, and indeed in regard to both grounds, it is maintained, in the first place, that as the defenders are a trading company, malice and want of probable cause cannot be pleaded against them. What the company, through those who act for the company, say is, not that the company were not competent to sue an action or to use diligence, nor even that the company were not capable of using defamatory words and oppressive and illegal diligence, but that these acts and words were privileged, inasmuch as these were judicial proceedings, and that being a company, malice and want of probable cause cannot be alleged against them to avoid the privilege. It must thus be quite manifest that this is not the case of the allegation of an ordinary moral delinquency against a company. I may have my own opinion upon that general question. But this is a plea of privilege on the part of the alleged delinquent, who says that the ground on which privilege might in an ordinary case have been overcome cannot be pleaded because the delinquent is a company. I am of opinion that there is no ground whatever for such a contention. It may be quite true in one sense that the company cannot be guilty of moral wrong. It is said that a company has no *animus*. Nor has it. It has no will, it has no memory, it has no conscience. But notwithstanding all that, the supposed or imaginary

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¹ *Scott v. Turnbull*, July 18, 1884, 11 R. 1131.

² *Urquhart v. Grigor*, Dec. 21, 1864, 3 Macph. 283, 37 Scot. Jur. 134; *Mackintosh v. Weir*, July 3, 1875, 2 R. 877; *Craig v. Peebles*, Feb. 16, 1876, 3 R. 441.

No. 18. *persona* which constitutes a company may contract obligations although it has no will, or memory, or conscience, and may be compelled to fulfil the obligations so undertaken. It is mere metaphysical subtlety to say that a company cannot be guilty of malice where the very nature of the proceeding in which the plea is taken necessarily implies that the *persona* has a power of action and a power of judgment. I therefore think that it is no answer to an action of damages for the wrongous use of arrestments, or for judicial slander, that it is directed against a company, and that privilege can only be pleaded by the company subject to the usual conditions.

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The second branch of the action relates to certain statements, alleged to be defamatory, which were made in an action raised by the company against the present pursuer. It is said that these statements are irrelevant to found an action of damages, in respect that there is no specification by the pursuer of the circumstances from which malice is to be inferred. Now, at this point I should wish to say a few words on the case of *Scott v. Turnbull*, 11 R. 1131, and the general principle which that case involved. The objection here is, that the mere allegation of malice, without a specification of facts which imply malice and would lead the jury to come to the conclusion that it existed, is fatal to the action. Now, I entirely agree in the view that was taken in the case of *Scott v. Turnbull*. Malice is in the breast of the party accused, and it cannot be known to the outer world unless there has been some act that evinces malice, and from which the existence of the malice is to be deduced. Consequently when a man alleges malice against another in a privileged suit, he must have some reason from which he has inferred its existence, some reason not in his own mind merely, but deduced from the outward acts or words of the person against whom the allegation is made. All that the rule laid down in *Scott v. Turnbull*—it had been frequently laid down before—was, that the averment of malice should not be left on the bare allegation of its existence; that he should specify to some extent at least the outward acts, words, or circumstances which have led him to infer that the person acted maliciously. I think that is quite reasonable, because otherwise an allegation of malice may be a random suggestion for which the litigant alleging it has no grounds in fact. But I do not think this case falls under that category. On the contrary, without saying in the least that the facts set out on the record necessarily lead to the conclusion that the proceedings in question were malicious, I think they are at all events facts which a jury are entitled to deliberate upon, and decide whether they were in their view sufficient to infer malice.

Shortly stated, the facts which the pursuer avers are these: The pursuer was the agent of this company, engaged apparently in pressing the sale of a certain article said to be patented, although there are doubts whether the patent was good. The pursuer and the company parted, and the company, it is said, entered into negotiations with a debtor of the pursuer requesting him not to pay his debt, and they raised an action against the pursuer for £125, and arrested the sum in the hands of the debtor, which amounted to £350. The next thing we find averred is a proposal by the pursuer to allow so much of the money, £140, to lie in the hands of the debtor covered by arrestment if the arresting creditor would allow the rest to be uplifted, which proposal, it is said, the defenders declined. The case went on for the £125, and the company lost it, from which it appeared that there was no debt of £125 owing. Having lost that case, they raised a second case, in which

they made a variety of assertions which are said in this action to be calumnious and defamatory, to the effect that the pursuer while their agent had fraudulently ascertained a trade secret that belonged to them, and had fraudulently disclosed it or traded on it. They lost that action also. These assertions are put in issue, and that they are defamatory admits of no question. The question is, whether there is sufficient allegation on this record to justify a statement that they were made maliciously and without probable cause? I do not think there is any doubt of that. It cannot be said that there is any want of specification. I think the specification is sufficient, and I think that if the jury are satisfied of the facts when they hear the evidence, there is enough to entitle them to infer malice. As far as this ground of objection is concerned, therefore, I think the issue ought to be allowed.

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The Lord Ordinary has held that the issue on the second branch of the case ought not to be allowed, because these defamatory statements were in truth the groundwork of the whole action. I do not see that that is a sufficient reason for not granting an issue. On the contrary, it rather seems to me that more importance must be attached to these defamatory statements by the fact to which the Lord Ordinary refers than if they had been merely incidental to the action. The Lord Ordinary says the party should be satisfied with his absolvitor, but absolvitor is no redress for the injury which may be caused by such statements. I do not know of any precedent for making the distinction suggested by the Lord Ordinary, and I am therefore inclined to grant an issue on both grounds.

LORD CRAIGHILL.—The action brought before us by the present reclaiming note is at the instance of the reclaimer, Mr Gordon, against the British and Foreign Metaline Company and the individual partners, as such partners and as individuals, and the purpose of its institution is to recover damages—first, for the alleged wrongous use of arrestments; and secondly, for the judicial slander set out in the record. The conclusion is for a lump sum of £1000, and decree is sought against the defenders jointly and severally. The action is thus an action against the company. They are set forth as the wrongdoers and as the parties by whom reparation is to be rendered, and unless the liability of the company shall be established the pursuer must fail in his action. There is no case laid, either in the condescendence or in the conclusions, by which, if there is no liability upon the company, any liability can be brought home to the individual partners of the company, either as partners or as individuals.

The company does not object to the interlocutor reclaimed against, in so far as it approves of the first and second issues, but this part of the interlocutor is objected to by Mr Bruce Thompson, a partner of the company. He contends that these issues ought not to be allowed, inasmuch as there is no relevant case stated for the pursuer. The irrelevancy is said to consist in this, that special malice is alleged and must be proved, and that this cannot be established inasmuch as the defenders are a company. This, in my opinion, is an erroneous contention. The existence of malice is a fact, and there is no more incongruity in a proof of such a fact against a company than of any other fact which necessarily is an element of liability. If it can be proved against such a company that wrongous arrestments were used, proof that the act was done maliciously may be brought home to the company for anything that appears to the contrary, or can be

No. 18. imagined in the nature of the case. The difficulty of the proof is not the question. Its possibility and its competency are the only things now to be decided. Upon neither of these can reasonable doubt be entertained.

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The company and Mr Thompson object to the third issue for the reasons explained by the Lord Ordinary, and also upon the ground that there is no relevant libelling of the malice imputed to the defenders. As to the former, my opinion is that the Lord Ordinary ought to have allowed the third as well as the two first issues. Judicial slander is a case of privilege, but not of immunity. If pleadings in an action are made the vehicle of slander, it is not the policy of the law to afford absolute protection. If malice is alleged there must be a trial, and if malice be established judgment for reparation must be pronounced.

The second objection ought also, I think, to be overruled. The case of *Scott v. Turnbull*, no doubt, raises a difficulty, for there is considerable similarity between the circumstances in the one case and those in the other, though these are not by any means identical. Nevertheless, were it not that every case in such a question is truly one of circumstances, I could hardly avoid the application of that decision on the present occasion. I am not, however, for carrying that precedent further than is necessary. Were we to do so we would practically be deciding that which it is for the jury to determine, and all that we can competently do is to judge whether, if the facts are as represented by the pursuer, the jury may reasonably come to the conclusion that the defenders were influenced by malice.

Such a case is, I think, presented on this record, and accordingly I agree with your Lordship in thinking that the third issue ought to be allowed. To that extent there should be an alteration of the Lord Ordinary's interlocutor.

I may add that when we come to the wording of the issues it will be well to consider whether the words, "or one or other of them," ought not to be kept out of the first and second issues. The defenders, to whom liability for the wrong complained of is imputed, are the company, and the company only. The pursuer cannot recover unless company liability be proved. How that is to be done is not matter for present consideration; but it is plain that even if the individual partners are to be examined, and one or more of them are to prove that the arrestments were used by their orders, the evidence in this case will be immaterial unless the result be that the order given is proved to have been the order of the company. The name of the company, therefore, is all that ought to be introduced into the issue. The proposed addition is inconsistent with the nature of the case, and its insertion might lead to inconvenience or confusion, by which the simplicity of the trial would be prejudicially affected.

LORD RUTHERFURD CLARK.—I agree in the opinions which your Lordships have expressed. This action is brought against the Metaline Company for the use of wrongous arrestments and for judicial slander. In defence the company were entitled to plead privilege. That plea, as a general rule, only throws upon the pursuer the *onus* of proving the malice which in other cases of slander would be assumed. But it is maintained by the defenders that the plea of privilege in the present instance has the effect, not merely of making the pursuer prove malice on the part of the defender, but of making all action against the

company impossible. I cannot assent to such a result as that. The company, No. 18.
when accused of slandering the pursuer, may certainly plead privilege as a Nov. 16, 1886.
defence. But they may use that plea only so far as it would carry an in- Gordon v.
dividual defender, and not to the length of making the action against them British and
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With respect to the ground on which the Lord Ordinary has disallowed the third issue, I think his Lordship has taken an erroneous view of the law. Where a party in raising an action makes statements which are relevant, even if they are defamatory of the defender's character, then that party is not liable in law for damages unless it can be shewn that he made these statements maliciously and without probable cause. It has been held that malice must be proved in regard to statements on record, even if these are not necessary to the subject-matter of the case, but are merely pertinent to it. But I have never understood that a party who has made a defamatory statement in a process has an absolute privilege to escape from the consequences. He has a privilege indeed in making his statement, but he is subject to any consequences that may result from his having made that statement, if in addition to having given utterance to the calumny he is proved to have made it maliciously and without probable cause.

LORD YOUNG was absent.

The issues were amended by altering the title to "issues in which," Gordon "is pursuer" and the company "are defenders," and the words "or one or more of them" were struck out from the first and second issues.

THE COURT then recalled the Lord Ordinary's interlocutor, approved of the issues as adjusted, and remitted to the Lord Ordinary.

REIND, LINDSAY, & WALLACE, W.S.—J. SMITH CLARK, S.S.C.—
BOYD, JAMIESON, & KELLY, W.S.—Agents.

JOHN CHARLES CUNINGHAME AND OTHERS (Glengarnock Iron Company), No. 19.
Petitioners.—*Pearson—M^r Kechzie.*

THE WALKINSHAW OIL COMPANY, LIMITED, Respondents (Reclaimers).— Nov. 17, 1886.
Balfour—W. Campbell. Cuninghame,
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Company—Winding-up—Creditors' petition—Disputed debt—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 80.—In a petition for the compulsory winding-up of a limited company the petitioners alleged that the company was unable to pay its debts within the meaning of the 1st subsection of the 80th section of the Companies Act, 1862, two bills drawn by the petitioners and accepted by the company not having been paid when due. It appeared that the company had no other debts, and had large assets, and that there was a *bona fide* dispute between the parties relating to the sum contained in the bills in question, the respondents alleging that there was a large balance due to them.

The Court dismissed the petition on consignment being made by the respondents, and found the petitioners liable in expenses.

THIS was a petition under the Companies Acts, 1862 to 1886, for a 1st Division. compulsory order to wind up the Walkinshaw Oil Company, Limited, B.
presented by John Charles Cuninghame and others, the partners of the Glengarnock Iron Company. The petitioners claimed to be creditors of the respondents for £1836, 16s. 2d., the amount contained in two bills, both drawn by the petitioners upon, and accepted by, the respondents—one for £5250, which fell due on 17th July 1886, and the other for £5500,

No. 19. which fell due on 21st July 1886, less a sum of £8953, 3s. 10d., which was due by the petitioners to the respondents. Neither of these bills had been met when due.

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It was stated in the petition that the affairs of the respondents had lately become embarrassed, and that the company was unable to pay its debts in the sense of the 80th section of the Companies Act of 1862, the respondents having failed to pay the sums due by them, or to secure or to compound for the amount within the time fixed by subsection 1 of that section,* after the service of the statutory notice on 3d September 1886.

The respondents lodged answers, and produced evidence shewing that the petitioners were their only creditors, and that their works cost over £50,000, and were free of all burdens except liability for rent, which was not in arrear. The respondents were subtenants of the minerals in certain fields leased by the petitioners, and it was in connection with the valuation of certain plant which had been bought by the respondents from the petitioners that the debt alleged to be due to the petitioners had been incurred, the respondents alleging that after giving credit for the bills there was due to them a balance of £7600. They further stated,—“The respondents believe and aver that the petitioners took this course for the purpose of avoiding having to pay a fair price for the said plant of which they have taken possession as aforesaid, and with the object of either coercing the respondents to consent to a sale thereof at an inadequate price, or of throwing the respondents' company into liquidation, and so bringing about a forced realisation of their assets.”

It was admitted at the bar that a quantity of coal had been delivered by the respondents to the petitioners on 8th October, thereby reducing the alleged debt by £1200.

After counsel had been heard, on the suggestion of the Court the respondents agreed to find caution for £600.¹

The respondents then moved for expenses.

LORD PRESIDENT.—It appears to me that this was not a case in which the petitioners ought to have proceeded in the way in which they have done. There was, no doubt, a disputed debt, that is to say there was a dispute as to the amount owing by the one party to the other. The petitioners were in possession of two past due bills, which had been granted by the respondents, and they had it in their power to raise the question between them in the usual form, by giving a charge on the bills. If they had done so, the security to be found in the meantime, while the question was being tried, would have been arranged in the usual way in the Bill-Chamber, and arranged in an equitable manner. But

* Subsection 1 of section 80 of the Companies Act, 1862, is,—“A company under this Act shall be deemed to be unable to pay its debts (1) whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor.”

¹ *Petitioners' Authorities*.—*In re* Globe New Patent Iron and Steel Co., June 26, 1875, L. R., 20 Equity, 337; Buckley on the Companies Acts, p. 195.

Respondents' Authorities.—*In re* London and Paris Banking Corporation, Nov. 21, 1874, L. R., 19 Equity, 444; *In re* Cathdick Publishing and Bookselling Company, 1864, 33 L. J., Chanc. 325.

instead of taking that very obvious course the petitioners come here alleging against the respondents that they are insolvent and unable to pay their debts, and the presentation of that petition was preceded by a correspondence, of the tone of which I cannot at all approve,—a series of threatening letters, for the purpose, apparently, of forcing payment of the balance of a debt, which was said not to be due. I think, in these circumstances, the petitioners ought to be found liable in expenses.

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LORD MURK.—I am of the same opinion.

The open and proper course was to give a charge on the bills, and had that been done the question between the parties would have been settled in the usual way. I therefore agree with your Lordship in thinking that in the circumstances this was not a case for having recourse to the remedy of liquidation under the statute.

LORD SHAND.—I am entirely of the same opinion, and concur with your Lordship in thinking that this is a case in which the application for a liquidation was entirely unwarranted. There was only a debt as to which a *bona fide* doubt exists, and not only is there no evidence of insolvency, but there is evidence before us to shew that the company is possessed of property far beyond the amount of the debt in question, and also that there are no other creditors with debts due to them who desire or are in position to take steps for having the company placed in liquidation. In these circumstances, therefore, I agree in thinking that this petition ought never to have been presented, and that the petitioners ought to be found liable in expenses.

In regard to the statement of the company that a quantity of coal had been delivered by them to the petitioners on the 8th of October, thereby reducing the debt, I shall only say that even if this transfer had not been made, this was not a case for liquidation, but was a case for the use of diligence, and if a charge had been given and suspended all that the petitioners could have claimed would have been caution or consignment of a larger sum than £600, and from all we have seen of the case the company would have had no difficulty in providing such caution or consignment. It must be borne in mind in the case of individual debtors that imprisonment for debt is now abolished, and the remedy against them is by diligence to affect their property. The same diligence is competent against company debtors, whether a limited company or not, and the proper mode of proceeding for a past due bill, where the debt is open to dispute as here, is to use diligence, at least in the first instance, but parties in the petitioners' position cannot, in my opinion, successfully come here and apply for a remedy by way of liquidation.

LORD ADAM.—I concur.

THE COURT, in respect of the consignment by the respondents of the sum of £600, dismissed the petition, and found the petitioners liable in expenses.

J. & F. ANDERSON, W.S.—J. & J. GALLETLY, S.S.C.—Agents.

No. 20. MRS ISABELLA M'DIARMID OR WEBSTER, Appellant (in Sheriff Court)
(Respondent).—*J. G. Smith—Shennan.*

Nov. 17, 1886. WILLIAM COUPER TAIT (John Webster's Trustee), Respondent (in Sheriff
Webster v. Court) (Appellant).—*J. C. Thomson—Salvesen.*
Webster's Trustee.

Contract—Pactum illicitum.—Marriage with deceased wife's sister—Bona fides.—A Scotsman went through a ceremony of marriage with the sister of his deceased wife in Norway, where such marriages are legal. They returned to Scotland, and cohabited together there for about twelve years. They then entered into an agreement to separate, the man to pay the woman an annuity of £52 a-year. Held that this agreement was not struck at as being *ob turpem causam*.
Hamilton v. De Gares, June 26, 1765, M. 9471, doubted.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

ON 21st May 1869 Isabella M'Diarmid went through a form of marriage with John Webster (both being then domiciled in Scotland), in the British Consul's office in Christiania, Norway, to which country they had gone shortly before. This marriage was invalid according to the law of Scotland, Isabella M'Diarmid being the sister of Webster's deceased wife, but it was valid according to Norwegian law. The parties returned to Scotland and lived together there as man and wife until 14th August 1882, when they entered into a "minute of agreement of separation," which bore to be between Webster, of the first part, and "Mrs Isabella M'Diarmid or Webster, presently residing at Baillieston, wife of the said John Webster, of the second part," and proceeding on the narrative that the parties had agreed to live separate and apart from each other, *inter alia*, provided that the first party should pay to the second party for her separate clothing, maintenance, and support, the sum of £1 sterling per week, during the joint lives of the parties, and so long as they continued to live separately.

On 24th March 1886 the estates of Webster (who had in the meantime married another woman) were sequestrated by the Sheriff of Lanarkshire.

Mrs M'Diarmid or Webster lodged a claim to be ranked for £500 as the capitalised value of her annuity under the above agreement.

On 9th August the trustee rejected the claim.

Mrs M'Diarmid or Webster appealed to the Sheriff, and on 6th October the Sheriff-substitute (Erskine Murray) recalled the deliverance of the trustee, and ordained the respondent to rank the appellant in terms of her claim, finding neither party entitled to expenses.*

* "NOTE.— . . . Now, while it is true that, legally, appellant is not the bankrupt's wife, it is clear that there was an obligation on him to make such a provision. This is not like an agreement void *ob turpem causam*, in consequence of its being granted as the price of prostitution. Even in a case of ordinary irregular connection, it has been held that 'a compensation for injury already sustained' is not voidable.—See Bell's Principles, sec. 37, and Bell's Illustrations, i. pp. 59 to 61, and specially the case of *Gibson v. Dickie*, therein referred to on p. 61. In *Gibson's* case, the man bound himself to pay back to the woman certain sums she had given him, besides paying so much a-year for her life; in the present case there is no obligation to repay the monies received through advances on her property, but only the aliment, so, even had this been a case of irregular connection, it would have been the stronger of the two. But, when there is taken into consideration the fact that, after having gone through the form of a marriage with appellant, and lived thirteen years with her, and resided in her house, and got advances of money thereon, Webster left her for the purpose of marrying another, the wrong done her was so great and manifest, that Webster's obligation to make compensation was clear, and the compensation under the agreement was no way excessive. The fact that appellant is called

The trustee appealed, and argued ;—In general it was true that a distinction was admitted between bonds granted as the price of prostitution, and bonds granted subsequent to the termination of the connection, as a provision due in honour and justice for injury done. But Mr Bell, in so stating the law, excepted from the favour shewn to bonds of the latter description bonds granted where the woman knew the granter to be married at the time of their connection,¹ which was in principle exactly the present case, and this exception was borne out by the case of *Hamilton*,² on which Mr Bell founded. There was nothing in the report of that case to shew that the connection continued after the granting of the bond, and it was a case decided on a consideration of two previous cases, which were opposed to each other.³ A later case⁴ was in the same direction, though the English authorities were adverse. The *bona fides* supposed to arise here from the circumstance of a marriage ceremony having been gone through in Norway would equally apply to a marriage between an uncle and a niece, which was valid in some countries.

Argued for the claimant ;—Bell's exception was not sound law. It was not borne out by *Hamilton's*² case, in which the connection continued, for anything that appeared in the report at all events, after the granting of the bond. Even if *Hamilton's* case was to be read otherwise, the extreme lengths to which the older cases had carried the law on this head had been reprobated,⁵ and the *bona fides* of the claimant here, which could hardly be doubted, looking to the whole circumstances of the case, took it out of the rule which *Hamilton's* case had been supposed to establish.

LORD JUSTICE-CLERK.—I am quite satisfied with the judgment of the Sheriff-substitute in this case, and the reasons he gives for it. I think the bond was given to the woman to enable her to live comfortably on the termination and in respect of the termination of the connection. It is a sad case, and I am not disposed to say more about it. I think the case of *Gibson v. Dickie*, referred to by the Sheriff-substitute, fully justifies his judgment.

LORD YOUNG.—I am of the same opinion, and I think it right to say that in the circumstances it was most proper for the man to make a settlement on this woman, and that he would have acted almost brutally if he had not. Going to Norway, marrying her there, living with her for thirteen years as his wife, and then throwing her over in order to marry another woman—I cannot conceive a case in which honour and justice, to use the words of Professor Bell, would make it more absolutely proper for him to make some provision for the woman he had so treated. I confess I am surprised at the opposition, surprised that the creditors should have raised any objection to make this payment, and surprised that the trustee should have insisted in the objection, unless abso-

his wife in the agreement does not alter the case. It is argued for the trustee that to sustain the claim would be to put her in a better position than a legal wife of the bankrupt. But this is not so, for the claim of a legal wife would not come to an end by bankruptcy, whereas a simple claim of compensation for an injury does."

¹ Bell's Comm. i. 299.

² *Hamilton v. De Gares*, June 26, 1765, M. 9471.

³ *Durham v. Blackwood*, July 20, 1622, M. 9469 ; *Ross v. Robertson*, June 23, 1642, M. 9470.

⁴ *Hamilton v. Main*, June 3, 1823, 2 S. 356.

⁵ *Young v. Johnson and Wright*, May 19, 1870, 7 R. 760, *per* Lord Deas, p. 764.

No. 20.

Nov. 17, 1886.
Webster v.
Webster's
Trustee.

lutely obliged to do so by the creditors. I quite recognise the rule of law of which the cases to which we were referred are illustrations—but no more than illustrations—and some of them, I agree with Lord Deas, go beyond illustrations of the rule, and apply it with a sternness which would be rejected now. The rule of law is that if the consideration for granting a document of debt be one of turpitude, the document will not sustain action. If such a cause appears on the face of the bond—if, for instance, the narrative of the bond bears that the woman agrees to live with the man as his mistress—the law will not enforce that; and if from evidence otherwise the Court are satisfied that the cause of granting was of this nature, neither will they enforce that. But where the object of the bond is to enable the man to make reparation to the woman with whom he has been living, and to put her beyond the reach of destitution for the future—when it is not to act as a retaining fee, so to speak, to insure the continuance of the connection, but as a provision on its termination—such a case is not within the rule of law at all. The case of *Hamilton* was a peculiar one. I do not say whether I should follow it in circumstances resembling those which it presented. It is possible that I should not. There a man who was living in adultery with a married woman granted a bond of annuity in her favour, and a similar bond in favour of her daughter or niece who was living with her. I suppose the man continued to live with the woman till his death—the rubric implies that, and there is nothing in the report to the contrary—but after his death an action was brought by the woman and her daughter or niece for payment of their annuities, and the Court found that no action lay on the bond granted to the mother, but sustained action on that granted to the daughter. That case, therefore, is quite different from the present—as I have said I rather think I would not follow it if circumstances exactly similar occurred again—but the present case I am prepared to decide on this simple consideration, that the man was in honour and justice bound to provide for the woman, and would have acted with the greatest cruelty if he had neglected to do so.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—I am of the same opinion. I do not think the circumstances of the case bring it within the rule of the case of *Hamilton*. I have no doubt of the *bona fides* of the wife. I can find no allegation in the record to the contrary, and I think she may well have thought the ceremony in Norway sufficient. With respect to the case of *Hamilton*, I can only say, in the words of an eminent authority, that it deserves to be reconsidered.

THE COURT dismissed the appeal, and affirmed the judgment of the Sheriff-substitute, with expenses.

JAMES SKINNER, S.S.C.—GILL & PRINGLE, W.S.—Agents.

No. 21.

ALEXANDER MACLEOD AND ANOTHER, Pursuers (Respondents).—

D.-F. Mackintosh—T. R. Clark.

Nov. 17, 1886.
Macleod, &c. v.
Davidson, &c.

JAMES M. DAVIDSON AND OTHERS, Defenders (Appellants).—*Scott—Rhind.*

Interdict—Trespass—Right not insisted in.—In a petition by a proprietor of lands for interdict to prevent persons pasturing their cattle on his lands, the defenders, *inter alia*, pleaded on record that they had a right so to pasture their cattle. Subsequently, by minute, they stated that they never claimed, and did

not now claim, such a right, but they made no motion to have the pleas asserting a right deleted from the record, although asked by the Court whether they proposed to do so. *Held* that the petitioner was entitled to interdict.

No. 21.

Nov. 17, 1886.
Macleod, &c. v.
Davidson, &c.

MAJOR FRASER of Kilmuir, in Skye, was proprietor of a field or park called Staffin Park, part of that estate, of about forty acres in extent, and bounded on the north and east by the sea, on the west by the Kilmartin River, and on the south by the township of Garrafada, also belonging to Major Fraser. This park originally formed part of the Garrafada township grazings, but had, some twelve years before the proceedings to be narrated, been detached from the grazings, the rents of the crofts being proportionately reduced. For the year ending Whitsunday 1885 it was let to Alexander Macleod.

Sheriff of In-
verness, Elgin,
and Nairn.
I.

On the night of 22d April 1884 about sixty yards of the wall separating Staffin Park from the Garrafada crofts were knocked down. In order to prevent the crofters' cattle getting into the park, Major Fraser's manager, on 14th May, contracted with a crofter named Lamont to have the wall rebuilt, but next day Lamont, alleging intimidation, declined to go on with the contract. Nothing further was done in the way of rebuilding the wall, but on 5th July Major Fraser had a meeting with the crofters regarding the continued trespassing of their cattle. Having obtained the consent of the tenant, Major Fraser offered the crofters a passage through the park in order to water their cattle at the Kilmartin River, but on condition that they were not to allow the cattle to graze or loiter in the park. They accepted this offer.

In December 1884 Macleod, the tenant of Staffin Park, with consent of Major Fraser, and Major Fraser for his own interest, brought an action in the Sheriff Court at Portree against the Rev. James M. Davidson, minister of the parish, as tenant of two of the crofts, and John Mackinnon and others, the tenants of the remaining crofts, for interdict against the defenders encroaching on the park, and placing their cattle thereon, and for removal of the defenders' cattle already there.

The pursuers alleged that the defenders, or those acting on their instructions, had knocked down the wall, and that they had since allowed their cattle to graze on the park notwithstanding repeated requests by the pursuers to remove them.

The defenders denied that they had had anything to do with knocking down the wall, and they pleaded that interdict ought not to be granted, in respect (1) that in any event they had not violated the condition on which the permission of 5th July had been given, and (2) that they had a right to graze their cattle on Staffin Park—the Rev. Mr Davidson (for whom separate defences were lodged), on the ground that such a right formed part of his benefice, and the other defenders on the ground stated in the following plea:—“(4) The permission given by the pursuer William Fraser to the defenders, his tenants, to water their cattle in, and to use the path through the field in question, being a part of the defenders' rights as his tenants, and being a restoration of part of their original rights as tenants of Garrafada, the pursuers are not now entitled to deprive them thereof by summary action of interdict.”

A proof was allowed. The facts already narrated, in so far as they had been in dispute, were proved. There was no evidence connecting any of the defenders with the breaking down of the wall. The defenders' evidence was almost entirely directed to shewing that the cattle had never, at least with their knowledge or authority, been permitted to graze on Staffin Park, and, in particular, that the condition on which Major Fraser's permission of passage over the park was granted had been strictly adhered to.

By two interlocutors, dated 28th and 30th December 1885, the Sheriff-

No. 21. substitute (Speirs) assolized the Rev. Mr Davidson, and granted interdict against the remaining defenders.

Nov. 17, 1886. Mackinnon and others appealed to the Sheriff (Ivory), who, on 23d
Macleod, &c. v. Davidson, &c. February 1886, recalled his Substitute's interlocutors, and granted interdict against all the defenders.

The defenders appealed. Their argument was directed to shew that they had made use of Staffin Park simply as a passage for their cattle, and they lodged a minute setting forth "that they never claimed, and did not now claim, any right of grazing their cattle on the park in question, called Staffin Park, or of entering upon the said park, except in virtue of and for the purposes specified in the permission granted by the pursuer Major Fraser on 5th July 1884, and that they will use due care to prevent their cattle grazing or encroaching on the park in question"; but they made no motion to have the pleas asserting a right struck out of the record, although asked by the Court whether they proposed to do so.

The respondents were not called on.

LORD JUSTICE-CLERK.—This is a case of some importance in more aspects than one. It appears that Major Fraser is proprietor of a strip of ground which runs along a river in Skye called the Kilmartin River, and that there are certain grazings on which the tenants of Garrafada have the right of putting their cattle, on the other side of the wall or fence which bounds Major Fraser's ground. A question arose as to the right of the Garrafada tenants to water their cattle at the river, and in order to do so, to pass over the strip of ground belonging to Major Fraser. One night the wall which separated this strip of ground from that in the possession of the tenants was pulled down violently and illegally, it is not known by whom—we have no evidence bringing it home to anyone—but in the morning sixty yards of it, I think, were found levelled with the ground. In consequence of the encroachments on his ground which followed, a meeting and conversation between Major Fraser and the Garrafada tenants took place, in which he admitted that it was not unreasonable that the tenants should have access to the stream for their cattle, and should be allowed to drive the cattle over his ground for that purpose, but he stipulated that in return for this privilege they should take care that their cattle did not trespass elsewhere on his ground. He also wished to have the wall built up again, and contracted with a man named Lamont to have that done. Certain influences, which have not been specifically explained to us, but which we can easily enough understand, were brought to bear, with the result that the wall was not built up, and is not built up yet, leaving Major Fraser's ground still open to the incursions of the cattle. In consequence this action has been brought against the Rev. Mr Davidson, the minister of the parish, who is one of those who claim a right to graze their cattle on this piece of ground, and against a number of crofters who make a similar claim. The actual rioters by whom the wall was pulled down have not been discovered, nor is it proved that any of those who are called as defenders in this action were individually participant in the matter, but I think that the persons who are called in this process lay claim to rights which are wholly inconsistent with the rights of the proprietors of the ground. It appears to me that if these pleas remain on record that is quite a sufficient ground for granting interdict. It is everyday practice that a threatened charge may be suspended or a threatened encroachment prevented by means of an interdict. There is no better ground for granting interdict than that an encroachment has been threatened, and there can be no doubt that an encroachment has

been threatened on the part of the minister and the other defenders here. The Sheriff-substitute has assolized Mr Davidson, but the Sheriff has directed interdict against him as well as against the other defenders. I think that the Sheriff's judgment must be supported. Mr Davidson's contention is quite clear. He says that the park in question formed part of the land on which he and his predecessors as ministers of Stenscholl were entitled to exercise the right of grazing, and that he had been illegally excluded from these lands. The other defenders say that the permission given by Major Fraser was merely a restoration of a right which they formerly possessed. We are now told that these pleas are all a phantom, but they were threats of encroachment, and that is enough to justify interdict. Without going into the evidence in the case, I think we ought to sustain the judgment of the Sheriff.

No. 21.

Nov. 17, 1886.
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Davidson, &c.

LORD YOUNG.—I am entirely of the same opinion, and I only wish to say this, that I agree with your Lordship that the rights which are asserted by the defenders on record, and the pleas which were put there, and are standing there, now being admittedly unfounded, the rule of law is that the complainer is entitled to interdict. That rule is not an absolute rule, for the respondent may be able to shew that interdict is not necessary,—that is to say, although the complainer may be entitled to have the respondent restrained from doing the things of which he complains, yet the whole circumstances of the case may be such, in the opinion of the Court, that the end in view may be obtained with more propriety otherwise than by granting an interdict. Here I think that it is the right of the complainer to have his legal rights in this strip of ground vindicated by means of the remedy of an interdict, for so far as I have been able to discover there are no circumstances in the case sufficient to take it out of the general rule of law.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute of 28th and 30th December 1885, and the interlocutor of the Sheriff of 23d February last: Find that the pursuer Major William Fraser is proprietor, and the pursuer Alexander Macleod is tenant of the field or park described in the prayer of the petition, and that the defenders assert right to graze their cattle on the said field, and to lead them through it to water in the Kilmartin River: Find that the rights so asserted are unfounded: Therefore repel the defences; interdict, prohibit and restrain the defenders in terms of the prayer of the petition." Then followed a decree ordaining the defenders to remove such cattle as were already on the park, and a finding of expenses.

SKENE, EDWARDS, & BILTON, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

JOHN SMITH, Pursuer (Respondent).—*Jameson—Younger.*
MRS ANN RIDDELL, Defender (Appellant).—*J. A. Reid.*

No. 22.

Nov. 18, 1886.
Smith v.
Riddell.

Contract—Family arrangement—Lease—Failure of consideration from supervening circumstances.—By written assignation Smith, an old man of eighty-two, the yearly tenant of a farm, on the narrative that from age he was unable to attend properly to business, agreed with Riddell, the husband of one of his nieces, "that during the remainder of my life the said James Riddell shall maintain and support me at bed, board, and lodging suitable to my station,

No. 22. and along with the said James Riddell and his family, to which I shall be considered to belong, and that whether I or the said James Riddell or both of us remain as tenant" of the farm or remove to another. In consideration Smith assigned and made over to Riddell "the lease and right of occupancy of the said farm, together with the whole stocking, crop, and other effects thereon, surrogating and substituting the said James Riddell in my full right and place of the premises, with full power to him to take and receive full possession of the said whole stocking, crop, and other effects as his own absolute property." Riddell signed the deed as consenting to and adopting it, and shortly thereafter, with his wife and family, went to reside in the farmhouse with Smith, and began to manage the farm; but before he had done so for six months, and before he had been accepted as tenant by the landlord, he died. His widow, as his executrix, claimed the stock and cropping. *Held* that as in consequence of Riddell's death his part of the agreement was incapable of fulfilment, his widow was not entitled to the stock and cropping, which remained the property of Smith.

2D DIVISION.
 Sheriff of
 Aberdeen,
 Kincardine,
 and Banff.
 I.

ON 22d November 1884 John Smith, an old man of eighty-two, who had held the farm of Bogmill of Balquhain, in Aberdeenshire, under a lease for nineteen years, which expired at Whitsunday 1883, and had thereafter continued to possess as yearly tenant, granted the following assignation in favour of James Riddell, the husband of one of his nieces, viz.:—"I, John Smith, tenant from Whitsunday 1884 to Whitsunday 1885 of the farm of Bogmill, . . . considering that in consequence of my old age I am unable to attend properly and efficiently to the said farm or business generally, and that in consequence I desire to be relieved of the obligations upon me as tenant foresaid, and of all business matters, and that James Riddell, at present residing at Woodside, Wester Fintray, the husband of my niece, should succeed to me as tenant of said farm, and have transferred to him the stocking therein, to which the said James Riddell has agreed on the terms and conditions after mentioned, viz.:—That during the remainder of my life the said James Riddell shall maintain and support me at bed, board, and lodging suitable to my station, and along with the said James Riddell and his family, to which I shall be considered to belong, and that whether I or the said James Riddell or both of us remain as tenant of the said possession at Bogmill or remove to another possession. Therefore, in consideration of the premises, I hereby assign, convey, and make over to the said James Riddell the lease and right of occupancy of the said farm of Bogmill, together with the whole stocking, crop, and other effects thereon, surrogating and substituting the said James Riddell in my full right and place of the premises, with full power to him to take and receive full possession of the said whole stocking, crop, and other effects as his own absolute property. And I, the said James Riddell, subscribe this assignation as consenting to and adopting the same and the foresaid conditions under which it is granted. And we both consent to the registration hereof for preservation. In witness whereof," &c.

Shortly thereafter Riddell, with his wife and family, came to reside with Smith at Bogmill, and Riddell conducted the management of the farm until July 1885—a period of not quite six months—when he died, without having been accepted as tenant by the landlord. Smith then gave up the farm. Mrs Riddell, as executrix of her late husband, claimed the stock and cropping in virtue of the above assignation, and advertised a dispenishing sale. Smith brought an action in the Sheriff Court at Aberdeen to have her interdicted from proceeding with the sale.

The foregoing facts were not disputed.

The pursuer pleaded, *inter alia*;—There being a strong *delectus personæ*

between the parties to the agreement, and the defender's author having failed in the performance of his part, the defender cannot fulfil the obligations incumbent on her author, and parties should now be restored. No. 22.
Nov. 18, 1886.
Smith v.
Riddell.

The defender, who stated that she was willing to aliment the pursuer, pleaded;—The assignation being for onerous causes, and having been completed by possession, cannot now be resiled from.

On 7th June 1886 the Sheriff-substitute (Dove Wilson) declared an interim interdict formerly granted to be perpetual, and appointed the consigned price of the subjects, which had been sold by order of the Court, to be paid to the pursuer, with expenses.*

On appeal the Sheriff (Guthrie Smith) affirmed the judgment.†

The defender appealed.

LORD JUSTICE-CLERK.—The Sheriffs are both of opinion that this agreement cannot be, and ought not to be, enforced according to its letter, on the ground, apparently, that supervening events, totally unforeseen, have substantially prevented the consideration on account of which it was granted from being fulfilled, with the result that this old man cannot receive the only counterpart for which he agreed to give up his property. I am inclined to agree in that view. It is an unusual kind of case—a family arrangement, by which, in consideration

* "NOTE.— . . . Whatever difficulties might have arisen had the deceased not died till after he had been received as tenant by the landlord, and after the assignation and delivery of the stocking to him had been thus completed, it seems to me that his death while delivery was incomplete put an end to the agreement. At that time if the pursuer had refused to go on and complete the deceased's entry, or if the landlord had refused to accept him, or if anything whatever had then occurred to prevent the pursuer from giving complete implement, the deceased might have refused to go on. In the same way it seems to me that the defender's inability to give implement of the agreement puts an end to it. The obligation on the defender's side was not that she or somebody whom she might select was to board the pursuer and manage his farm for him. It was an obligation that the deceased was to do so, and to substitute for the deceased a person with whom the pursuer might have no comfort, and in whom he might have no confidence, would not be just. An unforeseen circumstance has put an end to the possibility of carrying out this agreement, before delivery under it was complete, and as the defender can no longer offer the consideration, she seems to me no longer entitled to demand the completion. It seems to me that it cannot well be questioned that, so long as the pursuer was tenant of his farm, and resided on it, he could not be held to have given complete delivery of it or of its stocking to any other party."

† "NOTE.—I think that this case has been rightly decided by the Sheriff-substitute. The respondent, an old man of over eighty years of age, wished James Riddell to come and manage his farm for him, and succeed him in the tenancy—an arrangement to which the landlord apparently had no objection, being willing to 'grant a new lease in which Riddell would be recognised as tenant or joint tenant' (defender's stat. 6). But before this could be carried out, Riddell died, and now neither the respondent nor the landlord will have anything to do with the widow. It is quite clear, in these circumstances, that she has no title to enforce the contract to the effect of demanding delivery of the stocking and other effects which were to have been given to Riddell when the new lease had been arranged in consideration of the respondent being allowed to live in family with him when he was managing the farm. The whole arrangement has proved abortive. The property had never passed out of the respondent's possession. The contract was as purely a personal contract as could be—for it was Riddell, and not his wife, that he had in view when he entered into it, and it would not be fulfilled by his being offered a home somewhere else."

No. 22. of his living in family with and being supported by the husband of his niece, the old man was to give up all interest in the farm and title to the lease. Before it came into operation the niece's husband, who was to undertake the obligation of the lease, died, and now the old man says that he never meant to enter into any arrangement unless he could get Riddell, his niece's husband, to come and live with him, and consequently that through Riddell's death the whole arrangement has been subverted. I am of opinion that this is the reasonable view. I think it would be against reason and against conscience that this agreement should be enforced against this old man when the only consideration for which he undertook it has become impossible of fulfilment.

Nov. 18, 1886.
Smith v.
Riddell.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

THE COURT adhered.

J. D. MACAULAY, S.S.C.—R. C. GRAY, S.S.C.—Agents.

No. 23. THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY OF NEW MEXICO, Appellants.—*Balfour—Murray—G. R. Gillespie.*
Nov. 19, 1886. THE COMMISSIONERS OF INLAND REVENUE.—*Lord-Adv. Macdonald—Sol.-Gen. Robertson—A. J. Young.*
Scottish Mortgage and Land Investment Co. of New Mexico v. Commissioners of Inland Revenue.
Revenue—Property and Income-Tax Act, 1842, 5 and 6 Vict. c. 35, sec. 100, schedule D, Fourth Case—Interest received from foreign investments.—A Scottish company which had invested funds in America, instead of bringing home the interest, invested it in America, but deducted an equivalent amount from capital raised in this country for transmission to America for investment. The amount so deducted was divided as income among the shareholders. Held that the interest was to be regarded as interest received in this country, and was therefore liable to assessment for income-tax under the fourth case of schedule D of the Income-Tax Act, 1842.*

A Scottish company which carried on the business of borrowing money in this country and lending it on American securities, having been charged with income-tax on interest received from American investments under the fourth case of schedule D, objected to the assessment on the ground that the company, as a trading company, could only be assessed upon its profits under the first case of schedule D. *Held* that the assessment under the fourth case was competent.

1ST DIVISION. **M.** THE SCOTTISH MORTGAGE AND LAND INVESTMENT COMPANY OF NEW MEXICO, LIMITED, incorporated under the Companies Acts, was formed in 1882 principally for the purpose of borrowing money in this country on debentures at a low rate of interest, and lending it out in the United States of America, together with the paid-up capital, at a high rate of interest, on the security of land in that country.

The company had its head office in Glasgow, with a managing board of six directors, there being also an advising board of directors in the United States, with a manager there. A duplicate of the books of the agencies in America was kept at the office of the company in Glasgow, and the American transactions were recorded therein from monthly advices received from the manager and its agents there.

The company was assessed in the sum of £129, 7s. under the fourth case of schedule D of the Income-Tax Act,* charged upon a sum of £5174, as the company's profits for the year ending 31st December 1884.

* The rule contained in the fourth case, schedule D, section 100, of 5 and 6 Vict. cap. 35, is,—“Fourth case.—The duty to be charged in respect of interest arising from securities in Ireland, or in the British Plantations in America,

The company appealed, and a case was accordingly stated by the Commissioners, which set forth,—

"12. The sum of £5174, on which duty is charged, . . . embraces the following sources of profit, viz. :—

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"Interest of money lent by the company on the security of property in the United States of America, earned or accrued and brought into account in the year ended 31st December 1884, . £6926 5 2
"Transfer fees received, 2 12 6

£6928 17 8

"Expenses of management in America, £1193 5 10

"Do. do. at home, . 562 0 7

1755 6 5

"Amount assessed, £5173 11 3"

"The interest paid or due to debenture-holders during the year amounted to £3094, 18s. 1d., and this sum is not deducted in computing the amount for assessment.

"13. The income on which the assessment was charged was applied as follows :—

"Interest on debentures paid and accrued to 31st December 1884, £3094 18 1

"Dividend of 7 per cent to the shareholders, 700 0 0

"Extinction of the debit balance of the year 1883, 499 10 7

"Reduction of preliminary expenses, 508 5 5

"Carried forward, 370 17 2

£5173 11 3"

"8. The interest received by the company's agents in America was periodically brought into account in the books of the company kept at the head office in Glasgow. Out of the funds raised by the company in this country there was retained a sum equivalent to the interest realised from the American securities after defraying the working expenses in America, and no interest from foreign securities was received in Great Britain during the period above mentioned."

"15. It was contended on the part of the company that the company was of the nature of a banking and trading concern, and that the assessment should be made in terms of case first, section 100, of 5 and 6 Vict. cap. 35; * . . . or alternatively, that if the assessment fell to be made under the fourth case, that no assessment fell to be made, in respect that

or in any other of Her Majesty's dominions out of Great Britain, and foreign securities, except such annuities, dividends, and shares as are directed to be charged under schedule C of this Act.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year, without any deduction or abatement."

* The first case, schedule D, is,— "First case.—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act."

Rules.

"First. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years," &c.

No. 23. no interest arising from foreign securities had been received in this country during the year of assessment, all such interest accruing to the company having been retained and invested abroad.

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"16. The Surveyor of Taxes maintained that the profits were of the nature described or comprised in the third clause, schedule D, section 2, of 16 and 17 Vict. cap. 34, and that the assessment fell to be imposed on the actual amounts which have been or will be received in the United Kingdom in the year of assessment, according to the rule contained in the fourth case, section 100, of 5 and 6 Vict. cap. 35.

"17. That although the interest may not have been sent home *in forma specifica* during the year, yet there was brought into account in the books of the company at Glasgow a sum equivalent to the amount of the interest on the American securities, which sum was retained out of the monies raised in this country, and the sum so retained was applied to the payment of the interest on the money borrowed by the company, to the payment of a dividend to the shareholders, and in payment of the expenses of management in this country."

"19. The Commissioners found (1) that the profits of the company were of the nature described in the 3d clause, schedule D, sec. 2, of 16 and 17 Vict. cap. 34; (2) that the assessment fell to be imposed on the full amount of the sums which had been received in the United Kingdom in the year of assessment, and that according to the rule in the fourth case, sec. 100, of 5 and 6 Vict. cap. 35, duty was chargeable on the profits of the company which had been brought into account in their books at Glasgow, in so far as such profits had been applied to the payment of interest, dividends, debit balance, and preliminary expenses, in respect that, by being so brought into account and applied, they must be held to have been received in this country in exchange for an equivalent sum raised in this country and invested abroad, but not upon the profits which had been carried forward, even although such profits had been brought into account in the books of the company at Glasgow, in respect that they had not yet been actually dealt with and applied as money received in this country."

"When this appeal was previously before the Commissioners, their attention was not directed to the fact that a portion of the profits in respect of which duty was charged had been carried forward, and they now desire to amend the decision then given by them by relieving from assessment the amount of such profits, viz., £370, 17s. 2d."

The appellants argued;—(1) Schedule D of the Income-Tax Act was applicable to the case of profit and gain only. Nothing was subject to taxation which was not profit or gain. It was impossible to say in the present case whether there was profit or gain until the accounts of the whole transactions carried on by the company were complete. The interest upon which the assessment had been made had not yet been received in Great Britain, and had accordingly not entered their balance-sheet. Until it did so it was impossible to regard it as profit. (2) The sums proposed to be assessed did not literally come within the terms of the fourth case under the statute, because they were not received in Great Britain. It was said that the operation disclosed in the case, and which was carried through in the company's books, was equivalent to "receipt." But, as matter of fact, the money remained in America, and was invested there. It was settled law that a member of a firm carrying on business abroad, but having an agency at home, need not return his whole profits, but only what he brought home.¹

¹ Sully v. The Attorney-General, May 11, 1860, 29 L. J., Exch. 464; Attorney-General v. Alexander, Nov. 20, 1874, L. R., 10 Exch. 20; cf. also Casens Sulphur Co. v. Calcutta Jute Mills Co., 1876, L. R., 1 Exch. Div. 428.

The respondents' argument sufficiently appears from the opinions of the Judges. No. 23.

At advising,—

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LOED PRESIDENT.—The question in this case is whether the duty has been properly charged as falling within the fourth case of schedule D of the Income-Tax Act of the 5th and 6th of Victoria, or whether it ought not to have been charged according to the rules applying to the first case under schedule D. The first case is that of "duties to be charged in respect of any trade, manufacture, adventure, or concern, in the nature of trade, not contained in any other schedule of this Act," and under that case duties are to be charged upon a sum equal to the full amount of the balance of profits or gains of the trade, upon a fair and just average of three years ending upon such day of the year immediately preceding the year of assessment on which the accounts of the trade shall have been usually made up. Under the fourth case the duties are charged "in respect of interest arising from securities in Ireland or in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign securities," except such annuities, dividends, and shares as are directed to be charged under schedule C of the Act. In this case the duty is to be charged upon a sum not less than the full amount of the sum so far as the same can be computed, which has been or will be received in Great Britain in the current year, without any deduction or abatement.

Now, the present company is undoubtedly a trading company, and I do not doubt that the duty might have been charged in this case as under the first case in schedule D; but that is not the question. The question is whether it may be lawfully charged under the fourth case. One can quite understand that in particular circumstances the duty may be chargeable either under the one or the other. The income in respect of which the duty is to be charged may fall under more than one description in the statute, and in that case it would, of course, be in the option of the Commissioners of Inland Revenue to take the case that was most favourable to themselves. It appears to me that although this might have been charged as a duty upon the balance of profits and gains under the first case, it is equally chargeable as the interest accruing upon foreign securities under the fourth case.

The duty is charged on a sum of £5174, and that sum is computed from the accounts of the company for the year ending the 31st of December 1884, presented to the annual meeting of shareholders on the 7th of April 1885, and it embraces the following sources of profit,—“Interest of money lent by the company on the security of property in the United States of America, earned or accrued or brought into account in the year ended 31st December 1884, £6926”; then there is a slight addition for transfer fees, and there is a deduction of the expenses of management in America, £1193, 5s. 10d., which seems to be quite right, because that cannot have been received in this country as part of the income derived from the foreign securities. But there are also deducted the expenses of management at home. Upon what principle that deduction is made I do not know, but as the Inland Revenue have chosen to make it, of course the other party will have the benefit of it. Then the 13th article sets out,—“The income on which the assessment is charged was applied as follows, as appears from the company's printed report and accounts for the year ending 31st December 1884, interest on debentures paid and accrued to 31st December 1884,”

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—that is interest paid upon debentures held in this country, in which the company are debtors,—“dividend of 7 per cent to the shareholders, extinction of the debit balance of the year 1883, reduction of preliminary expenses,” and “balance carried forward.” Now, it will be observed that these items are all of them properly chargeable against income, and not against capital. Of course it is needless to say that interest upon debentures payable by the company is a charge upon income, and so is the dividend eminently a charge upon income, and the other items are in the same position. That shews that the company were dealing with this as proper income, which they disposed of in this country, and paid away in this country. But the peculiarity of the case arises from an explanation given in the 8th article of the case, which states that “The interest received by the company’s agents in America was periodically brought into account in the books of the company kept at the head office in Glasgow. Out of the funds raised by the company in this country there was retained a sum equivalent to the interest or gain realised from the American securities after defraying the working expenses in America, and out of this sum was paid all the working expenses in Great Britain, the interest to debenture-holders and depositors, and a dividend at the rate of 7 per cent to the shareholders for the year 1884.”

In these circumstances the company contend that this sum of £5173 cannot be charged with duty as interest arising from securities in foreign countries, because the rule for charging the duty under the fourth case provides that it is to be charged on a sum not less than the full amount of the sums which have been or will be received in Great Britain in the current year; and they say that the state of the fact, as mentioned in the 8th article of the case, shews that this interest was not received in Great Britain. Now, in one sense of the word that may be true. That is to say, the interest received by the company’s agents in America has not been in *forma specifica* sent to this country. The money received by the agents in America remains in their hands, and it remains in their hands for investment there. But then an equivalent for the amount of that interest is retained by the managers in this country out of money borrowed by them on debentures for the purpose of being sent out to America and invested upon foreign securities there. So that the one sum is just set against the other in the books of the company here, and it is for the Court to determine whether that *species facti* does not sufficiently satisfy the words of the rule under case fourth, that the interest upon the foreign securities has been received in this country.

I have already adverted to the way in which a sum equivalent to the interest received in America has been disposed of in this country. It has been disposed of as income. In point of fact, it was received in the shape of capital, because it is part of the proceeds of debentures granted by the company in this country, for which they have received capital sums in exchange. But if in the process of book-keeping it was not converted into income, then the payments made out of that money were altogether illegal, because these sums mentioned in article 13 of the case are sums which could not be paid out of capital,—I mean the interest upon debentures, and a dividend of 7 per cent to the shareholders. If the dividend to the shareholders had been paid out of capital, that would have been altogether illegal, and so also with the interest paid on debentures in this country, and all the other items embraced in the 13th article of the case.

So that according to the way in which this company keeps its books, it has really converted a sum which was received in this country as capital into an

equivalent for the interest upon the foreign securities, and it represents in their books interests upon these foreign securities. Now, in these circumstances, it appears to me quite impossible for the company to maintain that they have received that interest. They have received it in this most proper sense of the term, that it enters their books in this country as such interest, and is paid away as such. I am therefore of opinion that the duty is rightly charged under the fourth case, and that the deliverance of the Commissioners ought to be affirmed.

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LORD MURK.—I am of the same opinion. The sums in question, though received in America, were brought into account here as interest by the company. That is clear upon the admission in the case; and having regard to the articles which your Lordship has referred to, I think the moneys were disposed of in such a way as to shew that the interest was in substance brought into account in this country, and so received and dealt with as interest. Instead of having the interest sent home they used funds which they had in hand here that were sufficient to pay the interest and dividend, as shewn in article 13 of the case. There might have been something in the state of the exchanges which rendered it inconvenient to send the money to this country at the time; and the money in this country which they had in hand was therefore applied to pay dividends and interest. In these circumstances I think the bringing it into account in that way makes it money substantially received by them here in the sense of the fourth head of section 100 of the statute. I think that is clear, and the question thus raised appears to me to be very much the same kind of question as one of those which were so anxiously argued in the case of the *City of Glasgow Bank and Liquidator v. Mackinnon*, Feb. 3, 1882, 9 R. 535, where it was held that money so dealt with by the City of Glasgow Bank was not to be held as a payment out of capital, but when carried to a profit and loss account was a proper payment of interest, although the interest itself was never sent over to this country.

LORD SHAND.—The alternative contentions of the parties maintained at the bar seem to be these,—on the one hand it is maintained on the part of the Crown that as this company sends a large amount of money, year by year, to America, for the purpose of being placed in foreign securities, which yield a larger amount of interest than they can get here, a practice of that kind falls directly under the fourth case mentioned in the statute, which expressly provides that in regard to foreign securities the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums which have been or will be received in Great Britain in the current year, without any deduction or abatement. On the other hand, it is contended for the company that in their case that rule of the statute should not be followed, but that their balance-sheet for the year should be looked at, and the difference which they bring out as profit in that balance-sheet should be taken as the subject of assessment.

I presume the company making that contention have satisfied themselves that if the income-tax were charged in that way a large advantage would accrue to them. That point seems to depend upon this,—whether they would be entitled, even in that view, in striking their balance for the year, to deduct in a return for income-tax interest upon borrowed capital. The company has a large number of shareholders, and it provides to a certain extent its own capital. But in addition, it borrows a large amount of capital on debenture; and if in striking profits it is proper to deduct interest upon borrowed capital, then undoubtedly they

No. 23. would have the advantage which they claim. We have not been called upon to consider that question, and I express no opinion upon it, but I observe that one of the rules under the first case in the statute is, that in estimating the balance of profits and gains chargeable under schedule D upon assessing the duty thereof, no sum shall be set against, or allowed, or deducted from, or allowed to be set against or deducted from such profits and gains on account of any sum employed, or intended to be employed, as capital in any such trade, manufacture, adventure, or concern, nor on account of any capital withdrawn from such adventure or concern. If, on the one hand, the interest upon this borrowed capital is a proper deduction in the case of a trading company, no doubt this company would get the benefit. If, on the other hand, it is not lawful to make such a deduction under the words I have read, it appears to me that the company would get no advantage from it.

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But assuming that it would be an advantage to them to be assessed under the first case, I entirely agree with your Lordship that they cannot successfully maintain under the statute that the first is the only case on which it would be open to the commissioners to assess them. The fourth case expressly in explicit terms includes the case of individuals and of companies sending money abroad to be placed upon foreign securities, and provides expressly that the sums received upon such securities shall be subject to assessment. It is true, as your Lordship has observed, that it might be within the power of the Crown to have charged it otherwise if for their advantage. But it is worthy of notice that the first case is headed by these words, "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act." This particular kind of security does appear to me to be contained in case four of the same schedule of the Act, and I concur with your Lordship in holding that the Crown is entitled to assess under that case which in their opinion will produce the largest sum. As to the effect of the words in the statute "interest received in this country," I have no doubt. As your Lordship has pointed out, if it is not in substance received in this country, they would have no right to treat it as profit and divide it. It is treated as profit, it is divided, and therefore it must be taken to be received in this country. But I think it is quite plain that it is so received, because in article 8 of the case the parties tell us that in place of bringing this money home *in forma specifica*, the company retain it and divide it, instead of sending it out to America for investment. The other course would be that the company should send out so much money to America and get exactly the same sum sent home, having to send a remittance out and get a remittance back, with no possible meaning, and probably as Lord Mure has observed, with a considerable loss in exchange by the transaction. To avoid that they refrain from sending out money which otherwise they would send out to America, and as matter of account they treat that money which was obtained in America as having been sent home. I cannot doubt that within the meaning of the statute the money was so treated as being received in this country from investments abroad, and therefore I am of opinion with your Lordships that that argument on the part of this company also fails.

LORD ADAM.—I concur.

THE COURT affirmed the determination of the Commissioners.

MACKENZIE, INNES, & LOGAN, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

EDWARD SWEENEY, Pursuer (Appellant).—*Rhind—Orr.*
ROBERT A. M'GILVRAY, Defender (Respondent).—*Pearson—Younger.*

No. 24.

Nov. 23, 1886.

Reparation—Negligence—Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. cap. 42).—During the execution of a contract for laying concrete in the premises of a tramway company, the foreman of the contractor had been in the habit of giving orders to the labourers employed under him to come ten minutes before their ordinary work hours each morning to remove from the sheds certain tram-cars which obstructed their work, but which it was the duty of the company to have removed daily.

In an action of damages raised by one of the labourers, who had been injured in assisting to remove the cars, against the contractor, on the ground that the accident had been caused by the fault of his foreman, the defender alleged and adduced evidence to the effect that the removal of the cars did not fall within his contract, and that the employment of his men in this work by the foreman was without his knowledge, and was not authorised by him, and pleaded that he was not responsible.

Held that the foreman's orders for removal of the cars, being in furtherance of the contract work, were orders which the labourers were bound to obey, and that the defender was responsible under the Employers Liability Act for the negligence of his foreman; *dis.* Lord Craighill, on the grounds that in removing the cars the labourer was not working in the contractor's employment, and that the order to remove the cars was not within the scope of the foreman's authority.

ROBERT A. M'GILVRAY, plasterer, Glasgow, was, in April 1886, under 2^d Division. contract with the Glasgow Tramway and Omnibus Company to lay concrete on certain parts of their premises at Maryhill. In order to enable the men to proceed with their work it was necessary to remove every morning the tramway-cars which were on the rails in a shed on the premises. The cars ought to have been removed by the tramway company before seven o'clock in the morning, which was the hour for M'Gilvray's workmen commencing work. In consequence of the tramway company's servants habitually neglecting to do so, it was the habit of John Gillies, the contractor's foreman or gaffer employed at the job, with the labourers under him, to attend each morning before seven to remove the cars. Sheriff of Lanarkshire.
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Edward Sweeney, one of the labourers, having been injured while so engaged, raised an action of damages in the Sheriff Court of Lanarkshire against M'Gilvray for payment of £200, or for payment of £165, 15s., or such sum as should be found due to him under the Employers Liability Act, 1880.

The pursuer averred that, on the morning of 20th April, there were four or five cars on the rails in the shed, and that, as the materials for making the concrete were on one side of the rails and the mixing machine on the other, the defender's foreman, John Gillies, ordered the pursuer and others to push the cars out of the shed, and that, while the pursuer was engaged in pushing one of the cars, he was injured by Gillies pushing another car against him from behind, and that "the accident was caused through the fault or negligence of the defender or of his foreman, the said John Gillies, for whom he is responsible."

The defender averred:—"On the date in question the defender's foreman, Gillies, who is ordinarily engaged in manual labour, in order to prepare for beginning work at seven o'clock A.M., began moving some of the tramway-cars out of the shed. Gillies gave no orders to pursuer or anyone else to assist him, but the pursuer and another man named M'Mahon, among others, voluntarily began to help Gillies to push out the cars. Gillies was pushing out the last car at a slow pace, when the car in front,

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which was pushed by pursuer and M'Mahon, suddenly struck on a stone or some other obstacle, and Gillies' car coming up from behind struck the pursuer, and injured him slightly. As Gillies was behind the car he was pushing it was impossible for him to see pursuer, but the pursuer and M'Mahon could easily have seen the car coming up behind them had they been exercising proper care, and could have stepped out of the way, or called to Gillies to stop the car. Pursuer materially contributed to said accident by his own negligence in not so doing. Pursuer was not ordered to push out the cars, nor was it his duty to do so, nor was he under the orders of Gillies, or bound to obey him."

The pursuer pleaded ;—(1) The pursuer having suffered loss, injury, and damage through the fault or negligence of the defender, or of those for whom he is responsible, is entitled to reparation therefor. (2) Or otherwise, the pursuer having been injured, while in the employment of the defender as a workman, through the fault or negligence of the defender, or of those for whom he is responsible, is entitled to decree under the Employers Liability Act, 1880, sec. 1, subsections 2 and 3,* in terms of the second conclusion of the petition.

The defender pleaded ;—(2) The pursuer not having been injured through the fault or negligence of the defender, or anyone for whom he is responsible, the defender should be assoilzied. (3) The pursuer having caused said accident by his own negligence, or having, at least, materially contributed to the accident by his own negligence, the defender should be assoilzied.

A proof was allowed. The evidence was to the following effect :—The work had been going on for some weeks before the occurrence of the accident. There were twelve or thirteen men employed as labourers under the charge of Gillies, as gaffer. The greater part of Gillies' time during the day was taken up in superintending the men, but he also worked along with them. The tramway company's servants had removed the cars from the shed on one or two occasions only, the last occasion being in consequence of a remonstrance by the defender about a week before the accident. The accident took place before seven o'clock in the morning, when the ordinary work hours commenced for which the men were paid, and was occasioned by Gillies pushing a car against a car in front, which latter was being pushed from behind by the pursuer and another labourer. The main points of dispute between the parties were as to the position of Gillies, and his authority to order the labourers to attend before seven for the purpose of removing the cars, and as to the defender's knowledge or sanction of their so doing.

The general import of the evidence for the pursuer was to the effect that the men had received no special order to attend before seven o'clock on the morning of the accident, but they considered that they had general orders from Gillies to attend every morning for the purpose of removing the cars. That Gillies had power to dismiss them if they dis-

* 43 and 44 Vict. c. 42, sec. 1.—"Where after the commencement of this Act personal injury is caused to a workman . . . (2) By reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him whilst in the exercise of such superintendence ; or (3) By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform, and did conform where such injury resulted from his having so conformed . . . The workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

obeyed his orders. That they were not aware until after the accident that the defender disapproved of his men removing the cars. No. 24.

On the other hand, the evidence for the defender was to the effect that he was not aware that the men were in the habit of removing the cars. That he had forbidden them to do so, and that Gillies had no power to dismiss the men. Nov. 23, 1886.
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On 2d August 1886 the Sheriff-substitute (Spens) pronounced this interlocutor:—"Finds that the pursuer was, on the 20th April last, in the employment of defender: Finds that his work began to the defender at seven o'clock on the morning of said day, but a few minutes before said hour he was injured by the defender's foreman pushing a tramcar in such a way as to come against the pursuer's right arm, which was broken: Finds, under reference to note, that there is no liability at common law, or under the Employers Liability Act; therefore sustains the defences, and assolizies the defender," &c.*

The pursuer appealed, and argued;—The pursuer's claim was well founded under the Employers Liability Act. The accident occurred through the fault of Gillies, the defender's foreman. If Gillies gave the order which led to the accident in furtherance of his master's interest, that was enough to infer the master's liability though the master might not know of the order having been given. The negligence of Gillies would make the defender liable for the injury to the pursuer either under subsection 2 of section 1 of the statute,—Gillies having been negligent whilst in the exercise of the superintendence entrusted to him; or alternatively, under subsection 3,—Gillies being a person to whose orders the pursuer was bound to conform, and did conform with the result of being injured by his having so conformed.¹

The defender argued;—The pursuer was not acting in the defender's employment at the time of the accident. The removal of the cars was not part of the defender's contract. Both Gillies and the men had been expressly forbidden by the defender to touch the cars. The men removed the cars voluntarily before the ordinary hour of commencing work, without the defender's knowledge and against his orders.² In any case the defender could not be liable under subsection 2 of section 1 of the statute, because section 8 defines "person who has superintendence entrusted to him" as "a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labour." Gillies certainly did not fall under this category. Nor could the defender be liable under subsection 3, because that applied to a case of injury resulting from conforming to a negligent order. Here the injury resulted from

* "NOTE.— . . . So far as the second subsection is concerned, I am clear that, to make the master liable, the foreman must be acting within the scope of his employment. That he was clearly acting outwith his employment is not only clear from the evidence already referred to, but from the fact that the master only paid the men as from seven o'clock, and, so far as the employer was concerned, any work done before that hour was not done to the master.

"Again, as regards the third subsection, it follows, from what I have said, that, supposing an order had been given by Gillies to the men to run out the cars, this was not a lawful order, in the sense that there would have been any breach of duty to the employer in the pursuer or any of the other workmen refusing to obey it. . . ."

¹ Osborne v. Jackson & Todd, May 1, 1883, L. R., 11 Q. B. D. 619; Millward v. Midland Railway Co., Dec. 15, 1884, L. R., 14 Q. B. D. 68; Dolan v. Anderson & Lyell, March 7, 1885, 12 R. 804.

² Bunker v. Midland Railway Co., Dec. 12, 1882, 47 L. T. 476.

No. 24. a negligent act of the foreman, not a negligent order. Also, the pursuer could have saved himself from injury by ordinary care.

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LORD JUSTICE-CLERK.—This is a very narrow case, and it has been very well argued. It raises some rather subtle questions, both of fact and law. The impression produced on my mind is that no valid defence has been stated to the claim of the pursuer.

The state of the facts is clear enough. The man injured was engaged by the defender to assist as a labourer in laying concrete within the buildings belonging to the tramway company. The work could not go on without the tramway cars, which were standing unused in the shed, being removed from it. Usually the work did not begin before seven o'clock. For some reason it was necessary, or at least it was desired, that the work on the occasion in question should begin before seven o'clock. I have no doubt that the tramway company were bound to clear the building in order that the workmen might begin. Therefore it was clearly a reasonable thing, whatever might be the rights of the parties, that the contractor for the concrete should at his own hand take out the tramway cars, if not removed by the company. He was doing no injury to the tramway company in so doing, they having failed to perform their duty in the matter. Gillies, who was the head of the gang who were at work that day, went with the men before seven o'clock, and finding that the company had not cleared the shed of the cars, told his men to do it. He helped them by pushing a car, and in so pushing it the pursuer was injured. He had been engaged in pushing the car immediately in front. It is said that the defender is responsible, as he employed this man as his foreman. That this man did work with his own hands sometimes is certain, but the same was the case in *Dolan v. Anderson & Lyell*, 12 R. 804. That does not prevent him from giving orders to the men, and they were bound to obey him. It is said that the pursuer must have known that removing the cars was not part of his duty under his employment by the defender. That is stretching the matter rather far. They could not work at all—could not complete the contract—without removing these cars, and taking them out of the shed was only in furtherance of the work in which they were employed. Nobody was entitled to object except the tramway company, who could not complain of their doing so. It was not unreasonable to order the squad to remove the cars in order to commence the work, and it was in the direction of furthering operations.

It is argued further that the men had no right to touch these cars. But the tramway company cannot, I think, complain, and this is not a question with them. It is said, also, that the foreman had no function to discharge about the cars. But although he was told not to touch them, that was when the tramway company had undertaken to remove them. When the tramway company had failed in this, it is impossible to say that it was not a reasonable order to give. In questions under the Employers Liability Act I am not inclined to split hairs, and, in my opinion, the Sheriff has not construed it rightly in this case.

LORD YOUNG.—I am of the same opinion. I agree that there is much of difficulty about the case. The facts are that the defender was under contract with the tramway company to lay concrete in certain of the company's premises. The pursuer was a workman in the defender's employment as a common labourer.

The contract had been in course of execution for some time. The workmen understood that their work began at seven o'clock. That was the regular hour for starting. But as the tramway company habitually neglected their duty of shoving out the cars in time for the concrete layers to begin at seven o'clock, Gillies ordered the men to attend about ten minutes before seven in order to clear the premises of the cars, and enable them to begin laying the concrete at seven o'clock. Gillies' position is a question of fact in the case, but I do not know that we have better evidence than that of M'Mahon, who says,—“The gaffer's name was John Gillies. We went for the purpose of removing the cars about ten minutes to seven. We were ordered by Gillies the previous morning to shift the cars out before we started work. He was foreman over the job. Sometimes he worked, and at most times he was gaffering the men. For two hours he would be working, and for six hours he would be gaffering. By far the greater part of his time was occupied in gaffering or superintending. We removed the cars that morning before starting time. We had been working there before the accident from the time the job started. We obeyed Gillies when he ordered us to remove the cars. If we did not, we would have to look for another job.”

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Gillies told them to come ten minutes before seven. This order the men had to obey really on pain of dismissal. As to the habitual neglect of the tramway company's servants, he says,—“I was there from the time that the job started—for more than two or three weeks. I never saw the tramway men put out the cars except one morning, when one of the men gave a bit lift. That was two or three weeks, perhaps more, before the accident. I have not seen the tramway men repeatedly run out these cars. None of the tramway men ever ran them out. I was regularly at the job.” It is proved, in my opinion, in point of fact that the men were ordered by the foreman, and considered themselves bound to obey his order, and reasonably considered so, to attend a few minutes before seven and push out the cars. I think Gillies was appointed by the defender as his foreman, under whose charge he put the pursuer and other twelve or thirteen men. It must be taken that he was acting as gaffer or foreman in giving these orders, which were regularly given and obeyed for two or three weeks before the accident. The defence is that Gillies was transgressing his duty, and that the removal of the cars was outwith the defender's service altogether. But the pursuer was the defender's servant, and he was so under the orders of the defender's superintendent or gaffer or foreman of the job, and along with him other twelve or thirteen men. In these circumstances the defence which the defender states in his evidence is rather striking. “I would not have stopped Gillies from giving orders to any man in his own time to take out the cars, when he was not under my instructions. If he had instructed them after seven o'clock, or at seven o'clock, to touch the cars, I would have stopped him. I would not have allowed him to do that at all. I would not have allowed the men to touch the cars in my time. If the men liked to remove the cars, it was no concern of mine at all.”

Would any master suppose for a moment that that was the state of the men's mind? It is contrary to the reason and the likelihood of the thing. I cannot bear the master say that it was their own liking.

In obeying the order of the master's foreman, and in his service, the accident took place. Was nobody to blame? It was not a *damnum fatale*, and must have occurred owing to the work having been performed in a dangerous manner.

No. 24. It was the duty of the foreman who gave the order to take precautions that it should be safely performed. Irrespectively of the foreman's responsibility, I think the master was responsible for the proper precautions being taken. The master says he took none, that it was no concern of his at all. Irrespectively of the Employers Liability Act altogether, a master is responsible for the proper discharge of his duties as master, and when he neglects any of his proper duties and damage results to a workman in consequence, he is responsible. At common law, unmodified by the Employers Liability Act, the master is not responsible, if he perform all his duties as master, for neglect on the part of any of his workpeople, even of his superior workpeople. For superior and inferior workpeople went by the name of "collaborateurs," and if the master had performed all his duties, but one of the "collaborateurs" failed in his, there was no liability on the part of the master. The liability must fall somewhere, and if there is no express provision law will imply that the contract is that each workman shall take on himself the risk of mistake or negligence on the part of another. All that assumes that the master has done all his duties as master. Where he has not, there is liability, and the Employers Liability Act does not interfere with that in the slightest degree. Here the defender says that he took no care at all, though the accident shews that there should have been some care. Thus he admits that he neglected his duty as master altogether, that he made no provision for these cars being removed in reasonable safety. The duty was primarily on the superintendent if he was there with the duty of superintending, but the liability is not only on him but on the master under the Employers Liability Act, in whose service he failed by neglect to exercise a proper superintendence in this matter. If he was not acting as superintendent the master would be responsible at common law for allowing his men to attend morning after morning for weeks without having taken any proper precaution to see that the work was performed in safety. The cause of the accident is plain—the want of proper superintendence. That was the neglect of Gillies, if he was put there by the master, and of the master if he was not. On the whole matter I am of opinion that the defender is liable.

LORD CRAIGHILL.—After all the thought which I have been able to give to this case, I am not satisfied that the judgment of the Sheriff-substitute is not right. I therefore think that this appeal should be dismissed.

The pursuer is a labourer in the defender's employment, and suffered the accident, as he says, in consequence of the negligence of the defender's foreman or gaffer. The ground of my opinion that he is not entitled to recover damages is (1) because the work on which he was engaged at the time was not the work of the defender, (2) because the order given was not within the scope of the authority which the gaffer possessed. There is no doubt that the work ought not to have been left to be done by the defender. There was an implied obligation on the tramway company to remove all obstacles to the execution of the contract. One of these consisted in pushing out the tramway cars. It was their duty to remove these cars by seven in the morning that the work might be done. It might quite well be that, the tramway company not having done that which ought to have been done, the defender would give authority to his servants to do it. If so it would be the same thing so far as the pursuer is concerned. But there is no evidence of that, for I think that the evidence leads to an opposite conclusion. The master knew that the cars had been removed

by those whom he had engaged in his service. But he did not approve of that which had been so done. He told Gillies he would speak to the tramway company about it, and told his servants not to touch the cars. He repudiated the work as not his work. I have great difficulty in seeing how a servant receiving orders in these circumstances from the gaffer should be entitled to recover damages from his master.

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But the matter does not rest here. I think that the work must be held to have been within the knowledge of the pursuer as not work for his master. There is a contract between the pursuer and the defender for service. That service begins at seven. If they are asked to come before, must not the men have been satisfied that it could not have been for the master's work? I think the pursuer must have known that this was not under the defender's employment. There is no warrant in the circumstances of this case for the opinion that by refusing to do this work the pursuer would have broken the defender's order. I therefore do not feel at liberty to concur.

LORD RUTHERFORD CLARK.—I think that the judgment should be recalled, and that the pursuer should have judgment in his favour. I am sensible of the delicacy and difficulty of the case, but I can come to no other conclusion. The defender was under contract with the tramway company for laying their premises with concrete. The pursuer was one of the labourers employed by the defender for executing that contract. It is not said that he was in any respect a skilled workman. He was merely a labourer. We may safely infer that his employment consisted in performing any labour which was required for the execution and furtherance of his employer's contract. It appears that in order to enable the work to proceed it was necessary that the tramway cars on the premises should be removed from the shed, and the pursuer was ordered by the foreman of the squad to assist in the removal of these cars. I think that was an order which he was bound to obey, because he was asked to furnish labour with a view to the execution of that contract. I think he would fairly assume that it was within his duty.

It is said that he knew that he was outwith his own contract with the defender because his time commenced at seven o'clock. I cannot draw that conclusion. All that we know is that the workmen were required to come to the premises with a view to doing certain things sometime before the ordinary hour. That leaves them in the same position after they had come as if it had been after the ordinary hour of work. When, therefore, the pursuer was ordered to do this piece of work, he could not know because it was before seven that it was outwith his employment. I have therefore come to the conclusion that he was in the position of one who was bound to obey that order.

It is said that the foreman should not have given that order. But the pursuer did not know of any disqualification to that effect; and therefore that is of no importance. Having got an order which he was bound to obey, the next question is, whether there was any negligence on the part of the person who gave it. I think there was such negligence, because Gillies did not take due care to see that the order was carried out with safety. Consequently, I think that the pursuer is, under the Employers Liability Act, entitled to recover against the defender. I agree very much with the view of Lord Young with reference to the defender's liability at common law. There is great reason to say that he

- No. 24. should have taken care that his own men were not injured in removing the cars. But I prefer to put it under the Employers Liability Act.
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THE COURT pronounced this interlocutor:—"Find in fact (1) that in April last the defender was under contract with the Glasgow Tramway and Omnibus Company to lay concrete in their premises at Maryhill; (2) that the defender employed the pursuer and other workmen as labourers in executing the work; (3) that it was the duty of the said company under their contract to remove the tramway cars from the premises every morning to enable the workmen to proceed with the work, but that they had continuously failed to do so, and the pursuer and the other workmen of the defender, by order of John Gillies, his foreman, whom they were bound to obey, attended each morning before the ordinary hours of work to remove the cars; (4) that while so engaged on the morning of 20th April the pursuer was struck and his right arm was broken by a car pushed from behind by Gillies against the car which the pursuer was moving forward; (5) that the injury thus sustained by the pursuer was caused by the failure of the defender's said foreman to take reasonable precautions against the collision of the cars: Find in law that the defender is responsible for the negligence of his foreman, and liable to the pursuer in damages: Therefore sustain the appeal: Recall the judgment of the Sheriff-substitute appealed against: Assess the damages at £60 sterling; ordain the defender to make payment of that sum to the pursuer: Find him liable to the pursuer in expenses in the inferior Court and in this Court," &c.

WILLIAM OFFICER, S.S.C.—LINDSAY MACKERSY, W.S.—Agents.

- No. 25. WILLIAM STIRLING AND ANOTHER (Mr and Mrs Urquhart's Marriage-Contract Trustees), First Parties.—*Dundas*.
JOHN GRUBB URQUHART, Second Party.—*Wilson*.
- Nov. 23, 1886.
Urquhart's
Trustees v.
Urquhart.
- 2d DIVISION.
M.

Trust—Anticipation of period of payment—Presumption against child-bearing.

JOHN URQUHART and MRS E. URQUHART, in the antenuptial marriage-contract of their son, J. G. Urquhart, bound themselves to convey by deeds (which they subsequently executed), to take effect at their respective deaths, their heritable and moveable estates to their son's marriage-contract trustees for behoof of their son in liferent, for his liferent use allenary, and of the children of the marriage in fee.

After the death of his father and mother the son, as their heir-at-law and sole next of kin, with consent of his wife, called upon the trustees to convey the estates to him, on the ground that no child had been born of the marriage, which had subsisted for thirty-nine years, and that his wife was now sixty-one years of age. In a special case presented by the marriage-contract trustees and the son, *held* that he was entitled to the conveyance.¹

J. & A. PEDDIE & IVORY, W.S.—MACPHERSON & MACKAY, W.S.—Agents.

¹ *Scheniman v. Wilson*, June 25, 1828, 6 S. 1019; *Shaw v. Shaw*, *ib.* 1149; *Gordon v. Cameron*, Feb. 8, 1873, 45 Scot. Jur. 272; *Louson's Trustees v. Dicksons*, June 19, 1886, 13 R. 1003; *Fleming v. M'Lagan*, Jan. 28, 1879, 6 R. 588; *Blackwood v. Dykes*, Feb. 26, 1833, 11 S. 443, and June 11, 1833, 11 S. 699, 5 Scot. Jur. 269 and 425; *Croxton v. May*, Aug. 18, 1878, L. R. 9 Ch. Div. 388; *Haynes v. Haynes*, Feb. 9, 1866, 35 L. J. Ch. 303.

CHARLES SAMSON (Inspector of Poor of the Parish of Kirriemuir), Pursuer No. 26.
(Respondent).—*Pearson—Hay.*

ROBERT DAVIE, Defender (Appellant).—*Kennedy.*

Nov. 26, 1886.
Samson v.

Parent and child—Bastard—Aliment.—Held (diss. Lord Young) that a *Davie.*
bastard son is liable to support his mother.

On 24th January 1885 Mrs Elizabeth Lindsay or Fairweather, a woman ^{2d Division.} sixty-six years of age, became a proper object of parochial relief, and as ^{Sheriff of For-} such obtained relief from the Parochial Board of Kirriemuir. ^{farshire.}

On 22d July 1885 the Inspector of Kirriemuir brought an action in the Sheriff Court at Dundee against Robert Davie, estate manager, Duntrune House, near Dundee, for repayment of the sums already expended in aliment of Mrs Fairweather and for relief of future aliment.

The pursuer stated that the defender was the natural son of Mrs Fairweather, and pleaded that as such he was liable to relieve the Parochial Board of the obligation to aliment her.

The defender denied that he was the son of Mrs Fairweather, and pleaded further that the action was irrelevant.

On 11th December the Sheriff-substitute (Campbell Smith) dismissed the action as irrelevant, finding the defender entitled to expenses.*

On appeal the Sheriff (Comrie Thomson), on 8th January 1886, recalled this interlocutor, and remitted to the Sheriff-substitute to allow a proof and to proceed with the cause.

* "NOTE.— . . . The question whether a bastard is bound to support his pauper mother is, so far as I am aware, not settled by any clear or direct authority. It has remained a subject of interesting speculation and fascinating doubt for generations, and I am sorry to be compelled to take a step towards putting an end to its indeterminate character, and still more to decide it in a way which I think not in accordance with natural right. But for the fettering considerations of settled civil law, I should have felt inclined to hold that the obligations of parent and child to give support against want ought to be reciprocal and co-extensive, that as the mother or father was bound to support the child when helpless, so the child ought to be bound to support either parent in case of ill health, or old age, or poverty, as is indeed, I believe, the usual custom in Scotland when human affections assert themselves, independently of legal regulations and of civil law; but passing from natural right to civil law, I am met with the insuperable obstacle that, except to one effect, the civil law does not recognise the relation of parent and child as existing between illegitimate children and the persons who have produced them. A bastard is pronounced by a host of authorities to be *filius nullius*,—that is, being interpreted, not a child at all but a mere physiological product, having no rights of any kind except the right to live and remain in the world at the expense of the temporary pair who have irregularly and improperly introduced it to life. So soon as a bastard is able to support itself, it is an alien to legal relationship, without legal father or legal mother. The bastard inherits nothing from his father, whatever fortune that father may leave. The bastard may make a fortune, and die unmarried and childless. His fortune will go to the Crown as *ultima heres*, and if the father get any part of his deceased bastard's estate, it will only be through the generosity of the Crown. The same thing would happen with the mother of a wealthy bastard. And here I touch the principle that separates the bastard from all legal ties, except those, by marrying, and otherwise, he or she may form for himself or herself. In law, the defender here is nobody's son. He has no mother at all, and, therefore, no mother for whom he is bound to bear the burden of giving her bread when she is old and destitute. I may have doubts of the real humanity of such a bastard son, but he has at least as much humanity as the law ascribes to him, which is a physiological humanity, with the right to escape from starvation in infancy, and until he becomes self-supporting."

No. 26. The evidence led at the proof disclosed that the defender was the natural son of Mrs Fairweather (which was ultimately not disputed),
 Nov. 26, 1886. that he was born in 1839, that he recollected to have seen his mother on
 Samson v. two occasions only, when he was 15 and 22 years old respectively, that
 Davie. he did not know she was his mother, and that neither she nor his father (who was alive) had contributed anything to his support since his childhood.

On 18th February 1886 the Sheriff-substitute (Campbell Smith) gave decree for the sum sued for, and reserved the pursuer's claim for future relief.

The defender appealed.¹

At advising,—

LORD CRAIGHILL.—The appellant is the illegitimate son of Mrs Elizabeth Lindsay or Fairweather, who resides in Kirriemuir. He was born in 1839, so that he is now forty-seven years of age. In infancy and early childhood he was nurtured and cared for by his mother, or by relatives of hers who took upon themselves the duty which she ought to have discharged. When fit for work he did what he could for himself. He always found employment, and has always been steady, and the consequence is that for his position in life, which is that of a farm overseer, he is in easy circumstances. In 1885 his mother became unable from failure of health to do anything for her living, and as she had no one to look to for support, the defender refusing to assist her, she applied to the parish, by whom she has since been maintained. The Parochial Board think that what they are doing for her ought to be done by the defender, for he has plenty of means, and these, as they say, to the extent required, ought, in fulfilment of a legal as well as of a natural obligation, to be used for his mother's support. The defender accordingly was called upon to relieve the Parochial Board. But the defender refused to comply with this application. The present action therefore was instituted.

The defender's ability is not disputed. What is put in issue is the legal liability of the defender. The Sheriff-substitute dismissed the action on the ground, as is explained in the note to his interlocutor, that "the defender being a bastard, he is nobody's son. He has no mother at all, and therefore no mother for whom he is bound to bear the burden of giving her bread when she is old and destitute." The Sheriff was of a different opinion, and the result in the end was that decree was given in terms of the conclusions of the summons. Hence the present appeal.

Were it the case that a woman who has borne a bastard is in the eye of the

¹ *Defender's Authorities*.—Corrie v. Adair, Feb. 24, 1860, 22 D. 897, *per* Lord Justice-Clerk Inglis, p. 900, 32 Scot. Jur. 377; Anderson v. Kirk-Session of Lauder, March 11, 1848, 10 D. 960, 20 Scot. Jur. 332; Fraser on Parent and Child, 2d ed. p. 127; Dig. xxv. iii. 5, subsecs. 3 and 4; D'Aguesseau, Dissert. sur les Bastards; Stephan's Blackstone, ii. 303; Horner v. Horner, May 24, 1799, 1 Hagg. 337, at pp. 351 and 357.

Pursuer's Authorities.—Just. Inst. i. 10, 12; Dig. II. ii. 4 and 5; Stair, i. 5, 8 and 9; Bankton, i. 6, 20; Wilson v. Todds, Jan. 30, 1867, 3 S. L. R. 192; Inspector of Inveravon v. Raeburn, Oct. 29, 1856, 1 Sheriff Court Decisions, 192, Taylor v. Spottiswoode, May 5, 1857, 2 Sheriff Court Decisions, 31; Robertson v. Robertson, Nov. 21, 1865, 8 Poor Law Mag. 244; Watson v. Robertson, Jan. 1868, 1 Poor Law Mag. (N.S.) 172; A v. B, Feb. 14, 1868, 1 Poor Law Mag. (N.S.) 439; Hoseason v. Hoseason, Oct. 21, 1870, 9 Macph. 37, 43 Scot. Jur. 20.

law not the mother of the child, there would be much to urge for the conclusion at which the Sheriff-substitute originally arrived. But such a view is repugnant to common sense, and there is nothing in the way of authority by which this paradox can be supported. No. 26.
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The Sheriff-substitute apparently rests his opinion on the description which has often been used that a bastard is *nullius filius*. But these words only import that in the eye of the law a bastard is without a father. This is the substance of many texts and many dicta in the civil law and in our own law. The result is, according to the authorities, that there is in law no father to a bastard, but it is nowhere said that in law a bastard is without a mother. Upon this point there never has, so far as I know, been any controversy. The contrary is indeed implied in all the passages in the *Corpus Juris Civilis* and in our own institutional writers, where it is said that a bastard is without a father. Of these the following are examples—Inst. i. 10, 12, and iii. 5, 4; Dig. i. 5, 23, and II. ii. 4 and 5. Out of our own institutional writers, Stair, iii. 3, 44, and iv. 12, 1, may be referred to. What is implied in these passages is expressed in the Institutes of Gaius, book i. sec. 64, where it is said—“Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur neque liberos; itaque hi qui ex eo coitu nascuntur matrem quidem habere videntur, patrem vero non utique; nec ob id in potestate ejus sunt [sed tales sunt], quales sunt hi quos mater vulgo concepit; nam et hi patrem habere non intelleguntur, cum is etiam incertus sit; unde solent spurii filii appellari, vel a Græca voce quasi *εργασθέντες* concepti, vel quasi sine patre filii.”

Mrs Lindsay or Fairweather and the defender are therefore in law, as well as in fact, mother and son, though all the rights and obligations of this relationship which result from the birth of a child in wedlock do not exist in the present case, where the defender is a bastard. And the question which now awaits decision is, whether the burden of his mother's support, now that she is destitute, affects the defender as a legal obligation. She was bound to support him in infancy—this being an obediential obligation based on the law of nature—*Vide* the case of *Marjoribanks*, Nov. 30, 1831, 10 S. 79, and the opinion of Lord Justice-Clerk Inglis in *Reid v. Moir*, July 13, 1866, 4 Macph. 1060, as well as the opinions of Lord Fullerton and Lord Balgray, which are cited by his Lordship. Is the defender in like manner not bound to support her, seeing he is able so to do, now that from age and infirmity she can do nothing for her livelihood? I think he is. The obligation arises *ex jure naturali*, and is one of those natural obligations to which it is decent as well as reasonable and expedient that our municipal law should give legal effect on account of the natural justice on which it is founded. This is the ground on which the liability of the putative father to contribute to the aliment of his bastard child has been made a rule of our law—*Vide* opinion of Lord Justice-Clerk Inglis in *Corrie v. Adair*, February 24, 1860, 22 D. 900—and the reason for this rule is certainly not stronger than can be urged for the recognition of the reciprocal rule that a bastard able to support his mother when she is in destitution is subject to this obligation. Such also was the rule of the Roman law expressed in so many words—*Vide* Dig. 25, tit. iii. “De agnoscendis et alendis liberis, vel parentibus, vel patronis, vel libertis.” There it is said (title iii. sec. 5, subsecs. 3 and 4)—“3. Idem in liberis quoque exhibendis a parentibus dicendum est. 4. Ergo et matrem cogemus præsertim vulgo quæsitos liberos alere, nec non ipsos eam.”

There is no contradiction to this in any other part of the *Corpus Juris*, nor

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in any of the works of any of the commentators. The question has been decided again and again in conformity with this text of the Roman law in many Sheriff Courts in the country, nor is any adverse opinion expressed on the subject by any of our own institutional writers, or by any of our Judges, while there is this passage in the lectures of Baron Hume. He says that "there is no obligation on a natural child to aliment his reputed father—at least it is an extremely doubtful question. The contrary holds with respect to the mother, however, whom the child is always bound to support if she be in indigent circumstances." *Vide Fraser on Parent and Child*, p. 127, for this quotation. This is of great consideration, and I take it into account, though I do not rest my opinion upon its authority alone. I come to the conclusion that there is legal liability upon the ground already explained, which is supported by the rule of the civil law, and by the opinion of Baron Hume, and it nowhere meets with any contradiction or refutation whatever. The Lord President and Lord Cunningham, as was pointed out at the debate, have expressed an opinion that a putative father in destitution has not a legal claim for support against his bastard child. What was said on this subject in the cases referred to—*Corrie v. Adair*, 22 D. 900, and *Anderson v. Kirk-session of Lauder*, 10 D. 960,—was altogether *obiter*, and there does not appear to have been any argument on the subject addressed to the Court. But even assuming that the views of those Judges were to be applied, were the question to be submitted for judgment, my opinion with reference to the right of the mother to be supported would not be in any way affected. In the eye of the law the woman bearing the child and the child to which she gives birth are mother and son, whereas the child that is born and the man who is made liable for a contribution of aliment, the putative father, are in law in no way related. The ground of liability in the one case therefore does not exist in the other. Lord Cowan in the case of *Reid v. Moir* makes this distinction in his opinion between the two cases.

On the whole matter my opinion is that the defender's appeal ought to be dismissed.

LORD YOUNG.—This is an interesting question, but I cannot say that I regard it as one of first-class importance. It has never occurred before for decision in this Supreme Court, and just as likely as not it may never occur again. The inclination of my opinion is with the Sheriff-substituta. I have not gone to the Roman law for guidance in this matter. The Roman law regarding the family relations has not very much in common with ours. Its leading idea is the *patria potestas*, to which we have nothing analogous. Legitimate children were under the power of the father to such an extent that he could put them to death. Even the property which the son acquired he did not acquire for himself, but for his father. He could not sue an action or be defender in one. In short, their rules were altogether different in conception from ours. If I wanted light to aid me, I confess I should prefer the more modern, the nearer, and the brighter light of the practice of our fellow-subjects on the other side of the Tweed, where the law of the family relations is akin to our own, and is conceived in the same spirit. When we were ourselves in a state of comparative darkness we resorted to the Roman law, and got from it some useful and profitable enough maxims, and if any considerations or principles which seem to us to be reasonable or expedient are to be derived from that source now, we will make use of them just as we should make use of reasonable or expedient

considerations which may present themselves from any other source. But the question here, now before us for the first time, must, I think, be determined by reference to considerations to which, so far as I know, the Roman law had nothing analogous. We have a poor law of our own, and a law of succession of our own. *Jus naturale*—it is difficult to say what that exactly means. The poor law is natural I suppose in one sense at least, because it is simply this,—that human beings shall not be allowed to beg or to starve, but that those who can afford to pay taxes shall be taxed for the benefit of those who would otherwise be obliged to beg or starve. Unfortunately, even in this advanced state of civilisation, there are bastards, but our law does not permit even bastards to starve, and I am not aware that we borrowed that from the Roman law. I rather think that by the Roman law bastards were left to starve, but by our law, although people are not encouraged to commit fornication, yet if they do, the fruits of the fornication are protected from starvation, though if those whose illicit amours have brought the fruits into existence are able to support them, and so prevent the tax from being laid on the public, our law is that they shall support their own offspring. That is the plain sense of the whole matter. If the parents cannot be found, or if they are unable to support the offspring, the humanity of modern times does not permit the offspring to starve. The poor law will support them. It might have been a tax imposed on the whole country as a single area, but its smaller areas make up the whole country, so that it comes to be just a public tax, and by means of this public tax illegitimate children are protected against starvation, but the father is bound to support the children if he can afford it, and so is the mother. Is that the *jus naturale*? It is quite natural at least in one sense—just as it is natural to pay one's debts. But then the converse proposition is, that whereas fornicators are by law bound to protect the public against having to support the fruits of their illicit amours, the fruits are on their part bound to protect the public against having to support the fornicators. I do not think that that follows—the one proposition appears to me reasonable and the other not, and accordingly if I go to the other side of the Tweed I find that they adopt the one proposition but reject the other. It was conceded that they do so.

The present case is that of a woman who has had several bastard children, and who at an advanced age becomes a pauper. The poor law authorities, after she became chargeable, discover that about thirty years ago she gave birth to a bastard son, who is now a gardener in a gentleman's family. She has seen him only twice during that long period, but unfortunately the poor law authorities discover that she and he are mother and son. He was ignorant of the fact himself, and in consequence this action was brought to have it proved against him that he is the son of his mother. Now, I cannot think that it is expedient or for edification to have this man called into Court to discuss such a matter relating to his own history. For, observe it is not a question of feeling or want of feeling on his part towards his mother—it is the public taxpayer who having discovered a relation which neither of the parties to it knew about or cared to perpetuate, says to the son,—“You are bound to relieve us of the sums which we are contributing to your mother's support.” I think that here a consideration arises to which there is nothing analogous in the Roman law, but a great deal that is analogous in the law which prevails on the other side of the Tweed. How do the public, who are seeking here to be relieved of

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the burden of supporting this woman, deal with bastard children? Here the considerations to which the Sheriff-substitute adverts commend themselves very strongly to me as they have done to our neighbours on the other side of the Tweed, who act on them. Does the public treat the son as the child of its natural parents? In one sense certainly. If the father and mother can support the child in infancy the public compels them to do so. But in no other sense will the public recognise the relation. If the father die a millionaire, or if the mother die a millionaire—if they die intestate I mean—to not one shilling of their fortunes would their bastard son be entitled. Nay, more, if the father or the mother died, leaving any fortune you choose to mention, in the event of the failure of blood relatives the public itself would take the fortune—it would go to the fisc through the Queen—and yet it is this bastard child, to whom they would give no benefit, that the public are asking to protect them against the burden of supporting this old woman—a child who, in this particular instance, had no notice that she was his mother until the raising of the action. Now, how would the Roman law deal with such a case—the case of the father or the mother of a bastard dying and leaving a fortune, but no blood relatives to take it? I do not know. Considerations of Roman law, therefore, I put aside. In this country I know that the child is not treated as a child at all. We have a maxim taken from the Roman law, indeed, but which we should, I suppose, have had if that law had never existed, *Oujus est commodum ejus debet esse et incommodum*—"He who has the benefit should bear the loss." But here, if there is any *commodum* to be taken from the mother, the public takes it in preference to the bastard child. So true is this that even if she leaves it to her child by will he is taxed for it at ten per cent as a stranger. There is no single circumstance in which the public consents to treat a bastard child as the child of its father or mother except this, that they must take from the public, and upon themselves, the burden of supporting their child if they are able, and the child requires it. In that respect, and in that respect alone, will the public recognise the relation.

As I have said, I am moved by the considerations which have determined the law of England in this matter—considerations which are of equal cogency here. The Roman law, I must confess, I have difficulty in understanding. Lord Craig-hill was good enough to give me the reference to two texts, to which he has also himself referred. One of them, Dig. book 25, tit. iii. sec. 5, subsec. 4, is in these terms:—"Ergo et matrem cogemus præsertim vulgo quæsitos liberos alere, nec non ipsos eam." Now, I put in parenthesis the words "*præsertim vulgo quæsitos*," and the text will then run,—"*Ergo et matrem cogemus liberos alere, nec non ipsos eam*"—"A mother, if able, must support her children, and her children must support her." Then, what is the force of "*præsertim vulgo quæsitos*"? Does it mean that there is a special duty of supporting his mother laid on the bastard, just as there is a special duty of supporting him laid on her, so that, if she has legitimate children as well as the bastard, the "*præsertim*" applies to him, and he must support her in preference to her legitimate children? That does not commend itself to my mind as good sense, and, if it does not, I cannot regard it as of any authority.

It appears from the proof that the father of this gardener of forty-seven is also alive, and I suppose therefore that the unfortunate man will have to support his father as well as his mother; just as they were both liable to keep him off the rates if they could, so must he keep them if he can, and they need it. Then, again, in

one of the cases mentioned, I think, by Lord Craighill, it was held that if a man marries the mother of a bastard child, he must support the child though not his own—he takes the mother with all her burdens, and cannot get rid of them. Now, I suppose this obligation is reciprocal, so that if he is liable to support the child, the child when it grows up becomes liable to support him as well as the mother. I cannot go that length, nor do I see, once you begin, what limit is to be placed to this obligation which it is sought to impose upon bastards of supporting their parents, and so of relieving the public, which refuses to allow to the bastard a single advantage through its relation to its father and mother. My judgment, therefore, after the most attentive consideration I have been able to give to the matter, would be in accordance with that of the Sheriff-substitute in his interlocutor of 11th December.

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LORD RUTHERFURD CLARK.—This case is one of novelty, but after the most careful consideration I have been able to give to it I have come to agree with Lord Craighill. I think we have a considerable body of authority—both text writers and decisions—for the proposition that a bastard son is liable to support his mother, and I am not disposed to pronounce a decision contrary to so much authority, especially as the obligation to support has been recognised in the civil law. I confess I do not share the difficulty of Lord Young in understanding the text on which he commented. It seems to me capable of a very simple rendering—"Ergo et matrem cogemus præsertim vulgo quæsitos liberos alere, nec non ipsos eam," which means, I think, "We will compel the mother to support her children, especially her bastard children, and her children we will compel to support her." Probably the "præsertim vulgo quæsitos" was added because of the difficulty which there might be of discovering the father in the case of bastards—the word "vulgo" seems especially to point to that. I do not think that the words "præsertim vulgo quæsitos" are to be brought into the second member of the clause. I think that the "ipsos" refers to "liberos" simply.

LORD JUSTICE-CLERK.—In this case I concur with Lord Craighill. I have looked into the authorities with some attention, as the question is one of considerable general importance, though the particular application is not likely to be of frequent occurrence.

I should be very sorry if the slightest doubt were thrown on the foundations of our law in this matter, which admit of no question. They are not those of the law of England. As I understand that system, it refuses to acknowledge any natural obligation on the part of parents to support their children. Any such obligation is with them statutory only, under the statutes for the relief of the poor. Now, whatever may be the virtue of that principle in the law of England, I believe England to be the only country in Europe which denies a place to natural obligation as regards this subject. In the case of our own country, from the days of Lord Stair to the present time, there is not a word in the authorities—whether institutional writers or judicial decisions—in which the slightest doubt is suggested as to the principle on which our law proceeds, or which makes any reference to the law of England as at all resembling our own. I think we should bear this clearly in mind now, for I own that I regard the principle of natural obligation as very valuable. We have only to look at that title in Stair under the head of Aliment, where he discusses the whole matter, to see that while he refers to the civil law, he places the subject entirely

No. 26. on the ground of *debitum naturale*, and the numerous cases in the Dictionary will be found to turn on that principle alone. I have made these observations, although except to assert the acceptance of the principle of natural obligation by the law of Scotland, they throw no light on the only question before us.

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That question presents some novelty for our consideration. It is not a question of public municipal law. It relates to the mutual rights and obligations of two parties—an illegitimate child and its parent. In regard to the civil law, I thought it was well understood that the law of *patria potestas* and of succession in the civil law formed no part of our system. They were early rejected, but, on the other hand, on the other relations of parents and children the texts of the civil law are not indeed authorities but illustrations, and very important illustrations. Lord Young has found some difficulty in giving a fitting sense to the text from the Digest which he has quoted. I quite agree with Lord Rutherford Clark's reading of it, but I think the best way of solving such a difficulty is to consult the commentators, and on referring to Voetius (*Voet. ad Pand. xxv. iii. 6*) I find that he amplifies the text very satisfactorily, and lays it down clearly that the two obligations of parent to child and child to parent are reciprocal, whether the children be legitimate or illegitimate. I do not say that we must necessarily follow these views, but I arrive at the same conclusion. The natural obligation between mother and child is as strong whether the child be legitimate or illegitimate, and therefore as a legitimate child is under an obligation to support its mother, so also must an illegitimate child be under the same obligation. It is true that there is a paucity of authority in this matter. But there are some cases and dicta. The opinions of the Lord President and Lord Cowan in *Reid v. Moir*, July 13, 1866 (4 Macph. 1060), are important, and are among the latest. The Lord President says that he can think of no other category of law to which the bastard's claim to aliment can be referred except that of "the obediential obligations based upon the law of nature"; and Lord Cowan, while reserving his opinion on the abstract question, says that he cannot see any difference between legitimate and illegitimate children. This case was referred to in *Wilson v. Todd*, which was an Outer-House decision by Lord Jerviswoode, whose judgment was acquiesced in. The rubric of the report in vol. iii. of the Scottish Law Reporter, p. 192, is—"Held that an illegitimate daughter and her husband were bound during the subsistence of their marriage to aliment the indigent mother of the former."

On these grounds I think we should dismiss the appeal and affirm the judgment.

THE COURT pronounced this interlocutor:—"Find in fact (1) that Elizabeth Lindsay or Fairweather is a proper object of parochial relief, and that she has received such relief from the pursuer to the amount of £4, 3s.; (2) that the defender is her illegitimate son: Find in law that the defender is liable to the pursuer in relief of the said sum: Therefore dismiss the appeal: Affirm the judgment of the Sheriff-substitute appealed against: Of new ordain the defender to make payment to the pursuer of the said sum of £4, 3s., with expenses."

REID & GUILD, W.S.—JOHN MACPHERSON, W.S.—Agents.

JOHN CUNNINGHAME, Claimant (Appellant).—*Murray*.
THOMAS GROSSART, Objector (Respondent).—*Shaw*.

No. 27.

Election Law—County Franchise—Long leaseholder—Joint tenant—Reform Act, 1884 (48 and 49 Vict. c. 3), sec. 4, subsec. 2.—The Reform Act of 1884 provides, sec. 4, subsec. 2, that “where two or more men are owners, either as joint tenants or as tenants in common, of an estate in any land or tenement, one of such men, but not more than one, shall, if his interest is sufficient,” be entitled to be registered as a voter. *Held (dub. Lord Mure)* that this limitation applies to the case of joint tenants under a lease for a period exceeding fifty-seven years.

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JOHN CUNNINGHAME, Alderbank, Bothwell, claimed to be enrolled as a voter for South Lanarkshire, as joint tenant of lands and tenements and houses at Carluke. Mr Cunningham was a partner of the firm of Merry & Cunningham, ironmasters, by which firm the subjects were held on a long lease, exceeding fifty-seven years. The lease was in favour of the three individual partners of the firm, as partners, and Mr Main, one of them, was already enrolled in respect of the subjects thus held.

Registration
Appeal Court,
Sheriff of
Lanarkshire.
B.

An objection was taken to the claim on the ground that by the 4th section of the Representation of the People Act, 1884, only one joint owner or tenant was entitled to be enrolled in respect of these subjects. The Sheriff-substitute (Birnie) sustained the objection, and rejected the claim.

Cunninghame having required a case, it was stated by the Sheriff-substitute.

In addition to the facts already narrated, it was set forth,—The houses were at one time used by the firm as dwelling-houses for miners in connection with their iron and coal workings near Carluke, but these workings were discontinued at Whitsunday 1875, and since then the houses have been let to ordinary tenants. Mr Cunningham's name was not upon the register at the date of the passing of the Act 48 and 49 Vict. cap. 3. The clear yearly value of each partner's interest in the subjects is not less than £10.

The question of law was,—“Is the claimant entitled to be enrolled as claimed?”

Argued for the claimant;—The claim here was rested on the franchise conferred by the Reform Act of 1832 on holders of property above £10 annual value under a long lease.¹ That franchise, like other older franchises, still remained.² It was not necessary, therefore, for the claimant to claim as an owner, although, no doubt, the holder of a long lease might now, if he pleased, claim as an owner.³ That he might claim under either description, was decided in the case of *Kirk*,⁴ where a tenant on a long lease was allowed to combine that title with that of tenant under an annual lease, a thing he could not have done if the former were necessarily to be held to be equivalent to ownership. No doubt, as argued on the other side, occupancy was considered as of the essence of the claim in that case, but simply because the subject was only worth £3, 10s., and occupation even under the Reform Act of 1832 was necessary in such a case. If the tenant did not claim as an owner, then he was not obnoxious to the 4th section of the Act of 1884, which, as interpreted by the 11th section, struck only at *pro indiviso* proprietors; it had been passed to do away with faggot votes, and was directed against owners only, that being the title under which

¹ 2 and 3 Will. III. c. 65, sec. 9 (Reform Act, 1832).

² 31 and 32 Vict. c. 48, sec. 56 (Representation of the People Act, 1868).

³ 31 and 32 Vict. c. 48, sec. 59.

⁴ *Kirk v. McGowan*, Oct. 24, 1870, 9 Macph. 11, 43 Scot. Jur. 11.

No. 27. faggot votes were always held, for no one had ever heard a tenant called a faggot voter.

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Secondly, these houses were occupied by the firm, who were *bona fide* carrying on business, these houses being part of their assets.

Argued for the objector;—Tenants under long leases had been raised by the 59th section of the 1868 Act to the position of proprietors. That was thenceforth their character, and they must claim under it. To enforce this contention was not to defeat any franchise given by the Reform Act of 1832. The franchise still remained, but it had a different name. At all events the Statute of 1884, when it spoke of "owner," must be taken to include those who were by the Act of 1868 entitled to that name, and if that were so this claim was inadmissible. The case of *Kirk* was decided on this ratio, that the claimant there was actually in personal occupation under the long lease, and truly, therefore, was "tenant to all intents and purposes."¹ That was not the case here, for there was no personal occupancy.

Secondly, there being no personal occupancy, the claimant not *bona fide* carrying on business therein, the exception to the 4th clause of the Act of 1884 did not apply.

At advising,—

LORD CRAIGHILL.—The question for our decision appears to me to be attended with difficulty, and there cannot be a satisfactory determination without minute attention to the provisions of the other Reform Acts, by which the law of the question is now regulated. If the law had been now as it would have been between 1832, when the first Reform Act was passed, and 1868, when the second Reform Act was passed, the right of the appellant to enrolment could not be doubted, but there was a material change effected by the latter of these statutes. Prior to 1868 joint tenants of a property, whatever the number might be, were entitled to be enrolled, under section 9 of the Reform Act of 1832, the lease which they held being for not less than fifty-seven years, if the value of the interest of each in the subject was not less than £10. But in 1868, by the 14th section of the Scottish Reform Act of that year (31 and 32 Vict. c. 48), it was enacted that "where any such lands and heritages shall be owned, held, or occupied by more persons than one as joint owners, whether in fee or in liferent, or as joint tenants and joint occupants of the same as the case may be, each of such joint owners shall be entitled to be registered and to vote, provided his share or interest in the said lands and heritages is of the annual value of £5, provided always that no greater number of persons than two shall be entitled to be registered." There was by this enactment a material change upon the relative provision of the Act of 1832. By the latter any number of joint tenants, if their interest were of sufficient value, were entitled to be enrolled, but by the former the right of enrolment, however numerous the joint tenants might be, and each possessing an interest of sufficient value, was restricted to two. At first sight this appears to be in conflict with section 56 of the Act of 1868, which enacts that a franchise conferred by this Act shall be in addition to, and not in substitution for, any existing franchise. But there is in truth no inconsistency. The qualification for the franchise created by the Act of 1832 remains as it was. All that was done by subsequent legislation was to limit the number of those by whom this franchise might be exercised. Since 1868, accordingly, the right of joint tenants under long leases, whatever the number of tenants might be, has been

¹ Per Lord Benholme in *Kirk v. M'Gowan*, 9 Macph. p. 12.

limited to the number to which by that statute the right to enrolment was restricted. No. 27.

The Act of 1884 proceeded still further in the way of limitation. It was Nov. 26, 1886. Canninghame v. Grossart. thereby (sec. 4, subsec. 2) enacted that where "two or more men are owners, either as joint tenants or as tenants in common, of an estate in any land or tenement, one of such men, but not more than one, shall, if his interest is sufficient to confer on him a qualification as a voter in respect of the ownership of such estate, be entitled (in the like cases, and subject to the like conditions as if he were the sole owner) to be registered as a voter, and when registered to vote at an election."

The question for decision depends upon our view of the true interpretation of this provision. The conclusion to which I have come is, that as the claimant is a joint tenant, and as another joint tenant is already on the roll, the claimant's right to enrolment is barred by the enactment which has now been quoted. The joint tenants, to whom along with others this enactment relates, are the same joint tenants as were the subjects of enactment in section 14 in the Act of 1868, and it appears to me that it would be anomalous were one interpretation given to the enactment in the one statute, and a different interpretation given to the enactment in the other. No doubt there is in subsection 2 of section 4 of the Act of 1884 an expression which suggests difficulty. The subsection begins with the words "where two or more men are owners," which affords apparent plausibility to the contention that the enactment applies only to those who are owners of the property which affords the qualification. But this, I think, is not an expression which affects the result when read in connection with the words which follow, for there are in the sense of the word "owner," as used in the Reform Acts, two sets of persons to whom that description may be applied. One is owners or proprietors in the ordinary sense of the words. The other is joint tenants under long leases for not less than fifty-seven years. This result is brought out by the interpretation clause, sec. 59 of the Act of 1868. "Proprietor or owner," it is there enacted, shall include any person who shall hold "under a lease for a period of not less than fifty-seven years, exclusive of breaks." This being so, it seems to me that subsec. 2 of sec. 4 of the Act of 1884 was properly framed to suit the circumstances as these were left by the previous Acts of Parliament. "Owner" was taken to include tenants under long leases as well as proprietors in the ordinary acceptance. The case of both was to be provided for, and both were provided for in the same way. Of two or more men who are owners either as joint tenants or as tenants in common, it is enacted that one, but not more than one, will be entitled to be registered as a voter, and when registered to vote at an election, and, as Mr Main is already on the roll, the claimant is not entitled also to be put on the register.

For these reasons I concur with the Sheriff-substitute, and am of opinion that the appeal against his decision ought to be dismissed. It was maintained in the course of the argument that this view which I have adopted is inconsistent with the decision of this Court in the case of *Kirk*, 9 Macph. 11. The rubric of that case is,—“Held that it was competent to combine contemporaneous possession of one subject on an annual lease, and of another on a lease of sixty years, to constitute a qualification as a tenant, although by the Act of 1868 any person who shall hold under a lease for a period of not less than fifty-seven years, inclusive of breaks,” is defined to be included under the term “proprietor or owner.” The reason of that decision is this, the definition in the Act of 1868

No. 27. had extended the meaning of "owner" beyond the ordinary acceptance of the term, and was held to include under it a joint tenant or tenant under a lease for a period of not less than fifty-seven years. The claimant there had been in possession under a lease for sixty years; he afterwards came to be in possession as tenant from year to year of another subject, and he sought to combine these two qualifications so as to make out a subject of sufficient annual value to sustain his claim. It was said that there could be no reference to the lease under which he was tenant for sixty years, because when you go to the interpretation clause you find that a tenant for such a period has been turned into an owner. The Court said that this is a view which you may take; you may claim as owner if you please, but there is an alternative, and you are entitled to take advantage of either character.

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The view I take of the present case appears not inconsistent with the view then taken by the Court. I think that Mr Cunningham is not an owner at all unless he seeks to avail himself of that character. He says he is a joint tenant and is nothing else. I take that to be so. The change introduced, as I have said, by the Act of 1868 is not a change of franchise. Tenancy is a good qualification, and so is joint tenancy, but there is a limit to the number of those that may be enrolled as joint tenants upon one subject, and it is because of that limit so introduced that, in my opinion, the Sheriff did right when he refused to sustain this claim.

LORD KINNEAR.—I am of the same opinion. The question is whether the appellant and his partner are owners as joint tenants of the subjects in respect of which the claim is made. That the appellant is a joint tenant does not appear to admit of question. That appears on the face of the case, and he cannot be otherwise described in legal language. The next question is, Is he owner as joint tenant? I think he is, for he is so described in the Act of 1868, sec. 59, which, except in so far as it is inconsistent with the later Act, is made part of it.

But then "joint tenant" is said to include "*pro indiviso* proprietor" in the interpretation clause of the Act of 1884. That is so, but "joint tenant" is not defined as meaning "*pro indiviso* proprietor," but merely as including it. We are asked to read the clause as implying that "*pro indiviso* proprietor" in Scotland is to be held equivalent to "joint tenant" in England, but I cannot accede to that argument.

I agree with Lord Craighill in thinking that the difficulty is cleared away by an examination of the previous statutes, and I agree with him in the distinction he takes between this case and that of *Kirk v. M'Gowan*.

LORD MURE.—Under the 14th section of the Act of 1868, which limits the right of joint tenants and joint owners to be put on the roll, this gentleman's qualification would be quite good. An objection is now made to it under the new statute, which further reduces the number of electors qualified to be put on the roll in respect of the same subject. The question is, What is the true meaning of the 4th section of the Act of 1884?

Now, the expression "owner as joint tenant" is an expression quite unknown to the law of Scotland. It must refer to an English qualification, not to any qualification in this country. But then, by the definition clause, "joint tenant" is defined as a *pro indiviso* proprietor, confirming the opinion that, in the view of the makers of the statute, joint tenants are in the same class as owners.]

the matter had stood upon these two clauses I should have been clear that this claim was good. No. 27.

But a difficulty is created by the Act of 1868, to which Lord Craighill has referred, for there tenants under a long lease are declared to be owners. The difficulty lies there, but that very point was brought up for decision in the case of *Kirk*, no doubt in a somewhat different shape. The Judges there laid down that that provision only gave the voter the privilege of claiming as an owner if he chose so to claim, but did not deprive him of his proper character as tenant. Now, if the claimant here is not an owner, but merely a tenant, his qualification does not seem to me to be affected by the limitation of the Act of 1884.

I do not actually dissent from the decision, but my difficulties remain.

THE COURT dismissed the appeal.

MACRAE, FLETT, & RENNIE, W.S.—MYLNE & CAMPBELL, W.S.—Agents.

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JAMES SMITH, Objector (Appellant).—*Maconochie*.

JOHN M'DONALD, Respondent.—*Strachan*.

No. 28.

Nov. 26, 1886.
Smith v.
M'Donald.

Election Law—County Franchise—Inhabitant-occupier—Change of qualification.—Held that a person who had been for twelve months preceding 31st July in occupation of a dwelling-house in a county, but had removed from it in September, and was consequently not in occupation when the Sheriff came to consider his right at a Registration Court in October, fell to be struck off the roll, and that although he had removed to and then occupied another house in the same division of the county, and would have been entitled to be enrolled had he lodged a new claim.

JOHN M'DONALD stood on the roll of voters for South Ayrshire as tenant of a house at Craigmark, Dalmellington. Registration
Appeal Court.
Sheriff of
Ayrshire.
B.

James Smith objected to the voter's name remaining on the roll, on the ground that he had ceased to occupy the house.

The following facts were admitted by both parties:—That John M'Donald, who was described on the assessor's list as collier, Craigmark, tenant, house, Craigmark, removed with his family from his house at Craigmark, in the parish of Dalmellington, which he had occupied since July 1885, in September 1886, and from that date till the date of the Registration Court had been inhabitant occupier as tenant of a separate dwelling-house at Bank, New Cumnock, within the same division of Ayrshire.

It was admitted that John M'Donald had removed at a date in September which allowed him sufficient time to give notice to the assessor that his qualification had changed.

The Sheriff-substitute (Paterson) repelled the objection.

The objector having required a case the Sheriff-substitute set forth the facts already stated, and submitted this question of law, viz.:—"Whether John M'Donald, having removed from the dwelling-house at Craigmark on which he is enrolled, is entitled to be retained on the roll on that enrolment?"

Argued for the objector;—It would be a strange thing if a voter were entitled to be enrolled and to vote on a subject to which, *ex concessis*, he had no right. Nor was this a merely technical objection, as would be seen by reference to the provisions for registration. By sec. 8, subsec. 6 of the Representation of the People Act of 1884, the provisions as to burgh registration were made the rule for counties also. These provisions were contained in the Burgh Registration Act of 1856,¹ as amended by the

¹ 19 and 20 Vict. c. 58, secs. 2 and 3.

No. 28. Reform Act of 1868.¹ By them the assessor's list was made up on the 15th September, and was to be open to inspection till the 21st, and claims must be lodged before the 21st. These provisions were designed to give all voters on the roll an opportunity of looking into their neighbours' qualifications and objecting to them, an object which would be defeated if the present claim were sustained, for no one had been warned that M'Donald's claim was made in respect of his new house at Bank. His proper course was to have taken advantage of "the proper machinery provided by the Act,"² and lodged a new claim. The voter must continue in occupation up to the date when the Sheriff sits, or else make a new claim.³

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Argued for the respondent;—The voter here was entitled on the last day of July to have his name inserted, as it had in fact been inserted, and any claim must have reference to that date.⁴ Nor was it at all anomalous that he should be entitled to be so enrolled, for it must be admitted that a voter once enrolled was entitled to vote even although he should have left the country altogether, a result much more startling than what was contended for here, where the voter was still in the same division of the county. To cut off this enrolment would be harsh and unjust to labourers, colliers and others, who frequently shifted their houses between terms. But the important point of time in the electoral year, with reference to which a man's claim must be judged, was the 31st July. That was the date up to which parochial relief would disqualify.⁵ Again, the period of four months, being the maximum period during which an occupier might let his house without disqualification, was limited to the year before 31st July.⁶ In short "there is a period within which all the elements of qualification or of disqualification must be found, and that period is twelve months back from the last day of July in the year of the claim."⁷ In *Donaldson's* case the voter had no qualification at all when the Sheriff took up his case. In the cases of *Livingstone* and *Allan* the voter had not the necessary qualification for the necessary length of time on 31st July.

At advising,—

LORD MURE.—On the facts stated it is pretty clear to my mind that the party here is in the position of having removed from the house he previously occupied and so has lost his qualification. No doubt he has gone to another house which would give him a qualification, but unfortunately he has not given notice to the assessor of the change he has made, nor has he made any claim.

Now, it is in accordance with the decisions that a party, who, when the Sheriff proceeds to consider his claim, is objected to on the ground that he has lost his qualification, if he has in point of fact lost it, cannot remain on the roll. That is settled, and it is equally well settled that, assuming him to have got a new qualification, it is necessary for him to give notice of it to the assessor or to claim to be enrolled upon it. That was settled in the cases of *Donaldson*, *Livingstone*, and *Allan* referred to.

¹ 31 and 32 Vict. c. 48, sec. 20.

² *Per* Lord Ormisdale in *Livingstone v. Oman*, Nov. 2, 1877, 5 R. p. 1.

³ *Donaldson v. Cree*, Dec. 19, 1868, 7 Macph. 330, 41 Scot. Jur. 193; *Allan v. Smith*, Nov. 5, 1879, 7 R. 6.

⁴ 19 and 20 Vict. c. 58, sec. 3 (*Burghs Registration Act*, 1856).

⁵ 31 and 32 Vict. c. 48 (*Representation of People Act*, 1868), sec. 3.

⁶ 41 and 42 Vict. c. 5 (*Occupiers Disqualification Removal Act*, 1878), sec. 2.

⁷ *Per* Lord Ardmillan in *Hewat v. Henderson*, Nov. 9, 1874, 2 R. at p. 15.

In these circumstances we had a very able argument from Mr Strachan on the question whether these decisions were applicable to cases under the Act of 1868, inasmuch as the enfranchising clauses were sufficient to shew that, if a man was actually in possession of a qualification sufficient to entitle him to be enrolled up to the end of July, that was enough. That was rather a startling proposition, keeping in view the practice which has been in use ever since the Reform Act of 1832. Nothing can be clearer than that under that statute the fact of having lost a qualification after the end of July is a good objection to the retention of the name on the roll. That is made clear by the form of objection given in the schedule H of that Act, which has been in use as a good form of objection ever since.

The words of the Statute of 1868 too discountenance the view for which Mr Strachan contended. They are (sec. 3),—"Every man shall . . . be entitled to be registered as a voter, . . . who, when the Sheriff proceeds to consider his right to be inserted or retained on the register of voters, is qualified as follows, viz., . . . (2) is . . . an inhabitant-occupier as owner or tenant of any dwelling-house." Then there are words shewing that he must not only be in occupancy at the date of making up the register, but must have been so for twelve months immediately preceding 31st July. I am therefore of opinion that the Sheriff did wrong in admitting this man.

LORD CRAIGHILL.—It is clear both upon the decisions and on principle that we must take a different view from the Sheriff. Mr Strachan overlooked this, that with regard to forms we are not bound by the Act of 1856, for we are only bound by it in so far as it is not inconsistent with the provisions of later Acts, and it is applicable "with the necessary alterations of notices and other forms" (48 and 49 Vict. c. 3, sec. 8, subsec. 6).

Now, previously to the Act of 1868 the sole inquiry was whether the person claiming had been in possession for twelve months back from 31st July. But then there was introduced a provision necessitating inquiry not only into what was the state of matters in July, but what is the state of matters when the Sheriff is sitting in judgment. It is the law introduced by that statute to which we are to have regard, and therefore I concur with your Lordship.

LORD KINNEAR concurred.

THE COURT sustained the appeal, and remitted to the Sheriff to expunge the name from the roll.

J. & F. ANDERSON, W.S.—W. WHITE MILLAR, S.S.C.—Agents.

ANDREW HUNTER BALLINGAL, Objector (Appellant).—*Darling*.
ARCHIBALD MENZIES, Respondent.—*Young*.

No. 29.

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Ballingal v.
Menzies.

Election Law—County Franchise—Inhabitant-occupier—Service Franchise
—"Dwelling-house"—*Reform Act, 1884 (48 and 49 Vict. c. 3), sec. 3.*—A clerk in the employment of a hydropathic company occupied as sole occupant a room in the building belonging to the company. No particular room was expressly stipulated for by him, but when he entered on his employment a room was given to him which he had occupied for ten years; part of its furni-

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ture belonged to him. He took no meals in this room, but either in the servants' hall or the reception-room. During about four months in winter he left the room thus occupied by him and lived in a smaller and more comfortable room. No one occupied the other room in his absence; he was entitled to use it, and he moved from the one to the other of his own choice. The house-steward had a room in the building set apart for him, but usually resided in a separate house in the neighbouring village.

Held that the clerk inhabited a "dwelling-house" in the sense of the 3d section of the Reform Act of 1884, and that the "dwelling-house" was not inhabited by any person under whom he served, and that therefore he was entitled to be registered.

Registration
Appeal Court.
Sheriff of
Perthshire.
B.

IN the Registration Court for West Perthshire objection was taken to the name of Archibald Menzies being on the roll, his character and qualification being that of "tenant and occupant of house, Strathearn Hydropathic, Crieff"; the franchise claimed was that known as the "service franchise," introduced by the 3d section of the Representation of the People Act, 1884.*

In 1876 Archibald Menzies had been engaged by the directors of the Strathearn Hydropathic Company, Limited, to act as a clerk, and he had since been in the employment of the said company in that capacity. When so engaged the company agreed that besides his wages he should have, in virtue of his said employment, a separate room in the main building. No particular room was expressly stipulated; but when he entered on service a room in the building was allotted to him, and he had for ten years occupied as sole occupant that room as his bedroom during the summer of each year. During the winter months he slept in a smaller room; he did so of his own choice, and for the sake of the greater warmth of that room. During these months he was entitled to use the other and larger room in which his bed was left, to which he had free access, and which was not occupied by anyone else. He was in the habit of using the smaller room from the end of October until May or thereby, but the exact times when he went to it and left it varied each year, and depended on the state of the weather and the temperature. Part of the furniture in the larger room belonged to him, and part of it to the company. He took his meals either in the servants' hall or in the reception-room—sometimes in the one, sometimes in the other.

The Strathearn Hydropathic is a limited company, managed and conducted by Dr Meikle, who is employed and paid by the company, and who resides in a house adjacent to the main building, and by a house-steward who has a house in the village of Crieff, in which he usually resides, but he resides sometimes in the building, in which there is a room appropriated to him. Archibald Menzies was subject to the orders of the house-steward; but both were subject to the orders of Dr Meikle. No director of the company resided in the building.

The Sheriff (Gloag) repelled the objection, whereupon the objector required a case, which was accordingly stated by the Sheriff.

The foregoing facts were set forth, and this question of law was stated:—"Whether, in respect of the foresaid facts, the said Archibald Menzies is entitled to be entered on the roll in respect of the qualification set forth in the 3d section of the Act 48 and 49 Vict. cap. 3?"

* 48 and 49 Vict. c. 3, sec. 3.—"Where any man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant-occupier of such dwelling-house as a tenant."

Argued for the objector;—(1) The respondent was not, in the sense of the Act, an inhabitant-occupier, and (2) if he was, the dwelling-house was inhabited by one under whom he served.

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(1) He was not an inhabitant-occupier, for the franchise introduced by the Act was limited to cases where a "house or part of a house was occupied as a separate dwelling."¹ That was meant to apply to cases where a man lived in a one-roomed house, complete in itself. This argument was supported by the recent case of *Brown*,² where a right to occupy part of the dining-room was alleged, and was looked upon as essential to the validity of the claim. It would be a strange result if this man were held to have "a separate dwelling" in respect of a room where he never took a meal, and from which, moreover, he was absent for six months of the year. For the franchise claimed, actual personal occupation was surely an essential.

(2) The house-steward inhabited the dwelling-house of which Menzie's room was a part. It was plainly absurd to argue that "dwelling-house" in the second part of the clause meant the same thing as "dwelling-house" in the first part of it; for if so, a butler, *e.g.*, could not be excluded unless his master slept in the same bedroom with him. The steward here was as much an inhabitant as the clerk, and that was sufficient to defeat the claim; true, he was not the employer, but the words of the statute were "under whom such man serves," not "whom such man serves." [LORD MURE.—I am under the impression that this question was decided in England in the case of *Marshall & Snelgrove's Shopmen*, after there had been contradictory decisions by different revising barristers.] That was so, and the claims had been admitted.³ But the present case was distinguishable from that. There no one lived in the premises except the claimants, for the caretaker was not looked on as an occupant, and there was a particular room where all had their meals regularly and as part of the arrangement under which they lived there, a fact which assimilated their case rather to that of the claimants in *Brown's* case.²

Argued for the respondent;—The one room, of which he had the exclusive use, was enough to satisfy the statute, and the present case was very close to the English case cited.³ There, as here, there was no dining in the separate "dwelling-house," not because that privilege was denied to the occupants, but because it was more convenient for them to dine elsewhere, *viz.*, in a common room. That the voter here did not all the year round actually use his room was not sufficient to defeat his claim. The fact that it was open to him all the time and closed to all others just shewed the fulness and exclusiveness of his right.

Second, It was maintained that "dwelling-house" must mean the same thing in both parts of the clause, so that the master or upper servant must occupy the same rooms as the lower servant before the claim could be defeated. [LORD KINNEAR.—That seems very hard to maintain. Had you not better read the interpretation clause (sec. 11, subsec. 4) into the 3d section, so as to make it run,—“Where a man inhabits any house or part of a house as a separate dwelling . . . and that house is not inhabited by any person under whom such man serves”?] Besides, the house steward did not inhabit the hydropathic establishment. He had a house in Crieff, and the case, if properly read, implied that that was his habitation.

¹ 48 and 49 Vict. c. 3, sec. 7, subsec. 4, defining "dwelling-house."

² *Brown v. Martins*, Nov. 6, 1885, 13 R. 159.

³ *Stribling v. Halse*, Nov. 2, 1885, L. R., 16 Q. B. Div. 246.

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LORD MURE.—Upon the facts as stated it does not appear to me to admit of doubt that if the respondent had continued to use the room so allotted to him as his bedroom throughout the year, his qualification and right to remain upon the roll would be established in respect of the provision of the 3d section of the statute. It is precisely the same question as that which was decided in England with reference to a service qualification in the case of *Stribling*, L. R., 16 Q. B. Div. 246, to which we were referred in the discussion, and which depends upon whether a bedroom so occupied by a party who takes his meals in another room in the same house is to be considered as a “dwelling-house” in the sense of the statute, and it was held that it did. Now, by the 7th section of the Act of 1884, sub-division (4) “the expression dwelling-house in Scotland” is said to mean “any house or part of a house occupied as a separate dwelling,” and it appears to me that a separate room allotted to a clerk, and occupied by him as his bedroom, being part of a house, falls within the definition of a separate dwelling in the sense of the statute.

But the difficulty raised in this case arises from the fact that the respondent did not use this room as his bedroom throughout the whole of the year. For the case bears that “during the winter months he slept in a smaller room of his own choice, and for the sake of greater warmth,” and if while he did this he had given over the larger room to someone else, I should have had great difficulty in adhering to the Sheriff’s decision, although even then the principle of the successive occupancy clause in the Act of 1868 would have afforded strong ground for maintaining that the *substantiale* of the qualification remained. In the present case, however, no such difficulty is raised. For the case bears that “during these months the respondent was entitled to use the other and larger room in which his bed was left, to which he had free access, and which was not occupied by anyone else.” In these circumstances it appears to me that the decision of the Sheriff refusing to remove the respondent from the roll should be adhered to. Because, although he does not appear to have actually used the room during the winter months as his bedroom, but to have slept by permission of the manager of the company in a warmer room, his right so to occupy it at any time he chose remained, and he moved into it and used it as his bedroom in the spring whenever it suited his convenience. That, I think, is sufficient to entitle him to retain his qualification.

Upon the further question raised, as to his qualification being affected by the residence of a manager or house steward in the building under whom he was bound to serve, I am of opinion that upon the facts no such residence is proved.

LORD CRAIGHILL concurred.

LORD KINNEAR.—I concur, but I confess that had it not been for the decision in the case of *Stribling v. Halse*, I should have had some doubt whether a person who has the exclusive use of the room in which he sleeps, and a joint use with other persons of other rooms in which he carries on business or eats, can be said to inhabit his bedroom. But that is my only difficulty, and that has been settled, as I think, by the case of *Stribling v. Halse*. That decision is not binding on us, but I agree with your Lordships in thinking that we should not lightly differ from the decision of the Court of Appeal in England

on the interpretation of a statute which was passed to give a uniform franchise in the two countries. No. 29.

THE COURT dismissed the appeal.

D. FORBES DALLAN, S.S.C.—J. KNOX CRAWFORD, S.S.C.—Agents.

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JOHN EGLINTON MONTGOMERIE AND OTHERS (W. S. Stirling Crawford's Trustees), First Parties.—*Balfour—Guthrie.*

CAPTAIN JAMES STIRLING STIRLING STUART, Second Party.—*Sol.-Gen. Robertson—C. K. Mackenzie.*

THE DOWAGER-DUCHESS OF MONTROSE, Third Party.—*Balfour—C. J. Guthrie.*

No. 30.

Nov. 26, 1886.
Stirling Crawford's Trustees.

Heir and Executor—Warrandice—By whom obligation of warrandice prestable—Catholic security.—An obligation to free lands of debt arising under the warrandice clause of a disposition falls to be satisfied by the executor of the grantor of the disposition in a question between him and the heir.

In a trust-disposition and settlement, executed in 1853, the grantor conveyed his whole estate, heritable and moveable, to trustees, for the purpose, *inter alia*, failing heirs of his body, of conveying his estate of M, and his other lands in the county of L, to his brother, and the heirs of his body, under the fetters of an entail. By the same deed he directed his trustees, failing his own issue, to make over the whole residue of his estate to the person who should succeed to M. By a codicil, dated in 1876, he disposed to his wife, in the event of her surviving him, the lands of B and A (which were among the lands originally directed to be entailed), and bequeathed to her the whole residue of his estate. The disposition of B and A contained a clause of warrandice in ordinary form under the Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), which imports absolute warrandice. In 1882 the truster granted a bond and disposition in security for £250,000 over the estates of M, B, and A. *Held*, in a question between the widow and the brother of the truster, the institute under the entail of M, that the debt of £250,000 fell to be apportioned between them according to the respective values of M on the one hand, and B and A on the other, and that, assuming that the widow had a claim under the clause of warrandice to have B and A cleared of debt, it was not a claim against the heir of the truster, but fell to be satisfied out of the residue which had been bequeathed to her.

WILLIAM STUART STIRLING CRAWFURD, of Milton, was married on 22d January 1876 to the Dowager-Duchess of Montrose. He died on 23d February 1883, survived by his wife. He left a trust-disposition and settlement, dated 21st October 1853, by which he conveyed *mortis causa* his whole estate, heritable and moveable, to trustees for the purpose (after paying debts and legacies) of conveying Milton, and any other lands and heritages in the county of Lanark which should belong to him at his death, to the heirs of his body, whom failing, to his brother, Captain James Stirling Stirling Stuart of Castlemilk, and the heirs of his body, with a further destination, under the fetters of a strict entail. By the same deed he directed his trustees to make over the whole residue of his estate, failing his own issue, to the person who should succeed to Milton on his death. 2ND DIVISION. I.

He left, among other testamentary writings, a codicil, dated 1st November 1876, whereby, *inter alia*, in the event of his wife surviving him, he disposed and bequeathed to her the lands of Balornock, in the Barony Parish of Glasgow, and the lands of Auchinearn, in the parish of Cadder and county of Lanark, and expressly excepted these lands from the lands by his said settlement directed to be entailed, and directed his trustees to include in the entail the lands and estate of Milton only; and

No. 30. thereby he also bequeathed to his said wife the whole residue of his estate, heritable and moveable, wherever situated, with the exception of the estate of Milton, and of any special bequests by him.

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The codicil contained a description of the lands of Balornock and Auchinearn, and the following clauses:—"And I bind and oblige myself, and my heirs and successors, to grant all deeds and writings which may be necessary for making the foregoing conveyance and bequest of the said lands of Balornock, Auchinearn, and others, in favour of the said Duchess, my wife, and her heirs and successors, valid and effectual: To be held; the said lands and others hereby conveyed, *a me vel de me*; and I resign the said lands and others for new infestment or investiture; and I assign the writs; and I assign the rents from and after the period of my death; and I bind myself, my heirs and successors, to free and relieve the said Duchess, my wife, and her foresaids, of all feu-duties, casualties, and public burdens payable for, or in respect of said lands and others, up to the said period; and I grant warrandice."

At the date of Mr Stirling Crawford's death there was a bond and disposition in security for £250,000 affecting the lands of Milton, and also the lands of Balornock and Auchinearn. This deed was dated 9th November 1882, and recorded on the 13th November 1882 and 23d January 1883.

Various questions arose under Mr Stirling Crawford's testamentary deeds between the Dowager-Duchess and Captain James Stirling Stirling Stuart of Castlemilk, Mr Stirling Crawford's brother, who was entitled under the trust-disposition and settlement to be the institute in the entail of the estate of Milton to be executed by the trustees. A special case was presented to the Court to have these determined. Among the matters in dispute was the question on whom the liability for the sum of £250,000 contained in the bond and disposition in security fell. Captain Stirling Stirling Stuart, the party of the second part in the special case, maintained that the bond was apportionable as in a question between him and the Dowager-Duchess, the party of the third part, and that the estate of Milton was entitled to relief from a share thereof in the proportion of the respective values of the estates of Milton on the one hand, and Balornock and Auchinearn on the other. The Dowager-Duchess maintained that the said bond fell to be met entirely out of the estate of Milton.

The question of law submitted to the Court on this point was,—“Is the bond for £250,000 entirely chargeable against the estate of Milton; or, as in a question between the party of the second part and the party of the third part, is the estate of Milton entitled to relief out of Mr Stirling Crawford's residuary estate from a share thereof in the proportion of the respective values of Milton on the one hand, and Balornock and Auchinearn on the other?”

Argued for the third party;—The disposition to the third party of Balornock and Auchinearn in the codicil of 1st November 1876 contained a clause of warrandice, which was in the form given in schedule B of the Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), and therefore (under section 8 of the statute) was a clause of absolute warrandice. Mr Stirling Crawford had therefore undertaken to give these estates to the third party free of all incumbrance.¹ It was clear that he intended this debt to be heritable, and therefore it fell to be paid

¹ *Coventry v. Coventry*, July 8, 1834, 12 S. 895, 6 Scot. Jur. 486; *Strong v. Strong*, Jan. 29, 1851, 13 D. 548, 23 Scot. Jur. 244; *Ersk. ii. 3, 27*; *Macalister v. Macalister's Executors*, Feb. 28, 1866, 4 Macph. 495, 38 Scot. Jur. 231.

by the second party as the heir in heritage. The third party, as residuary legatee, must have relief against the heir in heritage if she paid off the debt.¹ This view was strengthened by the fact that the deceased had charged the debt on Milton as well as on the estates disposed to the third party.

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Argued for the second party ;—Apart from the question of warrandice, the debt would fall on the estates proportionally.² The third party, as donee, with a clause importing absolute warrandice by the disponent, might have a claim for relief against his representatives, but the question was, who was primarily bound to satisfy the claim,—the heir or the executor of the deceased. The obligation of warrandice was simply an obligation to pay money. It was personal, not real warrandice, and was an obligation to indemnify in case of eviction.³ The party evicted would claim damages in money, and such a claim must fall on the executor, not on the heir. The present claim arose under a *mortis causa* disposition, but the principle was the same as under an ordinary disposition to a purchaser. The third party, as residuary legatee, must satisfy such a claim herself. The argument for her assumed that because the debt to be cleared off was heritable, that therefore the obligation to clear it off must be heritable and fall on the heir.

At advising,—

LORD JUSTICE-CLERK.—This question is in regard to the bond for £250,000 charged over the estates of Milton, Balornock, and Auchinearn, Milton belonging to the heir of entail, but Balornock and Auchinearn having been settled on the truster's wife, the Duchess of Montrose. The point which arises is whether the obligation of warrandice contained in the settlement of these two estates is prestable by the personal representatives of the grantor of the conveyance, or is a charge upon the heir in heritage. Upon that point, as a general point, I have no doubt whatever. It does not follow because a man disposes real estate, and comes under an obligation in regard to it, that the obligation is a debt against his heir, being heritable in its character. Exactly the reverse may be the case. Where a disponent conveys land to a donee, and undertakes over and above his disposition either to clear the estate of outstanding debt and burdens affecting it, or to relieve the donee for the future of burdens that may affect it, as in the case of augmentations of stipend, these may be personal obligations, and it does not alter their character that they refer to a landed estate. The obligation of warrandice here is exactly in that position, for it is contended that Mr Stirling Crawford undertook that no burden should be put on Balornock and Auchinearn, and then that subsequently he borrowed £250,000, and charged this sum on the three estates of Milton, Balornock, and Auchinearn. It is said that was contrary to the obligation of warrandice undertaken in the disposition, and I shall assume that it was. I am not altogether satisfied that when Mr Stirling Crawford bound all three estates to repay the £250,000 that he had any intention to make one of them liable, and that the others should be free, although the obligation of warrandice granted six years before had no doubt that effect. I do not, however, raise any question of that kind, because there may be good reasons which would dispel any doubt that I have. But this is a simple obligation.

¹ Bell's Trustee v. Bell, Nov. 8, 1884, 12 R. 85 ; Duncan, June 22, 1883, 10 R. 1042 ; Macleod's Trustees, June 28, 1871, 9 Macph. 903, 43 Scot. Jur. 517 ; Douglas's Trustees v. Douglas, Jan. 17, 1868, 6 Macph. 223, 40 Scot. Jur. 113.

² Bell's Pr., sec. 1936.

³ Bell's Pr., secs. 894, 895 ; Stair, ii. 3, 46.

No. 30. tion not to burden these two estates, or to relieve them of any burden that might be imposed on them. That obligation, supposing it to subsist at all, is an obligation on the personal representatives, and not on the heir of the person granting it.

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LORD YOUNG.—My opinion concurs with that expressed by your Lordship. The deceased left at least three heritable properties, Milton, which went to his heir-at-law, his brother, not succeeding as heir but under a special disposition to himself, Balornock and Auchinearn, which similarly went to his widow, the third party to this case, under a disposition by him. There was a catholic security for debt over the whole three estates, without distinction, for a sum of £250,000. It was conceded, and properly so, that where there is a catholic security over two or more estates, and these are given to different parties, that the catholic security falls to be divided and distributed among them, according to the proportionate value of the estates. This is a case for applying that rule. But in the disposition to the widow of the two estates given to her there is a clause of warrandice, and the case was argued on the footing that a clause of absolute warrandice imports an obligation to clear off any debt from the property conveyed. The most familiar instance is where a man sells an estate burdened with debt, and sells it not subject to the debt, but with a clause of absolute warrandice, then he is under an obligation to pay it off. In that specimen instance there is no doubt that he must do so, and if he dies without doing so, the obligation would be good against his representatives, whether in heritage or *in mobilibus*. It is good against both to the party who is the creditor in the obligation, but in a question between heirs the executor is primarily liable, for the simple reason that it is a personal obligation. If the price has not been paid at his death the executor would get it. If it was paid before his death the executor would take it. The obligation is a simple personal obligation, and is primarily prestable, not by the heir in heritage, but by the executor who takes the money, out of which money any such obligation is to be discharged. The claim is just for so much money as will enable the holder of the obligation to clear off the debt which he is entitled to have cleared off. In this instance that is the proportion of £250,000 effeiring to the properties in the disposition in which the clause of warrandice occurs. The question is why should that claim for money be heritable. The answer given is, because it is to pay a heritable debt. But what has that to do with it? The secured creditor is a creditor in a heritable debt, because he has got security over the three estates, but the creditor in the obligation of the clause of warrandice is not. She holds no security for that obligation. If secured over any estate it would be over Balornock and Auchinearn, which, being her own, are no security to her. But it is really not secured over these at all. It is entire confusion to say that, because the obligation is to pay off heritable debt, therefore it is heritable.

The only consideration which affected my mind seriously, even temporarily, was whether the deceased, having made his widow his executrix and residuary legatee (so that his bounty to her would be diminished if she had to pay this debt), is not to be taken as having intended that it should be paid by his brother taking the estate of Milton. But I have rejected this without any doubt as unsound. She was made residuary legatee and executrix so early as 1876, but it is according to the rule of our law that every last will—any deed or number of deeds—whereby a person is made executrix or residuary legatee, is to be taken

as speaking in the last moments of the rational existence of the deceased. When he put it on paper is generally quite immaterial. He might have altered afterwards this will made in 1876, and if he had, and given the residue of his estate to a third party, what reason could the widow have suggested for passing over that third party and going against his brother who took Milton? She happens to be the person to whom, in the last moments of his rational existence, he destined the residue of his estate, and therefore she is the person with means to satisfy the obligation.

I am perfectly satisfied on these considerations that she has no claim against the heir of Milton, or on the estate of Milton, to satisfy the proportion of the catholic debt, secured over the estates, effeiring to her own properties. If she had taken nothing else but these properties she would have had a claim against the heir or executor, primarily against the executor, but being herself the executrix, and taking the estate out of which the obligation is to be satisfied, I am clearly of opinion that she has no other claim.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—I also concur. The third party is the disponee under a disposition *mortis causa* of the two estates of Balornock and Auchinearn. These were subject to a security for a debt which had been charged upon them. The disposition contained a clause of warrandice, and she claims to have the estates disburdened of the debt. It is admitted on both sides that the claim to that extent is well founded. The only question is on whom does the fulfilment of the obligation lie,—on the heir or on the executor? I think the obligation is distinctly a personal obligation. And all personal obligations must be fulfilled by the executor, because they are primarily obligations on him.

THE following interlocutor was pronounced:—"The Lords having heard counsel for the parties in the special case are of opinion that the bond for £250,000 is not entirely chargeable against the estate of Milton, and that that estate is entitled to relief out of Mr Stirling Crawford's residuary estate from a share of the said bond, in the proportion of the respective values of Milton on the one hand, and Balornock and Auchinearn on the other : Find and declare accordingly," &c.

JOHN C. BRODIE & SONS, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

JOHN HUNTER, Pursuer (Appellant).—*Moncreiff*—*Low*.
SCHOOL BOARD OF LOCHGILPHEAD, Defenders (Respondents).—*D.-F. Mackintosh*—*J. A. Reid*.

No. 31.

Dec. 1, 1886.
Hunter v.
School Board
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School—Powers of school board—Use of buildings.—A school board has a discretion to allow the use of its schools for purposes which do not interfere with proper educational purposes.

Held that a country school board had not abused this discretion by granting its school for five days in vacation to a charitable society to be used as a sleeping and cooking place for a large number of poor children brought from a town for a holiday.

Public trust—School Board—Jurisdiction—Sheriff.—*Question* whether the Sheriff has jurisdiction to control the managers of public property in their administration. *Opinion* (*per* Lord Young) that he has not.

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2D DIVISION.
Sheriff of
Argyll.
I.

JOHN HUNTER, surgeon, one of the members of the School Board of Lochgilphead, presented a petition in the Sheriff Court of Argyll, at Inverary, against the School Board of Lochgilphead, their clerk, and two of the members of the board, craving the Court to interdict the defenders "from granting the use of the old public school and playground, situated in the village of Lochgilphead, to the Glasgow Foundry Boys' Religious Society, or the 'Fair Week Trip Committee' of the said society, or to any person or persons for the purpose of affording accommodation for the Foundry Boys during their annual summer trip, or for any purposes other than are authorised by the disposition of the site thereof" and by the Education Act of 1872.

The disposition of the site of the school, granted by Mr Campbell of Auchindarroch to the Presbytery of Inveraray in 1851, bore that the site was granted as a site for a school for the education of poor persons and for the residence of a schoolmaster and schoolmistress, "and for no other purpose whatever."

At a meeting of the board, on 4th May 1885, a letter was read from the secretary of the "Glasgow Foundry Boys' Religious Society," a kind of Ragged School Society in Glasgow, asking the board for the use of the school for the children of the society from 17th to 22d July. The managers of the society annually took the children of the society to the country for a few days, and it was proposed to use the school buildings as a shelter for them at night or in bad weather, and as a cooking place. The use of the school had been granted to the society on several previous occasions, the last being in 1883 during the school vacation. In 1884 the use of it had been refused.

At this meeting on 4th May it was decided by the casting vote of the chairman to grant the use of the school. At another meeting on 6th July Dr Hunter moved that it should not be granted. For this motion two members voted, and for an amendment confirming the previous resolution the chairman and one other member voted. The other members being absent or declining to vote, the former resolution was confirmed by the casting vote of the chairman.

Thereupon Dr Hunter raised this action. The two members of the board called were the chairman and the member who had voted with him. They did not lodge defences. He averred,—“The school was refused in 1884 owing to the manner in which the privilege had been abused in 1883, when the forms were unscrewed and displaced, the bedding and litter left on the school premises after the departure of the boys, the walls and blackboards written upon, and various other acts done to the loss and damage of the property. The Foundry Boys are drawn from the lowest classes of Glasgow, and are under no authorised discipline or control. . . . Looking to the classes from which the Foundry Boys are drawn, he is of opinion that there is danger of infection and disease to the children attending the said school, as well as the risk of serious damage to the board's property.”

The School Board answered;—“Denied that the school was refused in the year 1884 owing to the manner stated by the pursuer. Explained that since the year 1866, being the first year that the Glasgow Foundry Boys' Religious Society commenced their annual summer trips to various places in Argyllshire and elsewhere, no case of an infectious nature has ever been heard of or reported to the society, and every precaution is taken by the responsible managers in charge of the society, who become responsible, and pay for cleaning the school after their departure.”

The pursuer pleaded;—(1) The defenders are not entitled to use the said schoolhouse and ground for other than educational purposes, or such

as are sanctioned by the title thereto and the Acts of Parliament above quoted. (2) In any case the defenders are not entitled to grant the use of the said school to the Glasgow Foundry Boys' Religious Society, or to the Fair Week Trip Committee of said society, for affording accommodation to the Foundry Boys during their annual summer trip.

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The defenders pleaded;—(6) In the whole circumstances, the pursuer is not entitled to interdict as craved in the present action.

On 26th October the Sheriff-substitute (Campion) assoilzied the defenders on the ground that the application had been presented too late to interdict the defenders for 1885, and that he could not dispose of any question that might arise next year.

On 25th May 1886, the Sheriff (Irvine) recalled his Substitute's interlocutor, sustained the 6th plea in law for the defenders, and assoilzied them.*

* "NOTE.—In this cause the Sheriff has come practically to the same conclusion with the Sheriff-substitute, although on somewhat different grounds.

"He cannot consider the interdict here sought by the pursuer as limited to the single occasion now in question. It seems to him to be rather of the nature of a continuing interdict, and that it is thus necessary for its satisfactory disposal, to some extent at least, to go into the merits of the question here raised. And (1) as to the title to the ground on which these school buildings stand, and (2) the conditions and restrictions imposed there and in the Act of 1872, bearing on the uses to which alone these buildings may properly be applied, it seems to the Sheriff that these provisions are directed against permanent alienations of the schoolhouse for purposes opposed to its proper and primary use rather than against a temporary employment of that building for a limited and casual purpose like that in question, and therefore do not go very far towards solving the question here at issue.

"Nor does it appear that there exists anything in the shape of cases adjudged in the Courts of law to aid in this solution. In default of such authority, it might perhaps be thought that decisions of these Courts as to the legality of proposed applications of churches to other than their primary uses, of which some well-known instances are found in the books, might at least supply something by way of precedent or analogy, but here again the principles of decision are different. It is true that church buildings are not now, as they were in former times, devoted by consecration to the uses of public worship and the administration of the sacraments; yet a dedication of them, either actual or constructive, is recognised by our law,—'Though the formal consecration of things to sacred uses,' writes Mr Erskine, ii. l. 8, 'hath not been practised by the Church of Scotland since the Reformation (Mackenzie, sec. 4, h. t.), yet churches, communion cups, bells of churches, and other things destined to sacred purposes, retain to this day so much of the character of sacred that they are exempted from commerce, and so cannot be applied to the uses of private property while they continue in that state.' See also the opinion of Lord Medwyn in *Kirk-Session of St Andrew v. Magistrates of Edinburgh*, January 31, 1835, 13 S. 391. So Sir George Mackenzie, in the passage referred to by Erskine (Inst. ii. l. 4), includes among things that do not fall under commerce, 'things that are said to be no man's, but are *juris divini*, which are either sacred, such as the bells of churches; for though we have no consecration of things since the Reformation, yet some things have a relative holiness and sanctity, and so fall not under commerce, that is to say, cannot be bought and sold by private persons.'

"The law is similarly laid down by Bankton, ii. tit. 8, secs. 189 and 195. Reference may also be made to the cases of *M'Naughtan v. Magistrates of Paisley*, February 7th, 1835, 13 S. 432; and *Easson v. Lawson*, July 20th, 1843, 5 D. 1430. It would, however, appear that even as to the use of such buildings more freedom was sometimes allowed. 'It frequently happens,' says Mr Dunlop (*Parochial Law*, p. 60) 'that public meetings for objects totally apart from

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The pursuer appealed. Argued for him;—First, it was *ultra vires* of the board to give leave, but, second, even if they had a discretion to lend or let the school for purposes other than educational purposes, that discretion had been abused. The board could not use the school save for educational purposes, or grant it to others for any non-educational purpose, and the purpose must be one in which only their own parish was concerned. Otherwise the board, which had assessed the parish for the building of schools for the purposes of the Education Act, would be applying that assessment to a purpose and for the benefit of a set of persons for whom the Act did not authorise them to provide. They would be abusing their trust, and besides that contravening the conditions of their title. A school could not be lent for a flower show.¹ There was no doubt a custom of allowing the use of schools in country places for various kinds of local meetings, and it would be unreasonable to object to these. But the pursuer here appealed to the strict law, and relied on the cases in which the use of churches for other purposes than public worship had been prevented,² the character of the building there—consecrated by sentiment, if not by religious ceremonial—disposing the Court to apply the strict law even where, as in *Easson's* case,³ the proposed use was *quasi* ecclesiastical. But, if there was a discretion, the board had overstepped it. The pursuer here relied on his averments as to the damage done on former occasions and the risk of infection. These averments he offered to prove.

The defenders argued;—There were no doubt two questions here—First, assuming that the board had a discretion in the matter, had there been any act in excess of that discretion? and second, had the board a discretion at all, or was it not *ultra vires* to let or lend the school for any purpose other than education? If there was a discretion in cases of fire,

anything relating to religion or to the affairs of the parish are held in the church, and that it is likewise used for meetings of Courts of law and formerly of freeholders for the election of members of Parliament. This use of churches is certainly contrary to an ancient law, which prohibited holding of Courts of law within churches and churchyards (Quoniam Attachiamenta, cap. 86); but how far since the Reformation our Courts would interfere to prevent such use of a church seems doubtful.

“As already said, there do not appear to be any decisions of the Courts fixing with certainty the allowable uses of school buildings, but from the very absence of such judgments it may not be too much to infer that these questions are usually left to the discretion of those who are responsible for the due and proper care of the fabric itself, to grant or to refuse its use as may seem fit, and, where granted, to impose such regulations and restrictions as may be necessary for the prevention of injury, or for the repair of any damage that may be done.

“Cases of abuse may from time to time arise, but these, where gross or clamant, will no doubt be corrected by the Courts. But the use here granted seems a charitable, or at least an innocent one, and it does not appear to the Sheriff to call for the intervention of the law for its prevention.”

¹ School Board of Kettle, *per* Lord Adam (Ordinary on the Bills), June 1878, Sellar's Manual of the Education Acts, 178.

² Kirk-Session of St Andrews v. Magistrates of Edinburgh, Jan. 31, 1835, 13 S. 391, 11 F. 213, 7 Scot. Jur. 187—(interdict against a ward meeting); McNaughtan v. Magistrates of Paisley, Feb. 7, 1835, 13 S. 432, 10 F. 251, 7 Scot. Jur. 214—(interdict against use of church bell).

³ Easson v. Town-Council of Dundee, July 20, 1843, 5 D. 1430, 15 Scot. Jur. 633—(interdict against meeting “to explain the present position of the church and enforce her missionary and other schemes”).

plague, or shipwreck,¹ it would, for instance, plainly fall to be exercised in favour of the victims. It was difficult to place any limit on discretion, but it was sufficient to say that here there were no averments that raised an extreme case. Any damage was to be made good, and the fear of infection was vain in connection with a barely furnished building like a schoolhouse.

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But was there a discretion? It would be a pity if there was not, for all admitted that it was usual to let or lend schools for meetings that were not educational. The London School Board had framed a set of rules to regulate the letting of their schools for evening meetings and Sunday schools.² If boards were not to be allowed to let their buildings, it might operate to the loss of the ratepayers both by way of loss of possible rent, and also by deterring boards from building useful adjuncts, *e.g.*, gymnasia, which they might expect to pay for by contributions from persons other than pupils who might use them. It was *jus tertii* to appeal to the condition in the title, and that condition was pointed at a permanent alienation. The Education Act could not be held to forbid boards to let property belonging to them, such as old schools, and yet the pursuer must carry his argument that length. If public buildings generally had been declared by the Court to be capable of being used, each only for its primary purpose, no doubt this interdict must be granted. But the only class of cases cited was churches. At the root of all the authorities on that subject was the idea of the obligation incumbent on the Court and on burghal corporations to protect the Church of Scotland. Even although that distinction was sentimental, still, if it pervaded, as it did, these judgments, it prevented them from ruling any other class of cases.

At advising,—

Lord Young.—It appears that the charitable managers of the Glasgow Foundry Boys' Society provide an outing for the boys every summer, taking them generally to some sea-side place for a few days. They applied to the School Board of Lochgilphead for the use of the school as a kind of camping-ground for the boys at night. That use was granted, the school being then in vacation, and the buildings not being required for their ordinary use. But the pursuer maintained that this use was illegal, pleading "(1) The defenders are not entitled to use the said schoolhouse and ground for other than educational purposes, or such as are sanctioned by the title thereto and the Acts of Parliament above quoted." The second ground of his application is that, if not illegal, this was indiscreet, and should be checked and prevented, inasmuch as, "looking to the classes from which the Foundry Boys are drawn, he is of opinion that there is danger of infection and disease to the children attending the said school, as well as the risk of serious damage to the board's property."

These, then, are his two grounds. The first that this use is illegal,—that the law will not sanction the use of the board school except for the purposes specified in the Education Act. There is a reference, no doubt, made to the title under which the school is held, but it would only be the granter of the title who could complain on the score of a contravention of it. The other ground is that it is not discreet to allow this use.

On the first ground, I am of opinion that it is unfounded. There is nothing illegal in itself in allowing these children, under proper charge, to enjoy the shelter of the schoolhouse on these summer nights. It may be more or less

¹ Per Lord Mackenzie in case of churches in *Eason's case*, 5 D. 1430.

² Owen on the Education Acts, p. 83.

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discreet—I am not concerned with that at present—but it is not illegal. It is said that it is not a proper use under the Education Act. See what that would lead to. It would be illegal to allow a flower show, for example. To say that that would be illegal because it is not an educational purpose under the Act approaches nonsense, and the same may be said of a variety of purposes for which the use of school buildings is habitually given. Large rooms fit for meetings are not very frequently found in villages, and many useful meetings for public purposes could not be held at all if they could not be held in the schoolroom. When I was Sheriff of a Highland county I know that Small-Debt Courts used to be held there.

I think, then, that there was no illegality. But discretion is another matter. We know that there is a large discretionary power in this Court to regulate the administration of the guardians of public property,—the managers of public property,—for the benefit of the community. Questions of that kind have been raised about Bruntfield Links (*Magistrates of Edinburgh v. Warrender*, June 5, 1863, 1 Macph. 887, 35 Scot. Jur. 526), Kirkcaldy Links (*Grahame v. Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066), Musselburgh Links (*Sanderson v. Lees*, June 22, 1859, 21 D. 1011, 22 D. 24, 32 Scot. Jur. 14), and others. Many questions may be raised as to the exercise of discretion by such persons in permitting this or that use of the property, *e.g.*, selling, fencing, building, &c., and the Court may always prevent any use that is prejudicial to the interests of the community. But I never heard of an appeal to the Sheriff in such cases. He may interpose in cases of emergency to prevent an illegal thing being done, but to appeal to the Sheriff on a question as to the discretion or propriety of a resolution arrived at by a public body for the administration of its property is a novelty.

I am not prepared to say whether the resolution is right or wrong in the present case. I think the Sheriff is not to be called in in such a matter, and it would need to be a matter of considerable weight and importance to induce this Court to interfere. The board are the proprietors here as a matter of title, and I am not called upon to judge one way or the other as to the advisability of one course or the other. I can see a great deal to say on both sides. But it is a matter for the majority of the board to determine, and they did determine it. The matters raised are all matters for deliberation and discussion in the school board, but I do not think the Sheriff is to be called in to review the decision of the majority. I agree with the Sheriff in thinking that there is no ground in the matter of discretion or propriety for interdict, but I wish to repeat that in a question as to the exercise of discretion by guardians and managers of property for others, the Sheriff Court is not the proper tribunal to appeal to.

LORD RUTHERFURD CLARK.—The question is whether the school board is entitled to allow the school buildings for other than educational purposes. I think they are not restricted as the complainer maintains. I should be sorry to prevent any use of the buildings which may be useful for the community by pronouncing such a judgment as the complainer desires.

LORD JUSTICE-CLERK.—I concur, although I cannot say I think it is altogether a clear case. The complainer would need to shew that the school board had gone beyond their statutory powers, for I think that the thing was in itself reasonable. I am not prepared to say that the Sheriff might not fairly be in-

voked (1) on the question whether the board might give the use of the buildings for purposes which are not its primary purposes, or (2) in order to prevent any possible injury by the proposed use. But it is not necessary to determine that in the view I take of the case, for I think the amount of prospective or apprehended danger is not sufficient to induce us to interfere. I think the board have power to give the use of the room for purposes that will not interfere with the use of the school for its proper purposes.

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LORD CRAIGHILL was absent.

THE COURT dismissed the appeal, and affirmed the judgment.

M'NEILL & SYME, W.S.—J. & A. F. ADAM, W.S.—Agents.

NORTH BRITISH RAILWAY CO., Pursuers (Reclaimers).—*Asher—
J. C. Thomson—Dickson.*

BENHAR COAL COMPANY AND ITS LIQUIDATORS, Defenders
(Respondents).—*Sol.-Gen. Robertson—Murray.*

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Contract—Interpretation—Creditors making performance impossible.—The North British Railway Company, by an agreement entered into with the Duke of Abercorn to facilitate the passage of a bill promoted by them, agreed to buy 35 acres lying along the north side of their line at Portobello, including the site of a road running north and south across the land so acquired called Hope's Road. The company also agreed "whenever they take possession of any part of Hope's Road," to make a road "coloured yellow on a plan and according to section and specification hereto annexed," and to pay for the ground required at the rate of £400 per acre. This road was to run from east to west along the southern boundary of the Duke's ground and to lead at its eastern end into a road running parallel to Hope's Road. The agreement further provided,—“The Duke to have it in his option either to require of the railway company that this road be made, or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along north side of same, be paid to him in lieu thereof. Time of payment to be whenever the company take possession of any part of Hope's Road.”

A person coming in right of the Duke fenced off his ground to different fensurs up to the boundary of the railway company's property, and indeed encroached inadvertently on that property, thus making it impossible to form the road stipulated for.

Held (diss. Lord Rutherford Clark, and rev. judgment of Lord Kinnear), that as the road, the formation of which was the basis of the whole article of the agreement, was not to be formed, those in right of the Duke could not demand from the company a sum equal to the cost of constructing or of fencing it.

In 1872 the North British Railway Company, who were promoting a 2^D DIVISION. bill in Parliament, in order to facilitate the passing of the bill entered into an agreement with the Duke of Abercorn, who was then proprietor of Easter Duddingston, for the purchase of 35.165 acres of land on the north side of their railway at Portobello, including the site of a road called Hope's Road. Hope's Road ran from south to north across the land to be sold to the company near the middle of it. At the east end of the land to be sold another road called the Black Road ran from north to south parallel with Hope's Road. Hope's Road at its north end ran into the High Street of Portobello. Hope's Road was a private road which passed across the railway and into a high road on the south.

The fourth article of the agreement was in these terms:—"Fourth, The company to form the road coloured yellow on the plan not less than forty feet in width, and according to section and specification hereto annexed when-

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ever they take possession of any portion of Hope's Road, and to pay for the ground required therefor at the rate of £400 per acre, and to give to the Duke, his tenants and feuars, the right of use of any extended road to the High Street that the company may form. The Duke to have it in his option either to require of the railway company that this road be made, or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along north side of same, be paid to him in lieu thereof. Time of payment to be whenever the company take possession of any part of Hope's Road."

The road thus to be formed was to run along the edge of the company's property from Hope's Road to the Black Road, forming the northern boundary of the land acquired by the company.

This agreement was made while the bill was in committee, and was embodied in the Act of Parliament.

Subsequently the Duke sold his land to the Benhar Coal Company, who feued it out for villas. By inadvertence they gave out to their feuars part of the land sold to the railway company, and it was occupied by gardens, &c. It thus became impossible to make the road. The Benhar Company, however, maintained that they were entitled in the exercise of the option given to the Duke to demand from the company a sum equal to the cost of making and fencing the road, and the cost of the ground at £400 per acre, and that without making any road.

The railway company and the Benhar company came to terms for a conveyance to the latter company of the ground which had been inadvertently taken, but the railway company raised an action of declarator that the Benhar Company were not entitled to enforce implement of the fourth article of the agreement "except in so far as it provides that the pursuers are to give to the said Duke, his tenants, and feuars the right of use of any extended road to the High Street of Portobello the pursuers may form, and that the pursuers are freed and relieved of all obligations to form the road referred to in said fourth article and coloured yellow on the plan therein mentioned, and to pay for the ground required therefor, or to pay the cost of constructing and fencing the said road referred to in said fourth article." There was an alternative conclusion that the defenders, if they were entitled to receive the cost of the road, were bound to make it.

The pursuers stated that the proposed road would have been of great value to them, in the event of Hope's Road being shut up, as an access to the Black Road, and that they would have to provide such an access at their own expense.

The defenders denied this, and explained that they had formed other roads at their own expense for the convenience of their feuars.

The pursuers pleaded;—(1) The defenders having, by their own actings, rendered it impossible to make the road referred to in article fourth of said agreement, the pursuers are entitled to decree in terms of the first declaratory conclusion; or otherwise, in respect of the terms of said agreement, and of the said road being serviceable and necessary to the pursuers as condescended on, the pursuers are entitled to decree in terms of the second declaratory conclusion.

The defenders pleaded;—(2) The terms of article 4 of said agreement, with the option there specified of taking payment if required, being binding on the pursuers, the defenders are entitled to be assolizied.

On 20th May 1886 the Lord Ordinary (Kinnear) assolizied the defenders.*

* "OPINION.—The only question between the parties is as to the construction of the fourth article of the agreement between the Duke of Abercorn and the

The railway company reclaimed, and argued ;—This was an iniquitous claim, for the Duke had feued the land already, and those in his right were now seeking to obtain its value over again. The option given to the Duke was either to make the road himself and be paid for his expense by the company, or to call on the company to make the road for him. The words of the agreement plainly shewed that that was so, and that nothing fell to be paid if a road was not made, for the sum to be paid by the company was “the cost of constructing said road,” i.e., the road on the plan

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North British Railway Company. They are agreed that the defenders are now in right of the Duke under that agreement, and that they have dealt with their land in such a manner as to disable them from furnishing the ground required for the construction of the road described in the fourth article. In these circumstances the pursuers maintain that they are relieved not only of their obligation to make the road, but also of the alternative obligation to make the payments stipulated in the same article of the agreement, in the event of the Duke or the defenders in his place electing to demand these payments, instead of requiring the road to be made.

“I think this construction of the contract cannot be sustained. The Duke stipulates for the formation of a road, not upon the land conveyed to the railway company, but upon his own land in the event of the company taking possession of the road called Hope’s Road, the site of which is included in the conveyance to them, and, if that were all, there can be no question that he could not insist upon performance of this obligation, unless he were in a position to give the land required for the formation of the road. But he further stipulates that he ‘shall have it in his option either to require of the company that this road be made, or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fences along the north side of the same, be paid to him in lieu thereof.’ And in the event of his preferring to take the money instead of his road, he stipulates that the time of payment shall be ‘whenever the company take possession of any part of Hope’s Road.’

“It appears to me that this is an option to require either that a road shall be made, or that money shall be paid in lieu of a road. The stipulation is for the benefit of the Duke and his tenants or feuders ; there is no obligation on him to convey the road to the company in the event of its being constructed, or even to give them the use of it, and there is no obligation to construct a road in the event of his preferring to take money. It is not immaterial to observe that if, instead of requiring a road to be made, he elects to take the stipulated payments, such payments are to be made immediately upon the obligation coming into force by the company taking possession of any part of Hope’s Road. It cannot be suggested, therefore, that the previous construction of the road by the Duke is an implied condition of his right to demand payment. Nor can I see any ground on which the company could interfere after the money had been paid, and insist upon its being applied in the construction of a road. The Duke might have sold his land after obtaining payment, free from any obligation to the railway company, and, in the event of his doing so, the company would have no claim for repetition or damages. The only result therefore, of the conduct of the defenders in making use of their land as they are said to have done appears to me to be that it determines their election. They cannot require a road to be made on their land if they cannot give the land for that purpose. But that will in no way affect their right to have a money payment in lieu of a road, in the event of the obligation coming into force.

“The option for which the Duke has stipulated would have no meaning upon the pursuers’ construction. There is no difference, except in words, between requiring of the railway company that a road shall be made and requiring them to pay for making it. But the contract must be supposed to contemplate a real alternative. I think it was intended to provide for any contingency in which the actual construction of the road might be unnecessary or inconvenient for the Duke of Abercorn.”

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and the cost of fencing it. They were now asked to pay the cost of a road that never could be constructed, and the price of land that they could never acquire. If this had merely been an obligation to make a road, the company would certainly be free, for the Duke had made that impossible by his own act; any obligation coming in place of that obligation to make the road was alike incapable of enforcement. The company undoubtedly would have had a right of use in this road if it had been made, for it was to come in place of Hope's Road, in which confessedly they had a right. Hence their interest in having the road made, and a right to prevent it from being closed if once made.

The respondents argued;—The argument and illustration of the Lord Ordinary in his opinion were sound and cogent. Hope's Road was valuable, and the Duke was entitled to be paid if he was deprived of it. He might be paid either in money or in kind by the construction of a new road. That was the option given to him, and if the contention of the other side was to receive effect he had no option given to him at all. Looking to the possibility of Hope's Road being closed, the Duke had had to use valuable feuing ground as streets in order to give an access to his feus, and his feuing plan had been laid out on the footing that the road in question was not to be made. He had thus acted throughout on the footing that he had the option for which he now contended, and had spent money in making accesses, and lost the opportunity of making more money by turning feuing ground into streets. His claim was therefore quite a fair claim, and not iniquitous as had been maintained. The proposed road was no substitute for Hope's Road. The latter was an access from the north to the railway company's property: the former was an access to the Duke's feus. It was not therefore the case that the company would have had any right to use it if it had been made. On the construction of the clause, in addition to what the Lord Ordinary had said it was obvious that the company's construction gave no force to the words "in lieu thereof," which must mean "in place of the road," and therefore must contemplate the case of no road being constructed.

At advising,—

LORD YOUNG.—The matter depends on the construction of the import and effect of the 4th article of the agreement. It will be borne in mind that this agreement was made to facilitate the passing of the bill through Parliament, a kind of agreement which is made while bills are passing through committee, and made more or less hurriedly. Now, the fourth article is in these terms:—"The company to form the road coloured yellow on plan, not less than 40 feet in width, and according to section and specification hereto annexed, whenever they take possession of any portion of Hope's Road, and to pay for the ground required therefor at the rate of £400 per acre, and to give to the Duke, his tenants and feuars, the right of use of any extended road to the High Street that the company may form."

Now, I stop here in the meantime, although it is on the subsequent words that the question really arises, for I think that a great deal depends on the import and effect of the words I have read. Hope's Road is a private road, the *solum* of which belongs to the Duke of Abercorn, crossing the line of railway from south to north, and proceeding on the north to Portobello. By a previous clause in the agreement the *solum* of that road is sold to the railway company. They are the proprietors of the road, with liberty, of course, to shut it up. Although it is not so provided, the Duke and those in his right are to be entitled to use it until it is shut up. That is the plain meaning of the agreement,

although it is not so expressed. Then, when it is shut up, a substitute road is to be provided. No. 32.

"Take possession of Hope's Road" is not language used in its ordinary sense, for the company were in possession in 1872. "Take possession" in an agreement hurriedly made, as I have explained, must mean when they use the *solum* of the Co. road so that it can no longer be a road, then you are to make a substitute road. They are to pay for the ground, and to make a road upon it, with a right to use it as they use Hope's Road, the Duke also having a right to use it just as he uses Hope's Road. I think it is to be a substitute road in every sense for both parties.

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But there is an alternative, which does not, however, as I think, dispense with the making of the road. So far as I have read, the company are to form the road. But then the agreement goes on,—“The Duke to have it in his option either to require of the railway company that this road be made, or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along north side of same, be paid to him in lieu thereof. Time of payment to be whenever the company take possession of any part of Hope's Road.”

Now, I should have thought at first sight, although I see the argument of the Lord Ordinary, and appreciate it on a critical examination of the words, that the meaning of the words was that the Duke may require the company to make the road, or to supply him with money to make it, but it is to be made. That is a common sort of agreement, and it is an alternative with which we are quite familiar, *e.g.*, in the conclusions of summonses. It is not a power to exact a fine, it is a power to make the party with whom you contract execute the operation himself, or supply you with money to do it. The whole thing rests on the basis that the road is to be made. What is the cost of constructing a road which is never constructed? You may, of course, put the case,—“Suppose the road made, and suppose it fenced in a certain way, what would be the cost?” I dare say you could arrive at a sum, but the language is not suitable to such an agreement; it is suitable to an agreement that the road shall be made. It appears to me, indeed, to be a question whether the railway company may not have a remedy against the Benhar Coal Company if it has been rendered impossible to make the road. But that question does not arise here.

The interpretation contended for by the Benhar Company, I think, is contrary to good sense and to the intention of parties, and but for the difference of opinion which I know to exist, I should have thought that that was very clear. The Lord Ordinary sets some importance on the time of payment. As he has done so, there must be some foundation for his argument, but I do not see it. I have pointed out that the time when the railway company takes possession of Hope's Road means when they stop the use of it as a road. They are then to pay the cost of the substitute road. It is not to be a prepayment, however. If the Duke had proceeded to make the road it would have been absurd to make estimates before he began and to have had a prepayment of the estimated cost.

Now the road is not to be constructed, the North British Railway Company and the Benhar Coal Company must both go without it, except in so far as the railway company may have a ground of complaint against the other company, and I do not say they have not, because the means of making the road have been taken from them. That is the view I take of the case, and it leads me to an opposite conclusion from that of the Lord Ordinary. I think the Benhar Company is not entitled to demand any sum of money.

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LORD CRAIGHILL.—I agree. It appears to me, notwithstanding that the Lord Ordinary has adopted the opposite view, that this is a case in which a conclusion can be reached, and reached without difficulty, such as I have arrived at. Article 4 of the agreement seems to consist of two parts, the first being that which is set forth in the first sentence. There is there an obligation undertaken by the railway company to form the road, and as a part of that obligation another obligation to pay for the land required for the road at the rate of £400 per acre. These are the only obligations undertaken by the railway company.

The second part of the article consists of two sentences, and two things are provided for. An option is given to the Duke that he may require the road to be constructed by the railway company, the other alternative being that the cost of providing the road—of taking the land, and of putting up a fence—should be paid to him “in lieu thereof.” These seem to me not independent obligations, but obligations purely ancillary to the obligation undertaken by the railway company.

Now, that obligation on the railway company by which the company undertakes the formation of the road implies an agreement by the Duke of Abercorn that ground should be reserved by him for the making of the road. There was no need to take that land at once. It was only necessary to take it when Hope’s Road should be shut up. If the Duke was to insist for the fulfilment of this obligation when the time came, he behoved to reserve land for the purpose, for the road cannot be formed when there is no land on which to form it. The necessary result of making it impossible to form the road is the extinction of the obligation. Now, as a necessary consequence, not only is the obligation set forth in the first part of the clause extinguished, but the corollary of that obligation is also extinguished, viz., the obligation to pay for the land for formation of it. If there is to be no road the railway company is released from its obligation to make a road, and from its obligation to pay £400 for land for making it.

That being the actual state of things according to my reading of the agreement and my estimate of the nature of the circumstances, what is the effect on the ancillary obligation? The Duke might require the railway company to make the road. So he might, but only on the supposition that he has ground to give them to make it on. But if he has no ground to give, and cannot exercise that power, neither is he entitled to the alternative. That depends for its efficacy on the undertaking in the original obligation. The liability of the railway company centres in their original obligation. If that obligation is extinguished, there is no obligation to pay money. When the making of the road,—a road to be used by both parties,—became impossible, the agreement must be extinguished in all its parts. The result contended for is that the company is to be called upon to pay money and to go without the road.

LORD RUTHERFURD CLARK.—I agree with the Lord Ordinary, and, looking to the language of the agreement, I can reach no other conclusion. Proceeding as I do on exactly the same grounds as his Lordship has stated, it is unnecessary that I should give any further reasons for my opinion.

LORD JUSTICE-CLERK.—I agree with the majority of the Court. This result, I think, is the only course that can possibly be taken in fair dealing, for

nothing can be given as a consideration for the money which it is proposed shall be paid by the railway company. No. 32.

THE COURT recalled the interlocutor, and found and declared in terms of the first conclusion of the summons.

MILLAR, ROBSON, & INNES, S.S.C.—J. & F. ANDERSON, W.S.—Agents.

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COMMERCIAL BANK OF SCOTLAND, LIMITED, Petitioners.—

Sol.-Gen. Robertson—J. C. Lorimer.

LANARK OIL COMPANY, LIMITED, Respondents.—*Balfour—M'Keechie.*

No. 33.

Company—Winding-up order—Inability of a company to pay its debts—Security for debt—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 80, sub-sec. 1.—Where a limited company, in answer to a creditor's petition for a winding-up order, on the ground of inability to pay a liquid debt under the 1st subsection of the 80th section of the Companies Act, 1862,* pleads that the debt is sufficiently secured, the security must be such as will command in the market the amount of the debt founded on.

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THE COMMERCIAL BANK OF SCOTLAND, LIMITED, were creditors of the 1st Division.
Lanark Oil Company, Limited, in a sum of £10,000, 7s. 10d., the balance due as at 26th August 1886 under a cash-credit bond and assignation in security, dated in September 1884, granted by the company and three co-obligants named therein, and £567, being the interest due thereon. Under the bond and assignation in security the company and the other obligants were bound, conjunctly and severally, to pay the principal and interest to the bank "at any time when the same shall be demanded after three months from the last date hereof." B.

On 30th September 1886 the bank served a demand on the company, requiring them to pay the balance and interest above mentioned, but the company having neglected to pay the debt, or to secure or compound for it, to the reasonable satisfaction of the bank, the bank presented a petition to the Court in which they submitted that the company was unable to pay its debts, and prayed that it should be wound up, in terms of the Companies Act, 1862.*

It appeared that the capital of the company, which had been established in 1883, for the purpose of carrying on the manufacture of mineral oils, had originally consisted of £130,000 (since reduced), and had been all called up, and that the company had never made any profit.

The company lodged answers, in which they stated, *inter alia*,—"Explained and averred that the sum originally borrowed by the company from the petitioners was £20,000, of which £14,250 was upon the said cash-credit, and £5750 upon a temporary overdraft, but that the said loan of £20,000 was, in April 1886, reduced by a payment to account thereof,

* The 79th section of the Companies Act, 1862, enacts that "a company under this Act may be wound up by the Court as hereinafter defined under the following circumstances, viz :— . . . 4. Whenever the company is unable to pay its debts."

The 80th section enacts that "a company under this Act shall be deemed to be unable to pay its debts—(1) Whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding £50 then due, has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor."

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to the said balance of £10,000, 7s. 10d. In security of the said balance and interest now remaining due, the petitioners hold as a first charge the company's works and property at Lanark, which cost £80,000, and after writing off a sum of £30,000 for depreciation, now stand in the company's books at the value of £50,000. In addition to the heritable estate and plant thus held by the petitioners in security for the balance of the said cash-credit, they hold the personal obligation of three of the late directors of the company."

It further appeared that the petitioners had served a notarial requisition and protest on the company, on 4th September 1886, calling up the debt due to them under the bond, which notice would expire on 4th December, after which the petitioners would be in a position to realise their security.

The respondents further alleged:—"The whole debts of the company, both secured and unsecured, do not exceed £32,000, while the assets of the company exceed £85,000 or thereby, even at their present low and depreciated value. The respondents were in course of making arrangements for having the said cash-credit balance paid off before the petitioners were in a position to sell the said heritable subjects, but these arrangements have been stopped by the presentation of the present application." They accordingly submitted that they were not unable to pay their debts in the sense of the statute.

The petitioners argued;—The answers were irrelevant. Liquidation was not an exceptional remedy. It was the equivalent provided by the Legislature in the case of limited companies for sequestration in the case of ordinary trading firms. On the face of their bond the petitioners were entitled to immediate payment of their debt. It was liquid and undisputed. In order to be valid the security offered in answer to such a petition as the present must be such as could at once be placed in the market and would realise the amount of the debt.¹ Here there was no attempt to prove the value of the security. It was said to stand in the company's books at £50,000. But that was not cash down, which was the right of the petitioners. If they were really solvent—either the company or the individual obligants—as was alleged, there could be no difficulty about payment of the debt.

The respondents answered;—The debts contemplated in the statute were unsecured debts. Secured creditors—like the present petitioners—were not entitled to present an application for liquidation. But in any case, the position of the respondents' company, as set forth in their answers, was sufficient to satisfy the requirements of the statute as to security. Besides, the action of the respondents had been paralysed by the service of the requisition and protest under the bond, which prevented them from raising money.²

LORD PRESIDENT.—The remedy which is given to a creditor of a limited company under the Companies Act of 1862 to apply for a winding-up order is no doubt a very strong one, but I agree in the Solicitor-General's observation, that the remedy in question is intended to come in place of all the remedies possessed by the creditors of an ordinary trading company. The creditor of an ordinary trading company may apply for sequestration of the company's estate, and may proceed with diligence not only against the company, but also against the

¹ European Life Assurance Society, Oct. 15, 1869, L. R., 9 Equity, 122.

² Authority quoted.—*In re* London and Paris Banking Corporation, Nov. 21, 1874, L. R., 19 Equity, 444.

individual partners of the company. Under the Companies Act of 1862, a creditor of a limited company has none of these remedies, and the present petition asks us to enforce the right or remedy which is given by that Act, in place of those rights or remedies which are open to creditors in the case of ordinary trading firms. The remedy which is substituted by the Act of 1862 is not one which can be lightly refused by the Court. It is a statutory right.

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The debt upon which the present petition proceeds is due under a bond and assignation in security by which the debtor company was bound to make payment of the amount of principal and interest outstanding, at any time, when the same should be demanded, after three months from the date of the bond in September 1884. That period has long since expired, and accordingly I have no doubt of the petitioners' right to make this demand. The debt is long past due; it is liquid as being constituted under the bond to which I have referred, and it is undisputed. This of itself will not entitle the bank at once to present a petition for a winding-up order; they must make out that the company is unable to pay its debts, and the 80th section of the statute shews what is enough to justify the Court in inferring inability on the part of the company to pay its debts. A company is deemed unable to pay its debts if, after three weeks succeeding the service of a demand for payment, it does not pay the debt or give adequate security therefor. There is in the present case this presumptive evidence that it is unable to pay its debts. Notice was served upon the company on 30th September last. The three weeks have expired, and the debt remains unpaid. The only answer made by the company is that there is ample security for payment of the debt, and that this being so the case does not come within the operation of the 1st subsection of the 80th section.

I am quite willing to concede that that subsection may be construed to mean that the debtor company has not neglected to pay its debt if it can shew that at the time the demand was made there was in the hands of the creditor ample security for the debt. If, for example, a creditor held a first bond and disposition in security over a landed estate, say for £5000, and the rental of the estate reached as high a figure as £5000 per annum, the creditor would of course be amply secured, and it would be unreasonable to ask for farther security. The subsection does not exactly cover such a case, but it is a reasonable implication that there can be no failure within the meaning of its terms when the existing security is ample. That case is very unlikely to occur, and if it did, I think a different course would be adopted by the creditor. The debtor would not hesitate to make payment; for he could raise the money on an assignation to the security, and thus he would be enabled to pay the creditor. I rather think it is only where the security is insufficient, or is suspected to be so, that the question can arise; and when it does arise, the true test of its sufficiency will always be whether it is a security which can command the amount of the debt if put into the market. If so, the debtor is in no difficulty. The security, in short, must be marketable, else it is not such security as will reasonably satisfy the creditor.

This being so, I do not think the company has made any relevant answer to the demand of the bank, and I must say that when they suggest to the petitioners that they ought to exhaust the security by realising and selling the subject of it and applying the price *pro tanto*, if not to the full amount, in payment of the debt, they are suggesting a course which would be quite destructive of

- No. 33. their own credit and existence as a company, because the security extends over the very works in which the company carries on its business. A sale of the works would lead to the breaking up of the company as much as the winding up. I am therefore of opinion that the petitioners are entitled to a winding-up order.
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LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT accordingly pronounced a winding-up order, and appointed Mr Francis More, C.A., Edinburgh, to be liquidator.

MELVILLE & LINDESAY, W.S.—GEORGE M. WOOD, S.S.C.—Agents.

- No. 34. MRS CATHERINE SMILLIE AND SPOUSE, Pursuers (Appellants).—*Steele*.
THOMAS BOYD, Defender (Respondent).—*Sym*.
- Dec. 2, 1886. Smillies-v. Boyd.

Reparation—Dangerous animal—Dog within owner's premises.—Held that the owner of a dog which he knew to be vicious, and which he allowed to go unrestrained through his garden, was liable in damages to a person who had permission to enter the garden, and had been injured there by the dog.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

IN November 1885, Catherine Goldsmith or Smillie, pig keeper, Rutherglen, with consent of her husband, brought an action in the Sheriff Court at Glasgow, against Thomas Boyd, Braeside Avenue, Rutherglen, for damages on account of injuries which she had sustained through the bite of a dog belonging to Boyd.

In defence Boyd pleaded that the pursuer having been bitten through her own negligence he was not liable in damages, he having exercised all reasonable care as the owner of the dog.

A proof was allowed. The evidence was to the following effect:—The pursuer was in the habit of calling at houses in the district to collect the refuse of food, which she got gratuitously, for the use of her pigs. Among other places she had frequently gone to the house of the defender, who there had a valuable collie dog. The pursuer stated that she had never seen this dog, but it was not disputed that she knew of its existence, and further that she as well as the defender knew that it was of a vicious disposition, it having already bitten several persons, among others the pursuer's father, with whom she lived, and who like herself collected pig's meat. The defender led evidence to shew that he had warned both the pursuer and her father of the danger of coming to the house, as the dog had an antipathy to them, and that he had put a lock on a gate at the side of the house to prevent them going round to the back unnoticed. On the day in question, 7th October 1885, the pursuer went to the gate and rang the bell, and was admitted by the defender's wife, who unlocked the side gate, and took the pursuer round to the scullery at the back. The pursuer stated that she then got some refuse from Mrs Boyd, but Mrs Boyd's evidence was that she gave the pursuer nothing, having nothing to give her. Mrs Boyd then went into the house by the back door, which she shut. She admitted, however, that before doing so she might have told the pursuer that she was at liberty to go into the garden to gather some cabbage blades. The pursuer deponed that Mrs Boyd gave her this permission—See the evidence of both quoted in Lord Young's opinion, *infra*. In point of fact the pursuer did go into the garden. About twenty minutes afterwards Mrs Boyd, who stated that she was entirely ignorant that the pursuer was in the garden, told the dog to "run away and fetch coals," and opened the back door to let him out. He

immediately rushed at the pursuer, who was still gathering cabbage blades, and bit her severely on the leg. No. 34.

On 3d February 1886 the Sheriff-substitute (Guthrie) pronounced this interdictor:—"Finds that on 7th October last the pursuer was bitten in the left leg by a collie dog belonging to the defender: Finds that the dog was known to the pursuer to have bitten several persons and to be of a vicious disposition: Finds that the pursuer and her father had often been warned not to come upon the defender's premises lest the dog should attack them: Finds that on the said 7th of October the defender's wife admitted the pursuer to the garden, and after finding that there was no broken meat or refuse for her dismissed her: Finds that some time after the defender's wife went out for coals, taking the dog with her: Finds that the pursuer was still in the garden picking cabbage leaves, and that the dog at once attacked and bit her: Finds that the pursuer was in fault in being still in the garden after being warned of the danger: Therefore assolzies the defender," with expenses. Dec. 2, 1886. *Smillies v. Boyd.*

On appeal the Sheriff (Clark) adhered.

The pursuer appealed, and argued that the case was within *Burton v. Moorhead*,¹ which required the owner of a dog, who knew it to be of a vicious disposition, to use not merely reasonable but absolute precautions for the safety of the public. The pursuer was not a trespasser. The fair result of the evidence was that she had Mrs Boyd's permission to enter the garden.

Argued for the defender;—It was unnecessary for him to question *Burton v. Moorhead*. It was proved that the pursuer was in fault, and at all events it was to suit herself only that she went into the garden, taking the risk of a danger of which she knew perfectly well. The question was whether she was negligent.² On that question the Sheriffs were with defender. In *Daly v. Arrol*³ the Court had assolzied the owner of a dog which he knew to be of a vicious disposition, and which had bitten, not a stranger, but one of his own workmen, the ground of judgment being that the pursuer was guilty of negligence in unnecessarily approaching the dog.

LORD YOUNG.—In this case I think the whole question turns on the evidence of the pursuer and of Mrs Boyd, the defender's wife, and the greater part of that evidence leaves no ground for controversy as to the facts. The defender was the owner of a vicious dog, which was known by him to have been vicious, for it has conclusively shewn its vice by biting several persons, although it seems to have been a nice dog and an intelligent one for all that—I say "to have been," for since this occurrence it has been destroyed. The pursuer, a married woman about forty years of age, keeps pigs, and her father, who lives with her, seems to do so too, and they are in the habit of going about the houses in the neighbourhood to carry off the refuse of food—"brock" is what the pursuer calls it—which is useless to its owners, but is useful to the keepers of pigs, and in this way the legitimate ends of both parties are served. Upon the occasion in question, in October 1885, the pursuer went to the defender's house to get "brock," if the defender had any; she went to the front door and rang the bell; the defender's wife saw her and knew her, and from previous experience knew what her errand was. The defender's wife went to the gate leading to the back premises, un-

¹ *Burton v. Moorhead*, July 1, 1881, 8 R. 892.

² *Sarch v. Blackburn*, Feb. 24, 1830, 4 Car. and Payne, 297.

³ *Daly v. Arrol*, reported of date Dec. 2, 1886, *infra*, p. 154.

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Boyd.

bolted the gate, and allowed the pursuer to go in. In short, she invited her to come in and to go round to the kitchen door to see if there was any "brock" to be had or not. Now, up to this point the pursuer was not a trespasser. She was there on the invitation of the defender's wife on a humble but very useful errand.

The next matter, however, is one on which it is desirable to refer to the evidence of the two witnesses, whom I have mentioned as being the only really important witnesses. The pursuer's evidence is this,—“Mrs Boyd then asked me to take away some cabbage-leaves out of the garden; these were the blades left on the stalks after the cabbage is cut off. I went into the garden and was gathering the blades when the dog bit me. I did not see where it came from. It seized me by the left leg and threw me down on the green, till my screams brought Mrs Boyd to my assistance.” But Mrs Boyd being asked,—“Did you ask her to go in among the vegetables and get some cabbage-leaves?” gives this evidence:—“(A.) I could not swear I did, but her father and she were in the habit of taking everything they could. When I let the pursuer in I did not know I had no ‘brock’ to give her. I may have told the pursuer to go into the garden for the cabbage-leaves. (Q.) Was your attention next attracted by a scream from the pursuer? (A.) No. (Q.) Did you not go out to her assistance in consequence of the dog having attacked her? (A.) I let the woman in, and when I found there was no ‘brock,’ I went into the house and shut the door. The dog was in the house with me, and about twenty minutes afterwards I said to the dog—‘Run away and fetch coals for the kitchen fire.’ I went out with him, and the pursuer was there among the cabbages, and the dog ran forward and bit her.” Now, I cannot regard that evidence as a contradiction of the pursuer's, but rather as a confirmation. For although Mrs Boyd will not swear that she asked the pursuer to go into the garden to get cabbage-leaves she says it was a most likely thing for her to do; that the pursuer and her father were in the habit of going there and taking everything they could—everything which was useless to the defender, and which it was a relief to him to get rid of. Then was the pursuer in the garden with the permission and on the invitation of the defender's wife? I say on all the evidence that she was, and while she was thus on the defender's premises with the permission and by the invitation of his wife she was bitten by his dog, which was known to him to be vicious.

Now, listen to the interlocutor of the Sheriff-substitute,—“Finds that on 7th October last the pursuer was bitten in the left leg by a collie dog belonging to the defender: Finds that the dog was known to the pursuer to have bitten several persons, and to be of a vicious disposition.” The pursuer had never seen the dog before, but I think the Sheriff has truly enough found that she knew it to be of a vicious disposition. I think, however, that I should rather have expected a finding to the effect that the dog was known to the defender to be vicious; of that there is much more evidence. The judgment goes on,—“Finds that the pursuer and her father had often been warned not to come upon the defender's premises lest the dog should attack them.” I think that there is evidence that they were told that the dog was vicious, and that they had better not come. I should not have said that the proof was all one way, though I think there is evidence to that effect. But I should not have thought the evidence very material unless it could be shewn that the pursuer was where she was against the orders of the defender or his wife, whereas here she had Mrs Boyd's express permission and invitation. The Sheriff then goes

on—"Finds that on the said 7th October the defender's wife admitted the pursuer to the garden, and after finding that there was no broken meat or refuse for her dismissed her." Now, I could not have pronounced that finding. The pursuer says that she got some refuse. Mrs Boyd says that she had none to give her, and on that evidence I could not have come to a conclusion one way or the other, but it is a matter of no moment. Then we have two findings to which it is not necessary particularly to advert, and then comes the material part of the interlocutor—"Finds that the pursuer was in fault in being still in the garden after being repeatedly warned of the danger: Therefore assoilzies the defender, and decerns." No. 34.
Dec. 2, 1886.
The Smillies v. Boyd.

Now, I cannot find that the pursuer was in fault. I am of opinion that she was in the defender's premises by the permission and on the invitation of the defender's wife, and I am of opinion that she was not in fault. I cannot put into words the fault she is supposed to have committed. The case comes to be this—A vicious dog, which is known by its owner and keeper to be vicious, attacks and severely wounds a person who is lawfully, and without any fault at all, on the premises of its owner, and that being so, is there liability here? I think there is, and but for the circumstance that the Sheriffs have come to another conclusion, I should say an exceptionally strong and clear case of liability. If your Lordships think proper I should therefore propose to recall the judgment of the Sheriff, and find the pursuer entitled to damages as well as to expenses, and the damages I would propose should be fixed at £30.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK.—I quite agree in the judgment proposed by Lord Young, but I only wish to say one word in regard to the case of *Arrol*, because I think that that case illustrates a distinction sometimes lost sight of. If a dog is known to be vicious, then there is an obligation on the owner of the dog to keep it in proper restraint. But knowledge that he is a vicious dog does not impose an obligation on the friends of the owner to stay away from his premises. They are bound to exercise a reasonable amount of precaution, but that is all. In this case the proprietor ought to have kept the vicious animal in restraint, and it is quite clear that he was in fault in not so restraining him. But in *Arrol's* case the dog was restrained; he was securely chained up, but the injured man in taking a short cut out of the works went within the range of his chain, so that the restraint was neutralised by the man going too near the dog. I quite concur in the present judgment.

THE COURT pronounced the following interlocutor:—" . . . Find that on the occasion libelled the pursuer, while in the defender's garden by permission and on the invitation of his wife, was attacked and severely bitten by his dog, which was known to him and to his wife to be vicious: Find that the defender was in fault in allowing the dog to be at large, and is liable in damages to the pursuer, who did not by fault or negligence on her part induce the said attack: Therefore sustain the appeal, recall the judgments of the Sheriff and Sheriff-substitute, assess the damages at £30," &c.

E. BRUCE LOW, S.S.C.—D. HILL MURRAY, S.S.C.—Agents.

No. 35.

Dec. 2, 1886.*
Daly v. Arrol
Brothers.

MYLES DALY, Pursuer (Appellant).—*M'Kechnie*—*A. S. D. Thomson*.
ARROL BROTHERS, Defenders (Respondents).—*Jameson*—*Napier*.

Reparation—Dangerous animal—Dog—Negligence.—A workman unnecessarily went within reach of a dog belonging to his employers, and known by them to be of a vicious disposition, which was chained to a kennel in the work-yard. He was bitten by the dog. *Held* that he was not entitled to damages from his employers on account of the injury thereby sustained, the Court being of opinion that the injury was due solely to his own negligence.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

MYLES DALY, boilermaker, brought an action in the Sheriff Court at Glasgow against Arrol Brothers, engineers there, for damages on account of injuries sustained by the pursuer through the bite of a dog belonging to the defenders, in whose employment he was at the date of the occurrence.

The defence was that the injuries had been caused by Daly's own fault.

A proof was allowed. The evidence disclosed the following facts :—The defenders had in their works a large watch-dog, which was chained to a kennel in their yard by a chain about six feet long. This dog had previously to 13th June (the date of the occurrence in question) attacked and bitten two workmen when it was off the chain. This was known to the defenders. Its kennel was in a part of the yard where it was not usual or necessary for workmen to pass. On 13th June the pursuer, during working hours, in order to take a short cut, passed the kennel within the range of the chain, when the dog came out and bit him very severely.

The Sheriff-substitute (Spens) assoilzied the defenders, holding that the pursuer was barred by his own carelessness.

The pursuer appealed to the Court of Session.¹

THE COURT (LORD JUSTICE-CLERK, LORD RUTHERFURD CLARK, and LORD M'LAREN) pronounced this interlocutor :—"Find that on the occasion mentioned in the record the defenders' dog was lodged in their works in a kennel, to which it was attached by a chain six feet in length : Find that the pursuer was aware of the presence of the dog there, but nevertheless approached it so near as to be within range of the chain, and was attacked and bitten : Find that the injury thus sustained by the pursuer is attributable to his own fault, and not to any fault on the part of the defenders : Therefore dismiss the appeal ; affirm the judgment of the Sheriff-substitute appealed against : Of new, assoilzie the defenders from the conclusions of the action : Find them entitled to expenses in the inferior Court and in this Court," &c.

W. R. PATRICK, L.A.—J. & J. ROSS, W.S.—Agents.

No. 36.

Dec. 2, 1886.
Lawson Seed
and Nursery
Co. Limited,
v. Lawson &
Son, Limited.

LAWSON SEED AND NURSERY COMPANY, LIMITED, AND LIQUIDATORS,
Petitioners.—*H. Johnston*.

PETER LAWSON AND SON, LIMITED, Respondents.—*Balfour*—*M'Kechnie*.

PETER LAWSON AND SON, LIMITED, Petitioners.—*Balfour*—*M'Kechnie*.

LAWSON SEED AND NURSERY COMPANY, LIMITED, Respondents.—*H. Johnston*.

Company—Winding-up—Petition for supervision order—Objection by creditors to winding-up—Competency—Companies Act, 1862, sec. 129.—A petition by the liquidator in a voluntary winding-up for a supervision order was objected to by a creditor of the company, on the ground that the winding-up would in-

* Decided June 25, 1886.

¹ *Authorities cited.*—*Stair*, i. 9, 5 ; *Sarch v. Blackburn*, Feb. 24, 1830, 4 Car. & Payne, 297 ; *Clark v. Armstrong*, July 11, 1862, 24 D. 1315 ; *Burton v. Moorhead*, July 1, 1881, 8 R. 892 ; *Addison on Torts*, p. 115.

juriously affect his rights. He also presented a petition for recall of the resolution to wind up the company on the same ground. *Held* that the objection was not relevant, and that the petition was incompetent. No. 36.

The A company, limited, which carried on business as seedsmen and nurserymen, agreed to transfer its seed business at a valuation to the B company, and to allow the latter to manage and realise the nurseries for a commission of 5 per cent on sales, reserving right to the A company to sell the nursery stock as a whole, and also agreed that the B company should, subject to the control of the A company, collect the whole debts due to the A company for a remuneration of 5 per cent. Two years afterwards the A company resolved to wind up voluntarily. Dec. 2, 1886.
Lawson Seed and Nursery Co. Limited,
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In a petition by the A company and its liquidators for a supervision order the B company opposed the application, and presented a petition for recall of the resolutions to wind up, alleging that the liquidation was a device of the A company to get rid of the agreement; that it was perfectly solvent, and had no creditors pressing for payment, and that the respondents would, under the agreement, be able to recover more than sufficient to pay any sums due to them. Further, that if the object of the liquidation was the realisation of the A company's estates, they had agreed that the realisation should be effected by the B company, and that the latter had a right to conduct it.

Held that the petition for recall was incompetent, and that the answers to the A company's petition for a supervision order were irrelevant.

Question, whether a shareholder who had voted against the resolutions had a title to petition for their recall.

THE LAWSON SEED AND NURSERY COMPANY, LIMITED, was incorporated under the Companies Acts in January 1873, and thereafter carried on the business of nurserymen and seedsmen in Edinburgh and London. 1st DIVISION.
M.

In November 1884 the company, as first parties, entered into an agreement with Thomas M'Laren, S.S.C., as representing a new company, to be formed under the name of Peter Lawson & Son, Limited, second party, whereby the first parties agreed (1) to grant or to concur in granting in favour of the new company a lease of certain premises in Edinburgh; (2) to sell to the new company at a valuation the said stock, &c. belonging to the first parties, their interests in certain seed contracts, and the goodwill of their seed business.

The agreement further bore,—“Seventh, The said new company shall manage and realise, on behalf of the first parties, and subject to their direction and control, the said nurseries . . . and pay the proceeds, as these are received, to the first parties. The said first parties shall pay all nursery rents, taxes, wages, and other expenses connected with the said nurseries, including the wages of all parties employed with approval of the first parties exclusively in the nurseries, but the said company shall pay all other expenses of management. The said company shall be entitled to deduct from the proceeds realised a commission of 5 per cent for their trouble, but declaring that this commission shall be payable only on trade sales, by private sale or public sale, and not on a sale of the nursery stock as a whole, should that be carried out by the first parties, who reserve full power at any time to dispose of the nursery stock in bulk or as a whole. But in the event of the said company finding a purchaser for the said nurseries as a whole, other than themselves, to the satisfaction of the first parties, the said company shall be entitled to a commission of 5 per cent on the purchase price. Eighth, The said company shall, subject to the direction and control of the first parties, collect the whole of the book debts due to the said first parties (and for which they shall receive a remuneration of 5 per cent on the amount collected), and shall pay the same on collection to the said first parties. Ninth, That all debts incurred by the said first parties in connection with said seed business, prior to 11th November 1884, as also the warehouse

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and office rents, and taxes, and employees' salaries, up to said date, shall be paid by them, and that the said company shall free and relieve the said first parties of all such expenses, from and after said 11th November 1884."

At an extraordinary general meeting of the Lawson Seed and Nursery Company, Limited, held on 29th October 1886, extraordinary resolutions were adopted, in terms of the 129th section of the Companies Act, 1862, to the effect (1) that it had been proved to the satisfaction of the company that it could not, by reason of its liabilities, continue its business, and that it was advisable to wind it up; (2) that the company should be wound up voluntarily; that George Todd Chiene and John Scott Tait, both chartered accountants in Edinburgh, should be appointed liquidators; and (4) that it should be an instruction to the liquidators if and when they found it expedient to have the voluntary liquidation continued subject to the supervision of the Court.

On 9th November following a petition for a supervision order was presented to the First Division by the company and its liquidators.

To this petition Peter Lawson & Son, Limited, lodged answers, in which, after narrating the agreement, they stated,—“ 3. In terms of, and in reliance on the said provisional agreement, the said company was formed, and was called Peter Lawson & Son, Limited. The company has carried on business since 11th day of November 1884 in Edinburgh and elsewhere, and in pursuance of and in conformity with the said provisional agreement, they have been collecting the debts due to the petitioners, and paying over the same to them as they were collected. . . . 4. The respondents acquired right by the said agreement to recover the said debts, and they also acquired right to manage, and if possible to realise the whole of the nurseries and stock belonging to the petitioners. In point of fact, they had been managing the works of the petitioners until the 4th day of January 1886, when, contrary to the terms of the said provisional agreement, the petitioners appointed a separate manager to look after their works. The fact that the respondents were to have the right to collect the said debts, and receive a commission thereon, and to manage, sell, and realise the said nursery, and also to receive a commission therefor, was a very important consideration in entering into the said agreement, and in point of fact it would not have been entered into but for that consideration. The petitioners were anxious at that time that the whole of the nursery business should be realised, and they got the promoters of the respondents' company to form the said company in order to put them in funds to clear off indebtedness to the bank for which the directors of the petitioners' company were personally liable. In this way a sum of about £16,000 was paid by the respondents to the petitioners, and the said directors were thus enabled to free themselves from personal liability, and to put their company upon a sound and solvent basis. . . . 7. The object of the resolutions is to put the said company into liquidation, and thus to end its liabilities under the said agreement. The petitioners had no other object than that in passing the foresaid resolutions. The said company is perfectly solvent, and it has no creditors who are pressing for payment, if indeed it has any creditors at all, except the respondents, who are not pressing for payment, and who are satisfied that if the said provisional agreement is worked according to its true intent and meaning they will recover from the debtors of the respondents sums more than sufficient to pay any sums due to respondents, and they are willing to wait until that is done. Further, if the object of the liquidation is to realise the estate and assets of the petitioners' company, the respondents have a right to effect that realisation, and so get

payment for their trouble in doing so, in terms of the conditions of the said provisional agreement." No. 36.

Peter Lawson & Son, Limited, further presented a petition for recall of the above narrated resolutions. Dec. 2, 1886.
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The Lawson Seed and Nursery Company, Limited, argued that the only claim which the new company had was for a commission, or for damages for breach of the agreement. They were merely creditors, and creditors could not intervene to prevent a voluntary liquidation. Under the 129th section of the Companies Act that was a matter entirely in the discretion of the company.

Peter Lawson & Son, Limited, argued ;—The sole object of the petitioners was to get rid of the agreement. The respondents had acquired the whole trade connection of the petitioners under the agreement, and they were under the agreement entitled to administer, manage, and realise the petitioners' nursery business. Impliedly the petitioners had renounced their right to wind up under the Companies Acts. They were personally barred from taking that step.¹ At anyrate the original petition should be sisted to enable the respondents to bring a reduction of the resolution to wind up.

LORD PRESIDENT.—The petitioners in this case, at an extraordinary general meeting of the company held on 29th October 1886, adopted extraordinary resolutions to the effect that it had been proved to the satisfaction of the company that it could not, by reason of its liabilities, continue its business, and that it was advisable to wind up, and that the company should be wound up voluntarily. They proceeded to name liquidators, and a resolution followed to the effect that it should be an instruction to the liquidators to apply, whenever they should deem it expedient to do so, to have the voluntary liquidation continued subject to the supervision of the Court. The present petition proceeds upon that extraordinary resolution, and asks the Court to pronounce a supervision order accordingly.

The jurisdiction of the Court in a matter of this kind is somewhat limited. If the voluntary liquidation has been regularly gone about, and the resolutions are in competent form, there is scarcely any question as to whether the order asked for should be obtained or not. I can easily understand that a creditor may come forward at such a stage and object upon various grounds. In the first place, he may object to the liquidators who have been chosen being continued, or he might shew that the resolutions to wind up voluntarily had not been competently gone about on any ground appearing on the face of the proceedings, or he might contend that, if the liquidation was to proceed at all, it was more expedient for the interest of the creditors that the winding-up should be conducted voluntarily rather than under supervision of the Court. All these are fair grounds for opposition to the granting of a supervision order.

But, if a creditor merely says that he thinks his rights will be prejudiced if the company goes into liquidation, I doubt exceedingly the relevancy of that objection. It is quite possible that creditors of a particular class may be prejudiced if the company goes into liquidation, and that they may expect to make a great deal more of their claim if they can succeed in persuading or compelling the company to carry on its business, notwithstanding the opinion of the shareholders expressed in their resolutions that it cannot be carried on by reason of

¹ Anglo-American Brush Electric Light Corporation, Limited, v. Scottish Brush Electric Light and Power Co., Limited, June 22, 1882, 9 R. 972.

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its liabilities. But such an objection is altogether irrelevant as an answer to such an application as this.

One can, of course, figure cases of continuing contracts where the subsistence of the company is quite indispensable to the creditor's being able to make the most of his contract. But that is no answer to an application like the present. What Peter Lawson & Son, Limited, state is that they have a contract with the company for managing its affairs. The company holds a lease of the grounds and nurseries, and Peter Lawson & Son, Limited, say they have an agreement under which they are entitled to manage its affairs, and to derive a money advantage in the form of commission. They also say they have a right, not only to manage its affairs, but also to wind it up—a winding-up which cannot very well be gone about until the termination of the seven years, when the leases expire. It is quite possible that this creditor company may have an interest adverse to the winding-up of the company; indeed, that they may have an interest that the company should go on; but I do not think that this is a sufficient objection to the liquidation.

That being so, it appears to me that the course adopted by Peter Lawson & Son, Limited, of presenting a petition for the purpose of having the resolutions to wind up voluntarily set aside summarily, as an answer to the petition for a supervision order, is quite incompetent. It is admittedly unprecedented, and I cannot see any authority for it in the statute, and there is certainly no warrant for it in the ordinary practice of the Court. The petition, therefore, must be refused.

The only remaining question accordingly is whether it is more expedient that the liquidation should remain a voluntary liquidation, or whether it should be under the supervision of the Court. Upon that question the opposing creditors say they have no interest to object, and, in these circumstances, the Court has a plain duty to perform, and that is, to grant a supervision order.

LORD MURK.—I am of the same opinion. The resolutions in question were passed in respect of powers contained in the 129th section of the Companies Act of 1862, and there was thus a unanimous resolution by the company to wind up voluntarily, and they now come here for leave to have the liquidation carried on under a supervision order. This is objected to by Peter Lawson & Son, Limited, who have also come into Court with a petition to have the resolutions rescinded. It appears to me, however, that this is incompetent on the grounds stated, because, under the 129th section of the Act, the question of the advisability of a winding-up is left to the company to decide, and I do not think that this Court has any power or jurisdiction to review their decision. That being so, I think that the petition of Peter Lawson & Son, Limited, must be refused.

In these circumstances, I see no good reason for refusing to grant a supervision order, which the company wish to have the benefit of. It may be that Lawson & Son, Limited, may be in a position to raise the points on which they say they will suffer prejudice before the liquidator at a future stage, but at present I cannot see that they can be heard to interfere on the grounds they have taken up in the matter now before us.

LORD SHAND.—If Messrs Peter Lawson & Son had any good grounds for challenging the resolutions to wind up which were passed by the company, it appears to me that these would require to have been enforced in an action of reduction for the purpose of having them rescinded. The resolution to wind up was adopted, *inter socios*, by the shareholders as a matter dealing with the

regulation of the company business, and the statute provides (sec. 129) that a company under that Act may be wound up voluntarily "whenever the company has passed a special resolution" (i.e., by taking the votes of the members of the company) "requiring the company to be wound up voluntarily." Accordingly, if a resolution be passed by the shareholders of the company, until it has been rescinded or set aside it must be acted upon, and I think the Court is bound to proceed upon it, as a good and valid resolution, until it has been set aside. I certainly think that this is so, as in a question with an outsider, a creditor of the company, like Peter Lawson & Son, Limited. Whether a shareholder who had attended the extraordinary general meeting, and had voted against the resolution, would have a good title to present a petition for its recall, or to bring a suspension, need not now be decided. But I confess that, for my part, I am disposed to think a reduction would be necessary.

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I take it that we must hold this petition for recall of the resolutions to be incompetent. But I farther think that the answers which have been lodged to the petition for the supervision order cannot be entertained, because they are presented by a party who is without right or title to object to such a resolution, for creditors of a company have, in my opinion, no title to object to the company going into liquidation where the provisions of the statute have been complied with. I regard them merely as creditors. The Lawson Seed and Nursery Company, which is now in liquidation, made an arrangement in December 1884 by which it was agreed that the new company, to be called Peter Lawson & Son, Limited, should manage and realise the nurseries and other estate belonging to the Nursery Company. But the only interest which the new company has in the Nursery Company is the pecuniary one that they shall receive a commission for their trouble. Mr Balfour says that they had this further interest, that their own business should be benefited under the new contract, and that it is the fact that it will be greatly prejudiced. But even if this could be spelt out of the agreement, which I think it cannot, I am unable to see that they are more than creditors having a money claim, and, this being so, I think they have no ground for stepping in with a view to having the present proceedings for a winding-up interfered with. These are entirely matters for the shareholders of the company going into liquidation.

The only other argument submitted was this: It is said by Peter Lawson & Son, Limited, that it is implied in the agreement in question that the company was not to be wound up except by them, and that thus the present proceedings are being taken in the face of the implied understanding or undertaking that was come to between the parties. I should be very slow to arrive at the result, upon the reading of this or of any agreement, that by implication a joint stock company was not to be entitled to take the benefit of the provisions of the Companies Acts, under which it was registered, relating to liquidation. I doubt whether a company could make such an agreement to bind them. But I think there is nothing whatever, either express or implied, to this effect in the present agreement which can deprive the company of the benefit of the provisions of the Companies Acts under which it was constituted.

LORD ADAM.—I concur with your Lordship in the chair.

THE COURT accordingly granted the supervision order prayed for, refused the petition of Peter Lawson & Son, Limited, and found them liable in expenses.

MACKENZIE & KERMAK, W.S.—T. & W. A. M'LAREN, W.S.—Agents.

No. 37. GEORGE TOD CHIENE (Liquidator of the British Canadian Lumbering and Timber Company, Limited), Petitioner.—*Murray.*

Dec. 3, 1886.
British
Canadian
Lumbering
and Timber
Co. Limited.

Company—Liquidation—Process—Intimation—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 100.—The liquidator of a company applied for an order under the 100th section of the Companies Act, 1862, on a former agent of the company, who was resident in Canada, to deliver up books and papers in his possession belonging to the company, and moved the Court to pronounce the order without intimation. The Court (*dis.* Lord Rutherford Clark) *refused* the motion, and ordered intimation.

Company—Liquidation—Sale of assets.—Circumstances in which the liquidator of a company in liquidation under supervision was *authorised* to sell growing timber belonging to the company by private bargain.

2D DIVISION.
M.

THE liquidator of the British Canadian Lumbering and Timber Company, Limited, which was being wound up subject to supervision, presented this note, under the 100th section of the Companies Act, 1862,* praying for decree against Allan Grant, a former agent of the company in Canada, ordaining him to deliver up to the liquidator certain books and papers belonging to the company in Grant's possession (over which, the note stated, Grant claimed a right of lien for a debt alleged to be due to him by the company), and failing compliance with this order for authority to the liquidator, or his duly authorised agent, to proceed against Grant in the Canadian Courts for recovery of the books and documents.

The liquidator moved that the prayer should be granted without intimation to Grant, and argued;—It was not necessary to give notice of applications under the 100th section of the Companies Act, 1862. Form No. 13 of the rules framed by the English Court under the Act, which was to be found at p. 594 of the 4th edition of Buckley, implied that. [LORD YOUNG referred to Buckley, p. 254, and the case of the *Commercial Union Wine Company*, Dec. 15, 1865, 35 Beav. 35, there cited.] That case was in the teeth of Form 13, and was very meagrely reported. It was the practice to proceed under section 100 against contributories without notice. No doubt if Mr Grant had been resident in this country the order would not have been asked without notice to him, but it was desirable to save time. [LORD YOUNG.—Intimating will not take long, but if you proceed without intimation you may lose a good deal of time, for when the Canadian Courts are told that the order has been pronounced behind the back of this gentleman, they may decline to act on it, and the whole thing will come back here and have to be begun again.] The liquidator had been advised by Canadian counsel to present this application, and he was willing that the order should run "subject to any rights of lien and retention which the said Allan Grant may have, as these may be ascertained by the Courts of Canada." Such an order would prevent any possible injustice, and

* Section 100 of the Companies Act (25 and 26 Vict. cap. 89) enacts,—
"The Court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company, to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *prima facie* entitled."

would, besides, produce a material saving of time, for the question of lien here raised was one of Canadian law, and would have to be determined by the Canadian Courts sooner or later. Under such an order they would settle it at once, and the case would return here ready for final disposal.

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LORD RUTHERFURD CLARK.—Had I been sitting alone, I must say I should have had no hesitation in pronouncing such an order as Mr Murray now asks. The qualification seems to me sufficiently to protect any rights which this gentleman may have.

LORD YOUNG.—I quite see the force of what Lord Rutherford Clark says, and think it highly probable that this gentleman would suffer no prejudice if such an order were pronounced; but then we are here proceeding *ex parte*, and speaking for myself, I cannot feel quite sure that this note discloses the only answer which may be made to this application, or that the Canadian Courts are the competent tribunals to consider all possible objections.

LORD CRAIGHILL.—At first I was inclined to take Lord Rutherford Clark's view, but especially after considering the English case to which Lord Young has referred, I have come to think that we should order intimation in the usual way.

LORD JUSTICE-CLERK.—I see no ground here for departing from our established practice.

The note further prayed for authority to the liquidator to sell by private bargain certain lots of growing timber in Canada belonging to the company, and stated that having failed to sell this timber by public auction, the liquidator had been advised that the usual way of selling such property was by private bargain, the buyer having a certain time for examining the subjects before closing the transaction, as possible purchasers were unwilling to incur the expense of making an examination of the subjects, which were in the interior of the country, except on a definite offer.

THE COURT ordered intimation to be made to Mr Grant, and, without giving any opinions, granted the second part of the prayer *de plano*.

GRAHAM, JOHNSTON, & FLEMING, W.S., Agents.

THE INCORPORATED SOCIETY OF LAW-AGENTS IN SCOTLAND, Petitioners.— No. 38.

C. J. Guthrie.

ANDREW CLARK, Respondent.—*Lord-Adv. Macdonald—Rhind—Hay.*

Dec. 3, 1886.
Incorporated
Society of
Law-Agents
in Scotland v.
Clark.

Administration of Justice—Law-Agents (Scotland) Act, 1873, secs. 13 and 14—Removal of law-agent's name from roll.—In a petition by the Incorporated Society of Law-Agents praying the Court to direct the removal from the rolls of law-agents in the Court of Session and in the Sheriff Court of the Lothians and Peebles the name of a law-agent who had been convicted of an offence under the 11th section of the Criminal Law Amendment Act, 1885, and had been expelled from the Society of Solicitors before the Supreme Courts, the Court in the circumstances, and having regard to a representation signed by a large number of enrolled law-agents to the effect that he should not be removed, *refused* the petition.

UNDER the Law-Agents (Scotland) Act, 1873, secs. 11 and 12, a roll of 1ST DIVISION.
law-agents practising before the Court of Session is directed to be kept by a registrar appointed for the purpose, and by section 14, subsection 1, the name of any person may be struck off the said rolls "in obedience to the order of the Court, upon application duly made, and after hearing parties, or giving them an opportunity of being heard." By section 22 it is enacted that "every enrolled law-agent shall be subject to the juris-

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diction of the Court in any complaint which may be made against him for misconduct as a law-agent, and it shall be lawful for the Court in either Division thereof to deal summarily with any such complaint, and to do therein as shall be just."

On 5th May 1886 Andrew Clark, a law-agent whose name was upon the roll of law-agents practising before the Court of Session, and on the roll of those practising in the Sheriff Courts of the Lothians and Peebles, was convicted of an offence under the 11th section of the Criminal Law Amendment Act, 1885, in consequence of which he was expelled from the Society of Solicitors in the Supreme Courts, of which he was a member, by interlocutor of the First Division, dated 15th May 1886, upon a petition to the Court, founding upon the Society's private Act of Parliament (34 and 35 Vict. c. cvii.), (*cf.* 13 R. 1170).

The Incorporated Society of Law-Agents now presented a petition praying the Court "to direct the registrar of law-agents and the keepers of the rolls of law-agents made up under the provisions of the Law-Agents Act, to strike the name of the said Andrew Clark off the said register and rolls." They founded upon the previous case at the instance of the Solicitors in the Supreme Court.

Clark lodged answers, in which he pleaded, *inter alia*, that the Society had no title or interest to present the petition. He further founded upon a representation which was made to the Court, and signed by 166 enrolled law-agents, to the effect that "Mr Clark has been sufficiently punished, and that his name should not be struck off the roll."

When the case came on for hearing, the Lord Advocate, for Clark, waived all the pleas stated in the answers, and founded solely upon the representation in question.

At advising,—

LORD PRESIDENT.—The Lord Advocate, on behalf of the respondent, withdrew all the objections to the title of the petitioners, and accordingly it is not necessary for the Court to dispose of the points raised in the answers affecting the title. But I think it right to say that I should be very slow indeed to reject the title of any person having an interest to make an application of this kind to the Court. The jurisdiction of the Court in this matter is not created by the Law-Agents Act. It is altogether independent of it, and the title to make a complaint of this kind is sufficient if the person making the complaint is himself an enrolled law-agent, and has an interest to see that the roll is kept pure.

As regards the merits of the application, and the statements made in answer, the duty of the Court is undoubtedly a delicate one. We have had to consider the effect to be given to a statement which has been put into process, signed by 166 gentlemen known to the Court as practitioners. In some cases—in a certain class of offences—I do not think the Court would be inclined to listen to any such statement, because there are offences of such a description as would completely disqualify a person committing them from acting in the profession of a law-agent in future; and no concurrence of opinion or sympathy with the party complained of could be allowed to interfere with the duty of the Court in putting an end to the connection between it and the person so offending. But the offence of which the respondent was convicted here is of a peculiar kind; and seeing that so many gentlemen who are practising in the Court, or at least following the profession of a law-agent within this district of country, are desirous that the punishment already inflicted upon the respondent should be held as sufficient, and imply, although they do not expressly

state it, that they are willing to associate with him in future as a professional brother, the Court has come to be of opinion that in the circumstances they will not strike the respondent's name off the roll, and further, that they will make no order in the matter of expenses.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT accordingly refused the petition.

CARMERT, WEDDERBURN, & WATSON, W.S.—PARTY—AGENTS.

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Dec. 3, 1886.
Incorporated
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Law-Agents
in Scotland v.
Clark.

HONEYMAN & WILSON, Pursuers (Respondents).—*Scott—Gardner.*
MRS ELIZABETH JAMES OR ROBERTSON, AND OTHERS, Defenders
(Reclaimers).—*A. S. D. Thomson.*

No. 39.

Dec. 7, 1886.
Honeyman &
Wilson v.
Robertson, &c.

Husband and Wife—Donation—Revocation by creditors.—A husband purchased certain heritable property, taking the title in favour of himself and his wife in conjunct liferent for her liferent use allanarly, and their children in fee, but under reservation of power to the husband at any time during his life, and without consent of his wife or children, "to sell, burden, wadset, and affect with debt, or even gratuitously dispone the subjects as if he were absolute proprietor of the same." There was no provision made for the wife by antenuptial contract or otherwise, and there was no allegation that the husband was not solvent at the date of the purchase. In an adjudication at the instance of a creditor of the husband, raised after his death, *held* that as the provisions for the wife and children were revocable by the husband at any time the subjects were not protected from his creditors.

In 1872 James Robertson, lodging-house keeper, Wemyss Place, Edinburgh, bought from John Dick, spirit-dealer there, certain heritable subjects, taking a disposition in favour of himself "and Elizabeth James or Robertson, his spouse, in conjunct liferent for the said Elizabeth James or Robertson, her liferent use allanarly," and to their children *nominatim*, their heirs and assignees in fee, but under a reservation in favour of James Robertson "at any time of his life, and without the consent of his then wife, the said Elizabeth James or Robertson, and his children . . . or any of them, to sell, burden, wadset, or affect with debt, and even gratuitously dispone the subjects as if he were absolute proprietor of the same" therein described. The investiture was in the following terms:—"In virtue of which precept I hereby give to the said James Robertson, senior, and Mrs Elizabeth James or Robertson, in conjunct liferent for the said Elizabeth James or Robertson, her liferent use allanarly, and to the said Jemima Robertson, James Robertson, junior, and Francis Robertson, equally between them in fee, saine of the shops, dwelling-houses, and others above described, consisting of the two halves or shares *pro indiviso* thereof respectively, but always with and under the whole burdens, conditions, and declarations before specified or referred to, and with and under the reservation, power, faculty, and liberty in favour of the said James Robertson, senior, before mentioned."

1st DIVISION.
Lord Kinnear.
B.

James Robertson died on 29th December 1884, leaving a trust-deed under which his widow and others were appointed trustees and executors.

On 25th January 1886, Messrs Honeyman & Wilson, merchants in Edinburgh, who were creditors of James Robertson, there being no executry estate out of which they could obtain payment of their debt, raised an action of declarator and adjudication against Elizabeth James or Robertson, and others, in which they sought to have the heritable property above mentioned adjudged to them in payment of their debt.

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The pursuers pleaded, *inter alia*;—(2) The said deceased James Robertson having contracted the obligation sued on, and not having left estate to meet the same otherwise, the reservation and others in favour of the said deceased James Robertson libelled must be held to have been used and exercised by him, at least to the effect mentioned in the summons; and the pursuers are accordingly entitled to decree of declarator, as concluded for. (3) The pursuers are entitled to have the subjects and others mentioned in the summons adjudged to them for payment of the debt due to them by the said deceased James Robertson.

The defenders pleaded;—(1) The present defender Mrs Elizabeth James or Robertson is entitled to vindicate her right of liferent under the investiture in her favour as against the pursuers' alleged rights or claims. (2) Being feudally vested in the subjects mentioned in the summons long before the pursuers' alleged debt was constituted or incurred, the defender cannot now be dispossessed by them. (3) In any event, if the subjects can be adjudged under this action, they must be burdened with the liferent right in favour of the defender. (4) The action is incompetent and irrelevant, in respect the liferent infestment in the present defender's favour, if reducible, can only be set aside in a properly libelled action of reduction. (5) The deceased James Robertson senior having died without having exercised the reserved faculty or power in his favour condescended on, the pursuers are not entitled to the decree concluded for.

It was admitted that there was no antenuptial contract of marriage entered into between Mr and Mrs Robertson in which any provision was made for her, and there was no allegation that Robertson was insolvent at the date when he bought the subjects.

On 31st March 1886, the Lord Ordinary (Kinnear) pronounced this interlocutor:—"Having considered the cause, finds that the fee of the subjects libelled was vested in the deceased James Robertson, that the same are liable to be adjudged for payment of his debts, and that the liferent interest of the defender, Mrs Elizabeth James or Robertson, is not valid or effectual to her in competition with the creditors of the said deceased: Therefore repels the first five pleas in law for the defender, and continues the cause, reserving in the meantime all questions of expenses. Grants leave to reclaim."*

* "NOTE.—The title to the subjects in question is taken to the deceased James Robertson and his wife, the defender, in conjunct liferent, for her liferent use allanarly, and certain of their children in fee, but under reservation of power to the husband, at any time during his life, and without the consent of his wife or children, 'to sell, burden, wadset, and affect with debt, or even gratuitously dispoise the subjects, as if he were absolute proprietor of the same.' There can be no question that this leaves the absolute right of property in the husband, and that the interest of the wife and children is nothing more than a hope of succession to the rights of fee and liferent conferred upon them respectively.

"It is said that the wife's liferent ought to be sustained as a reasonable provision, since she is not otherwise provided for, and there would have been force in the contention, were it not for the absolute right of the husband to dispoise the subjects, either onerously or gratuitously, without the consent of the wife. But a widow cannot compete with the husband's creditors for a provision which may be revoked at the pleasure of the husband. The case appears to be a hard one, but I can find no sufficient reason for holding that the subjects are protected from the diligence of the husband's creditors.

"The case was argued on the assumption that there was a debt due, and that the only question was whether the defender's liferent could be affected by an adjudication at the pursuer's instance. But the amount is not proved by admission or otherwise, and decree of constitution cannot be given until this is done."

The defenders reclaimed, and maintained that the disposition of these subjects in favour of the widow in liferent was a reasonable provision for her, and was entered into when the husband was solvent. To provide for his wife was a natural obligation on a husband, and it would at most only be reduced *quoad excessum*. By the husband's death the right became effectual.¹

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The pursuers maintained that the provision was clearly revocable by the husband during his lifetime; his creditors were in exactly the same position as he was in regard to the gift, for it was purely testamentary, and could insist on its being revoked. Creditors could not be excluded without the interposition of a trust.² This could not be a provision for the wife. That was inconsistent with its being left under the husband's administration.³

At advising.—

LORD PRESIDENT.—In this case the Lord Ordinary says that the position of the widow is a hard one, and I quite agree with him, but, at the same time, we must take care that this hard case does not lead us into any bad law, as hard cases are proverbially apt to do. The deed on which the widow's right depends was taken by her husband from a third party. It is a disposition in favour of James Robertson and his spouse in conjunct liferent for her liferent use allenary and certain of their children and their respective heirs and assignees in fee. Now, that destination admits of different constructions according to circumstances, but the point in the present case depends entirely on the terms of a reservation in favour of the husband, reserving to him a power at anytime during his life, and without the consent of his wife or children, "to sell, burden, wadset, and affect with debt or even gratuitously dispose the subjects as if he were absolute proprietor of the same." Now, the Lord Ordinary has held that the effect of that reservation is to leave the husband just as free and unfettered in dealing with this property as if no attempt had been made to make a provision for his wife and children, in short, that this conveyance, so far as it regards the right of the wife and children, can have no effect other than a purely testamentary one. I agree with the Lord Ordinary in that view of the case. The cases with which it is sought to assimilate this one are all easily distinguishable, and I need not refer to them at length. To go no further back than the well-known case of *Rust v. Smith*, Jan. 14, 1865, 3 Macph. 378, in which Lord Deas delivered the opinion of the Court, I find there a very good example of how such a provision may be made effectual against the husband's creditors. There the husband purchased a house, and took the disposition from the seller directly to his wife. The wife was not infert therein, but, nevertheless, in the husband's bankruptcy the circumstances were such that the Court held that there being no allegation that the husband was insolvent at the date of the disposition, it was a reasonable provision for the wife, and not revocable by the husband or by anyone else in his right. Now, it is that element of revocability which distinguishes this case from *Rust v. Smith*, and other cases of the same nature. It is quite impossible to say that this provision was not revocable. The husband could give

¹ *Sharp v. Christie*, Jan. 19, 1839, 1 D. 396; *Wright v. Harley*, June 2, 1847, 9 D. 1151, 19 Scot. Jur. 500; *Galloway v. Craig*, July 17, 1861, H. of L., 4 Macq. 267; *Dunlop v. Johnston*, April 2, 1867, 5 Macph. (H. L.) 22, 39 Scot. Jur. 382; *Boustead v. Gardner*, Nov. 4, 1879, 7 R. 139.

² *White's Trustees v. Whyte*, June 1, 1877, 4 R. 787.

³ *Bell's Prin.* sec. 1944.

No. 39. away the property gratuitously, or he might sell or burden it so as to render the provision quite inoperative when the time came for it being carried into effect, and, therefore, I agree with the Lord Ordinary in thinking that it is not effectual against the husband's creditors.

Dec. 7, 1886.
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LORD MURE.—I regret that I have not been able to come to any other conclusion than that at which your Lordship and the Lord Ordinary have arrived, as I concur in thinking that this is a hard case for the defender Mrs Robertson. I have carefully examined all the cases to which we were referred to see whether any of them afforded sufficient ground for coming to a different conclusion, but my examination of them has resulted in this, that I am of opinion that to entitle the wife to maintain this case against her husband's creditors it would be necessary for her to establish three things, as set forth in the Lord Chancellor's opinion in *Galloway v. Craig*, July 17, 1861, 4 Macq. 267, viz., (1) that there was no antenuptial contract where a suitable provision was made for her; (2) that the husband was solvent at the date of the deed; (3) that it was the intention of parties that the disposition should act as a provision, and not as a gift merely. As regards the first two points there is no difficulty. There was no antenuptial contract, and there is no averment that the husband was insolvent at the date of the deed, but the difficulty of the case lies in this, whether the deed was intended to operate as a provision for the wife. I am sorry to say that I have been unable to come to any other conclusion than that it was not, and that the husband having preserved his right to dispoise or burden the property, the deed was revocable, and not good against his creditors.

LORD SHAND.—I think the ground of judgment is very well stated in the note of the Lord Ordinary. If the provision here stood simply on the conveyance of the house in the terms of the disposition without the clause of reservation, it might have been effectual against the husband's creditors. The husband conveys the property to himself and his wife in conjunct liferent for her liferent use allanarly, and to the children in fee, and a provision of that kind being reasonable, and the husband being solvent at the time it was made, the provision would have received effect. Unfortunately, however, for the widow, the husband qualified the disposition by a reservation to himself of a power to sell, burden, or gratuitously to give the property. It is impossible to represent that as an irrevocable provision in favour of the wife, and if it is not then the creditors are exactly in the same position with regard to it as the husband was, and are entitled to revoke the gift. The only effect of the deed was that the granter made a settlement which would take effect at his death, if it was not revoked, or if he had not during his lifetime incurred debt so as to entitle his creditors to insist on its revocation.

LORD ADAM.—In this case the husband retained the full benefit and enjoyment of the property during his life. He had a reserved power to sell or burden it, or to give it away gratuitously. That being so, it seems to me that this is an attempt to put the property *extra commercium*, and yet to retain the full benefit and enjoyment of it. That the law does not allow, and I think, therefore, that the disposition is simply a revocable provision, meant to come into operation at the time of the husband's death if it had not already been revoked.

THE COURT adhered.

FINLAY & WILSON, S.S.C.—D. TODD LEES, S.S.C.—Agents.

FINDLAY'S TRUSTEES, Pursuers and Real Raisers.

HARRY CHEYNE (Jane Findlay's *Curator ad litem*), Claimant.—*G. R. Gillespie.*

No. 40.

Dec. 7, 1886.*
Findlay's
Trustees v.
Findlays.GEORGE FINDLAY AND JESSIE FINDLAY, Claimants.—*Pearson—Baxter.*

Parent and Child—Succession—Conditio si sine liberis testator decesserit—Implied will.—A father executed a holograph will in 1878, when he was a widower, leaving his whole estates, heritable and moveable, to his two children *nominationem*. In 1884, before entering into a second marriage, he executed a marriage-contract in which he assigned £3000 to trustees to secure payment of an annuity of £150 to his second wife should she survive him, with directions to the trustees on her death, should she survive him, to divide the trust funds among his children of both marriages equally, and, in the event of his wife predeceasing him, to restore the fund to himself, the marriage-contract, in that event, containing no provision for children of the second marriage. He died six months after this marriage, survived by his widow, who subsequently gave birth to a posthumous child. This child claimed a share of the provisions made for the other children in the holograph will in addition to a share of the trust fund. The Lord Ordinary (Kinnear) *repelled* the claim.

GEORGE FINDLAY, hatter in Aberdeen, died on 15th May 1885, leaving a holograph will, dated 9th March 1878, in the following terms:—"I, George Findlay, with the full intention if spared to make a proper will fully detailed, do hereby appoint Mr George Findlay Shirras, my nephew, and Mr Patrick Morgan, 11 Richmond Terrace, to be trustees on my estate, and my son George to be trustee when the age of twenty-one, but to be present at all meetings till then but not to vote only to express his wish but to have full power @ twenty-one. The trustees to give my sister Ann Findlay the sum of forty pounds per annum during her lifetime, George Findlay, my son, and Jessie Ann Findlay, my daughter, to have share and share alike both of heritable and moveable, or the survivor of them. GEORGE FINDLAY. P.S.—The trustees to have a gift of nineteen guineas each."

OUTER-HOUSE
Lord Kinnear.

At the date of the will the testator was a widower, his wife having died in 1875, and the two children named in it were his only children. In 1884 he contracted a second marriage, and by an antenuptial contract he bound himself to make payment of an annuity of £150 to his second wife in case she should survive him, and in security of the annuity he assigned to trustees certain stocks and shares of the value of £3000 or thereby. In the event of the wife surviving, the trustees were directed on her death, leaving issue, to realise the trust funds, and divide the proceeds among all the children of both marriages equally, share and share alike; and it was declared that the provisions of the contract, so far as in favour of the children of the marriage, should be in full satisfaction of legitim, executry, and everything else they could claim through the father's decease, goodwill excepted. In the event of his wife's predecease, the trustees were to refund the stocks and shares so handed to them, and that whether there were any children of the marriage or not.

Findlay died about six months after his second marriage, survived by his wife. She gave birth a few months after her husband's death to a posthumous daughter, and shortly thereafter died.

Findlay's moveable estate was worth about £5066. He had two heritable properties, the title to the first of which, a house in Victoria Street, Aberdeen, was taken in 1867 in favour of him and his first wife in conjunct fee and liferent, but for her liferent use only, and, after the death of

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the longest liver, of the children procreated or to be procreated between them, equally, share and share alike, in fee. The title to the other, a house in Aberdeen, let to tenants, and which was purchased in 1874, was in favour of Findlay, the testator, and his heirs and assignees whomsoever.

Findlay's trustees raised a multiplepinding to determine the rights of his children in his estate. Mr Harry Cheyne, W.S., was appointed *curator ad litem* to Jane, the posthumous daughter, and claimed a third of the estate, heritable and moveable. George and Jessie claimed share and share alike of the estate, to the exclusion of Jane.

Both parties founded on the holograph writing referred to, the *curator ad litem* for Jane pleading;—Upon a sound construction of the testamentary writing of 9th March 1878, in the circumstances which have occurred, the pupil defender is entitled to an equal share of the whole estate conveyed by the said testamentary writing along with the pursuer George Findlay and his sister, Jessie Ann Findlay, and the claimant, as *curator ad litem* to the pupil defender, is therefore entitled to be ranked in terms of his claim.

Argued for Jane;—The will was holograph, and in the form of a direction to trustees, and was therefore open to construction.¹ In proceeding to construe the will, it could not be disputed that, in cases where a father had died before any child was born to him, a will in which no provision was made for the event of the birth of a child could be reduced by a *post natus*,² on the principle of the *conditio si sine liberis decesserit*.³ The law shewed favour to the child's claim, and it must be made "as plain as a pike-staff that the testator did not intend the succession to go to the child"⁴ before a right so deeply founded could be disappointed. The same reasoning covered the case of a child in the position of the claimant here, and authority had sanctioned such a claim.⁵ It was said that that authority, resting as it did on the case of *Anderson*,⁶ which had been reversed in the House of Lords, carried no weight. But although Lord President Campbell, in deciding *Oliphant's* case, had referred to *Anderson's* case as an analogy, the judgment in *Oliphant's* case rested on entirely different grounds, the claim in *Anderson's* case being a claim to share in a contract provision made by a father who was still alive at the date of the claim, the claim in *Oliphant's* case being a claim to participate in a succession, as here. The remedy, it was said, open to a posthumous child was reduction; that was so where there were no other children, and no means of ascertaining the father's mind to his children. Here his mind was plain, namely, to divide his whole estate equally among his children. Nor was the provision for children in the contract on the occasion of his second marriage a good ground for exclusion. In that contract all children—of both marriages—were equally favoured, and it was not a provision for all events, but only for the event of the father predeceasing the mother.

Argued for George and Jessie;—(1) The authority of *Oliphant's* case had been denied; and (2) the principle to which the other claimant appealed, viz., that a father could not be presumed to intend to leave a

¹ *Per* Lord Young in *Mitchell's Executor v. Smith, &c.*, July 7, 1880, 7 R. 1090.

² *Colquhoun v. Campbell*, June 5, 1829, 7 S. 709; *A's Executors v. B and Others*, 1874, 11 S. L. R. 259.

³ *Cod. vi. 42, 30.*

⁴ *Lord Glenlee in Colquhoun's case.*

⁵ *Oliphant*, Dec. 10, 1794, *Bell's Foll. Ca.* 126, cited *ad longum* in the opinion of the Lord President in *Spalding v. Spalding's Trustees*, Dec. 18, 1874, 2 R. 247.

⁶ *Anderson v. Anderson*, 1729, M. 6590, rev. H. of L., 1 Craigie, 136.

child unprovided for, was inapplicable in a case in which he had provided for the child. In *Spalding's* case¹ Lord President Inglis had pointed out that *Oliphant's* case had been rested on *Anderson's*, and that the reversal in that latter case could not have been known when the judgment in *Oliphant's* case was pronounced. His Lordship and the other Judges of the First Division in *Spalding's* case spoke of *Oliphant's* case as being therefore of no authority. Whatever might be the result in a case where a posthumous child was left destitute, the presumption of parental affection on which the whole case of the other claimant was founded could have no existence when, as here, the father had considered the possibility of his having more children, and had made provision for them if they should be born. That the posthumous child got less than the others was of no moment, for there was no presumption for an equal provision to all children. There was thus no ground for the application of the doctrine of implied will. If, again, the claimant pleaded the *conditio si sine liberis decesserit*, the result of that would be to reduce the will. The other claimant could cite no authority (unless *Oliphant*) for admitting the posthumous child to a share in the provision made *nominatim* for the others. If she had any remedy it must be by way of reduction.

The Lord Ordinary (Kinnear) pronounced this interlocutor:—"Repels the claim for Harry Cheyne, W.S., *curator ad litem* to Jane Elmslie Henderson Findlay: Sustains the claim for the other claimants, and ranks and prefers them in terms thereof, and decerns."*

THIS judgment was acquiesced in.

MACKENZIE & KERMACK, W.S.—STUART & STUART, W.S.—Agents.

¹ *Supra*, p. 168, note 5.

* "OPINION.— . . . The *curator ad litem* maintains on behalf of this posthumous daughter that, by an implication founded on the *pietas paterna*, the will may be so construed as to entitle her to share in the general estate along with her brother and sister. The only authority cited in support of this claim is the case of *Oliphant* (Bell's Fol. Ca. 125), where the claim of a posthumous child was sustained to a share of a bond of provision destined to two elder children *nominatim*. But no weight can be attached to that decision, because, as was pointed out in the case of *Spalding* (2 R. 247), it proceeded upon the supposed authority of a previous case of *Anderson*, which was reversed in the House of Lords. The case of *Anderson* is perhaps distinguishable, because what was proposed in that case was not to extend a will, but to extend a contract by implication. But if the judgment of the House of Lords cannot be taken as a direct authority against the present claim, it is at least sufficient, as was held in the case of *Spalding*, to displace the only authority which can be cited in support of it.

"The argument founded on implied will, therefore, would be unsupported by authority even if there had been no other provision for the ward. But it is a material consideration that she is, in fact, provided for by the marriage-contract. It is impossible to say, therefore, that the testator did not advert to the possibility of his having children by his second marriage. But if he has provided, whether by the will or by marriage-contract, for the contingency of such children coming into existence and surviving him, that appears to me to displace the assumption upon which alone they could be admitted to participate in an estate bequeathed *nominatim* to elder children."

No. 41.

Dec. 7, 1886.*

Stirling v.
Mackenzie,
Gardner, &
Alexander.JAMES HUTCHISON STIRLING, Pursuer (Reclaimer).—*Mackay—**C. S. Dickson.*

MACKENZIE, GARDNER, & ALEXANDER, Defenders (Respondents).—

D.-F. Mackintosh—Jameson.

Agent and Client—Reparation.—Circumstances in which the Court held that a firm of law-agents were not bound to make good to a client a sum invested by their advice on a heritable security which turned out to be insufficient.

Opinions that law-agents in lending a client's money on heritable security are bound to take all reasonable care in seeing to the sufficiency of the security, and are not responsible merely for the validity of the bond.

2D DIVISION.

Lord Fraser.

I.

DR JAMES HUTCHISON STIRLING had for many years been on terms of intimate friendship with Mr Mackenzie, the senior partner of the firm of Mackenzie, Gardner, & Alexander, writers, Glasgow, and was in the habit of consulting him and other members of the firm from time to time as to investments which he contemplated. In February 1878 Dr Stirling sold United States Funded Bonds to the amount of £5651, and this sum he was desirous of reinvesting. A correspondence followed, in which different investments were suggested. On 28th February 1879 Dr Stirling wrote Messrs Mackenzie, Gardner, & Alexander as follows:—"The enclosed letter (which please return) will suggest to you that I am again seeking an investment for some money. When I transferred the sum in question last year to Edinburgh I had some prospect of the purchase of some apparently advantageous feus; but I found myself in the end temporarily entrusting my funds to the company in allusion which, as then new (and with a friend at the board) I persuaded to allow me 5 per cent for a year. The same company are willing—rather manager proposes—to allow me (as a 'special') still the same terms on deposit for say four years. I intimated to them some time ago, however, that in view of the existing depression, and with the hope of investments that would rise, I should not this year renew my deposit. These are my views still. I cannot but observe, however, that, unless in the case of banks, the relative failure and general depression have rather tended to render good investments dear. I shall not meddle with banks, but still it may be possible to find stocks at once with a fair yield and a fair prospect of improvement on the improvement of business—a prospect, however, which as yet evidently only recedes, so far as business is concerned. Still, Government wants money, companies want money, and it is possible there may be a fall in prices in good stocks even by the 29th proxo. There was a depression in gas lately, which, taken advantage of, would have yielded large profits. The London, Chatham, and Dover Railway Company is evidently the favourite just now, but, like the N. B. sometime ago, it may be only a calculated cry, and a friend of mine in London, financial editor of a financial paper, is not at all warm about it. He favours the Metropolitan District. You see my desire is to redeem a certain loss the 'silver scare' (!) caused me. It is possible, in want of money, that a good company might allow even a 5 per cent for a term of years on such a sum as £5700. In fact, failing the possibility of depressed railway purchases, I must seek the best more permanent investment I can. They say property—I mean house property—is in a very bad way with you in Glasgow, and that great caution is necessary in regard to it. You see, then, that my idea is to do the best I can with the money, divided or undivided, and just in any way. I should be glad

and grateful did you afford me the assistance of your advice, information, No. 41.
and negotiation on this occasion."

On 14th March 1879 Messrs Mackenzie & Company replied:—"We were duly favoured with your letter of the 28th ulto. When your letter came to hand we had arranged that our Mr Alexander should write you with a proposal for investing at least £3000 of the amount you had coming out of investment, but unfortunately he was laid up almost immediately afterwards with influenza cold, and he has only recently got out and found time to write you. By this time you may, however, have completed your arrangements for reinvesting, without waiting longer to hear from us, and if so, you need not disturb them. What we had to propose to you was a loan on heritable property in Glasgow, bearing 5 per cent interest, which we consider a perfectly safe investment, and which is now available only because of the holders requiring for temporary purposes some funds. The bond in question is for £4000 over a property in Stirling Square, east end of Ingram Street, all let, rental of which is £581, 17s., and ground rent £214, 17s. The property belongs to a client of our own, and the bond is held by the Property Investment Company of Scotland, for whom we act. The loan was got when money was dear, and with the big ground rent was only given at 5 per cent interest. As we have said, the bond is for £4000; but as the company have occasion for the money, they are willing to give a preferable assignation of the bond to the extent of £3000 to anyone who would take that amount of it up, the result of the arrangement being that the £3000 would become a first security, and the remaining £1000 postponed to it over the property. The property was recently valued at £6500 over and above the ground-annual, and we know that the proprietor, about a year ago, refused £6000 for it. We are quite satisfied that the property is ample security for the £3000, and as the interest is a-half per cent more than usual, the opportunity is a good one, both as regards return and permanency of investment. In case you might still be open to think of the proposal, we send you a detailed rental and valuation of the property, and if you should think the matter worth consideration, you can let us hear from you regarding it. The company holding the loan is an Edinr. company of the same kind as the North Albion. The interest on the loan has been always paid regularly, and the company wish the money for financial purposes, and are in no way dissatisfied with the loan."

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The valuation referred to was made by Mr J. D. Smellie, and bore the date of 25th May 1875.

Dr Stirling closed with the proposal by return of post, and the Property Investment Company of Scotland executed an assignation, dated 21st March 1879, in favour of Dr Stirling of the bond to the extent of £3000, it being provided and declared that the assignee should rank *primo loco* for the £3000 and interest.

The interest upon the £3000 so lent was paid up to and including the term of Martinmas 1882, but after that date no interest was paid, and Mr Findlay, the proprietor, had allowed his ground-annual to run into arrear.

In March 1880 Mr Alexander died, and in December 1885 Mr Mackenzie retired from business.

On 28th October 1885 Dr Stirling raised an action against Messrs Mackenzie & Company, concluding for payment of £3000, with interest thereon at the rate of 5 per cent from Martinmas 1882.

The pursuer stated;—(Cond. 8) "The defenders accepted of and acted on the pursuer's employment as his agents in the transaction in question,

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and the pursuer relied, and was entitled to rely, on their exercising due professional care and skill on his behalf as a lender. It was the duty of the defenders as agents of the pursuer to make inquiries into and satisfy themselves of the sufficiency of the security subjects for the amount of the said loan, but they failed to do so. In particular, they failed to procure or to submit to the pursuer accurate information as to the reletting of the security subjects at the then ensuing term of Whitsunday 1879; they obtained no valuation of these subjects as at the date of arranging the loan; and they did not explain to the pursuer, who was unacquainted with business matters, and relied entirely on the defenders as his agents, what they themselves were well aware of, but the pursuer was ignorant of, that subsequent to the date of the said valuation of 1875 there had been a great fall in the value of property in Glasgow, and, in particular, of the property in question. They further took, as security for the pursuer's loan, a property which in fact was at the time, and which the defenders knew, or but for gross negligence or want of skill ought to have known, was utterly inadequate for the protection and safety of the pursuer. Moreover, what was assigned to the pursuer in security of his loan was a portion only of the bond and disposition in security for £4000, and he is thus not in a position to realise the security subjects without at all events risk of further loss and expense; and the defenders likewise failed, as was their duty, to explain to the pursuer that this would be the result of acquiring only a portion of the security. Their failure in all these respects, as set forth in this and the preceding articles, was a failure in their duty to the pursuer as his law-agents, and the defenders were thereby guilty of gross negligence and want of skill."

The pursuer pleaded;—(2) The omission of the defenders to make or cause to be made all due inquiries as to the value and rental of the said subjects and their sufficiency as a security for the said loan, and their failure to inform the pursuer thereon, and as to the fall in the value of heritable property in Glasgow, amounted in the circumstances to gross negligence and failure of duty towards the pursuer, for the consequences of which the defenders are liable. (3) The defenders having, while acting as the pursuer's agents, been guilty of gross negligence and want of skill in taking as a security a property which was and still is, and which by ordinary care they would have known to be, utterly inadequate, they are liable to make good to the pursuer the whole amount of the loan, and the interest thereon, as concluded for.

The defenders stated,—“They have acted as law-agents for the pursuer only when he specially employed them. The pursuer was in the habit of writing to them as friends to ask about investments, and no charge was made or paid for correspondence of this kind, the pursuer having for a long time been on terms of friendship and intimacy with the senior partner of the defenders' firm.”

They denied that there had been any misrepresentation, concealment, or neglect of duty on their part.

The defenders pleaded;—(4) The defenders having submitted to the pursuer a true statement of all the essential facts regarding the security subjects in question at the date of the transaction being entered into, they are not chargeable with misrepresentation. (5) The pursuer having taken the matter of judging of the soundness of the investment in question into his own hands, and, *separatim*, having led the defenders to believe that he had taken the matter into his own hands and was satisfied on the subject, he is not entitled to insist in the present action. (6) The defenders not having been guilty of negligence or want of skill in any professional duty undertaken by them on the employment of the pursuer,

or paid for by him, they are entitled to absolvitor, with expenses. (7) No. 41.
A law-agent not being liable as guaranteeing the soundness or sufficiency of investments made by his client, the defenders are entitled to absolvitor, with expenses.

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On 27th January 1886 the Lord Ordinary (Fraser) allowed a proof.

The import of the evidence is given by the Lord Ordinary in his note.

On 14th May 1886 the Lord Ordinary assolizied the defenders from the conclusions of the action.*

* "OPINION.—The pursuer seeks, by the present action, to make the defenders, his law-agents, liable for loss sustained in connection with a heritable security which they negotiated on his behalf. The ground of action alleged is gross negligence and want of skill, and also the non-communication of material facts.

"The pursuer and the senior member of the defenders' firm had been on terms of friendly intercourse for a number of years, and in consequence of this the pursuer exercised the privilege of consulting the defenders at various times as to investments of his funds. This correspondence has been produced, and certainly shews perfect intimacy with and knowledge of the Stock Exchange on the part of the pursuer. He asks for suggestions from his correspondents, the defenders, and he receives them. He judges of such suggestions with perfect good sense, great sagacity, and prudence, having at the same time a keen desire to get a security that would yield him 5 per cent. When examined as a witness the pursuer protested that he was not a business man—a protest, however, which cannot be accepted in the face of the letters which he wrote. In January 1876 he turns his attention to mortgages on house property, and requests information as to whether or not such an investment would be advantageous, and the defenders reply to him,—‘We think we might be able to place £3000 as a first mortgage on a good house and shop property in Ardrossan, which has just been purchased by public roup for £4015.’ On the 14th February 1876 the pursuer writes,—‘I find it difficult to come to a decision in any of the references, for which I have to thank you, in your letter of the 8th.’ The pursuer, in February 1878, sold United States Funded Bonds to the amount of £5651, which money he desired should be invested, and the mode of investment (hinted at at a personal interview between him and Mr Alexander, a member of the defenders' firm) is stated thus by Mr Alexander,—‘What has now to be done is to secure investments for this money, and I think I gathered from you that you would like to have bonds on house property to yield 4½ per cent. At present it is somewhat difficult to negotiate investments of that kind with a due regard to safety and eligibility.’ On 28th February 1879 the pursuer was again seeking investments, and in his letter of that date he says,—‘In fact, failing the possibility of depressed railway purchases, I must seek the best more permanent investment I can. They say property—I mean house property—is in a very bad way with you in Glasgow, and that great caution is necessary in regard to it. You see, then, that my idea is to do the best I can with the money, divided or undivided, and just in any way. I should be glad and grateful did you afford me the assistance of your advice, information and negotiation on this occasion.’ This letter produced an answer from the defenders, dated 14th March 1879, which is said to contain misrepresentation of material facts. But before referring particularly to this letter it will be convenient here to state some of the facts in connection with the security ultimately taken.

"John Findlay, a wright and builder in Glasgow, was proprietor of heritable property situated in Stirling Square, Glasgow, which consisted of a store, three shops, and a common lodging or dwelling-house above the shops. This property belonged to the City of Glasgow Improvement Trustees, and was sold by them to William M'Culloch. M'Culloch sold the property to Findlay on 12th January 1875, and in part payment of the price Findlay on the same date granted a bond for £4000 in favour of M'Culloch over the subjects. This bond M'Culloch assigned to the Property Investment Company of Scotland, Limited,

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The pursuer reclaimed, and argued ;—(1) The defenders had made false representations by stating that the property was a safe investment ; that

on the 28th May 1875. That company continued creditors down to March 1879, when they executed an assignation in favour of the pursuer of the bond, 'but that only to the extent of the sum of £3000 sterling of principal, with the interest thereof from the date hereof. . . . Providing and declaring, as it is hereby expressly provided and declared; that the sums, principal, interest, and penalties hereby assigned shall be ranked and preferred *primo loco* on the said subjects and others, and the rents thereof.' . . . This assignation is dated 21st March 1879, and was recorded on the 25th. Thus the pursuer became the preferable bondholder to the extent of £3000 ; and the Property Investment Company were made to hold, and still hold, a postponed security for £1000.

"Interest was paid upon the bond to the pursuer down to Martinmas 1882, but since that date he has received no return in the shape of interest. The whole of the rents have been swallowed up in the payment of a heavy ground-annual of £214, 17s., payable to the City of Glasgow Improvement Trustees, and which Findlay, the owner of the property, allowed to run into arrear to a very large extent. The amount of the arrear at present owing is £192. Owing to the depression in trade which is common to the whole country, the rents of this property have fallen, and its value consequently has been diminished. What its real value is, could, of course, only be ascertained if it were put up to auction—which has been already once done at the pursuer's instance, but no offerer appeared. James Sellars, an architect in Glasgow, one of the pursuer's witnesses, says,—'I consider the value of the property at present is about £2500 to £2800,—that is, over and above the ground-annual.' There can be little doubt that if the property were sold to-day, it would not bring a price to repay to the pursuer his principal sum of £3000 and unpaid interest ; and therefore he now claims payment from the defenders of £3000, with interest at 5 per cent from Martinmas 1882.

"The letter of the defenders, on which the pursuer mainly relies as evidence of negligence, misrepresentation, and non-disclosure of facts, dated 14th March 1879, says as follows:—'What we had to propose to you was a loan on heritable property in Glasgow, bearing 5 per cent interest, which we consider a perfectly safe investment, and which is now available only because of the holders requiring for temporary purposes some funds.' The letter then goes on to state that the bond referred to 'is for £4000 over a property in Stirling Square, all let, rental of which is £581, 17s., and ground rent £214, 17s.' Now, it is perfectly true that at the time when this letter was written all the property was let, and that the rental then was £581 ; but it is also the fact that one of the tenants had intimated that he would cease to be a tenant at the following Whitsunday, which he did ; and further, that another of the tenants had obtained a reduction of his rent from £300 to £250, and these facts were not disclosed. I do not, however, consider that there was misrepresentation here, nor that there was withheld information that ought to have been given. The property was let ; and if one of the tenants intimated that he would give up his lease at the following Whitsunday, there was no reason to suppose the part of the property so left would remain unlet. The letter further states that 'the property was recently valued at £6500 over and above the ground-annual, and we know that the proprietor, about a year ago, refused £6000 for it. We are quite satisfied that the property is ample security for the £3000, and as the interest is a-half per cent more than usual, the opportunity is a good one, both as regards return and permanency of investment. In case you might still be open to think of the proposal, we send you a detailed rental and valuation of the property, and if you should think the matter worth consideration you can let us hear from you regarding it.' The statement that the property was 'recently' valued is giving a very wide meaning to the word 'recently.' The valuation which was sent to the pursuer was one made by Mr J. D. Smellie in 1875, on behalf of the Property Investment Company of Scotland, when they

it was all let; that the proprietor had been offered £6000 for it about a year before the proposed loan; and by referring the pursuer to a valuation—

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became creditors in the bond for £4000 over it. This valuation, however, carries along with it its date, and the pursuer had thus the opportunity of seeing when the valuation was made—25th May 1875. Now, on the following day after that valuation was made, viz., 26th May 1875, Messrs Mackay & Ferguson, who were tenants of the store and offices, constituting part of the property, wrote to Mr John Findlay, the proprietor, a missive offer for a lease at a rent of £300, and in this missive offer they state as follows:—‘Further, we are to have the option of purchasing said stores and buildings, all as shewn on allocated feuing plans, being plot No. 1 of same, containing 871½ square yards, with a feu-duty of £214, 17s. 10d., at any time before 2d February next (1876), at the sum of £6500 sterling.’ The rental which accompanied the valuation was returned by the pursuer to the defenders along with his letter of 15th March 1879, and has been lost; but it is proved that the sum in the rental was, at the date of the defenders’ letter, as stated by them. The further statement that the proprietor Findlay had refused £6000 for the property is also proved by Mr Findlay, the proprietor, who at first did not remember the fact, but he finally gives it as his evidence,—‘I have no doubt I got a verbal offer of £6000 for the property, but I don’t know from whom.’

“Along with these statements of fact the defenders give an expression of very confident opinion. They state that they consider what they offer a perfectly safe investment ‘and ample security for the £3000.’ This opinion may have been right or wrong; but I see no ground for holding that it was not honestly given and believed. The defenders, no doubt, stood in the delicate position of acting both for the lender and the borrower. They were agents in Glasgow for the Property Investment Company of Scotland, who were creditors in the bond for £4000, and they were also agents for the proprietor Findlay. The Property Company were very desirous of obtaining money in order to meet calls upon them by depositors, and hence they gave instructions to call up this bond for £4000. Mr Couper, the manager of the Property Company, says,—‘I don’t think our fears were particularly excited about that loan. We were merely desirous of getting money to meet depositors that were coming in upon us.’ It was in consequence of the instructions to call up the bond that the defenders were induced to suggest this, as a security to the extent of £3000 to the pursuer. Now, at the time when this suggestion was made, the evidence is all to the effect that it was a good security for £3000. The fall in the value of property which began, by reason of the insolvency of the City of Glasgow Bank, was not felt to any great extent in March 1879; and it was only when the depression in trade went on continuing—and to get worse—during the subsequent years that all securities even upon the best sites, became materially depreciated. The property in question is in the centre of Glasgow, in a good business quarter, and altogether an eligible subject for a security. Mr Thomson, an architect and valuator in Glasgow, says of it,—‘It is a capital site. I think there is a value in it other than the mere old buildings.’

“The unexpected fall in the value of property, and the consequent depreciation of securities, is a notorious fact, to which all the witnesses speak; and the continuance of which they all also equally affirm to be unexpected. Findlay speaks of the matter thus:—‘I think the property in question was good security for £4000 at 15th March 1879. At that time neither I nor any other person anticipated that the depression of trade would be so great or so lasting as it has been. Property was at its highest point about the end of 1877 or beginning of 1878; after that it began to go down. I don’t think there had been any serious fall up to March 1879.’ This particular property also, in the estimation of some of the witnesses, had special advantages. Mr Smellie says,—‘We have been all very much disappointed since the crisis took place, as to the expectations we had formed of this locality. I would not, in 1879, have expected property in this locality to remain long depreciated. I would have expected the crisis to pass off within a few years.’ And he goes on to make

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tion, which they spoke of as recent, but which had really been made in 1875, and even at that date was a high valuation. (2) The defenders had

further explanations of an encouraging nature which, however, the continued depression has not confirmed. Mr Thomson says,—‘Property in that neighbourhood has been depreciated by the railway company having cleared away a great many premises and erected large stores. That cause has been operating, I should say, for eight years, but it did not develop a depression of other properties until about three years ago. I don’t think it had developed a depression in 1879. If the property in question was rented in 1879 for £581, 17s., that would represent a rate of 13s. 4d. per square yard. That was a very moderate rental in 1879, looking to the situation of the property. If I had been asked to value the property in March 1879, the rental being £581, I would very likely have taken a discount of between 10 and 15 per cent, say 12½, from the rental, and then valued it at so many years’ purchase. I would have made that deduction because of the risk of that rental not being maintained. Striking off £72,—12½ per cent from the rental would leave £509. I would have taken that at seventeen years’ purchase at that date, which would bring out a valuation of £8653. From that I would have deducted the ground-annual £214, capitalised at twenty years’ purchase £4280, leaving £4373 as the nett value. I think that would have been sufficient to secure a loan of £3000. If the loan had been at 5 per cent I think that would have been a good and satisfactory security. I would have advised such an investment even at 4½ per cent. If this property had been good security for £4000 in 1875, no reason occurs to me why it should not have been good security for £3000 in the spring of 1879.’

“But it is said that the defenders, instead of sending a valuation of the year 1875, ought to have got a new valuation in 1879, before suggesting the matter to the pursuer. In reference to this matter of the valuation, the peculiar circumstances of this case must be kept in view. The defenders were not asked to invest £3000 upon good security for the pursuer—leaving to them the selection of the security. In such a case it would have been their professional duty to have obtained a valuation as at the date when they made the investment. The agent in such a case stands in the position of a trustee, and would be responsible for the sufficiency of the security—(See *Smith v. Pococke*, 23 L. J. Chan. 545). But their position was not so. They were asked by a man who was studying the markets himself, to suggest some investment; and the correspondence shews that they made many suggestions, which the pursuer critically considered, and all of which he rejected, except the security over the Stirling Square property. He asked for advice and he got it; and the defenders laid before him all the materials that were in their possession. For these letters of suggestion, recommendation, and advice, no charge was made, and no commission was obtained from the pursuer for negotiating the transaction. Now, when the correspondence proceeded upon this footing, there was no neglect of professional duty on the defender’s part in not obtaining a new valuation—which they were not authorised to get,—it being doubtful, moreover, whether their suggestion in this case might not have the fate of their previous rejected suggestions. The valuation which they did send disclosed its date, and the pursuer took the matter into his own hands. He had, in a previous letter, expressed his opinion of the bad state of Glasgow property. The peculiarity of it was distinctly in his mind. It is impossible to read the correspondence without seeing that the pursuer here was judging for himself as to the nature and character of the security he was taking, and in this respect the case resembles one decided in the Chancery Court of England, the rubric of which is as follows (*Chapman v. Chapman*, L. R. 9 Eq. 276):—‘Although relief may be given at the suit of a client against his solicitor for loss sustained by gross negligence, yet where the loss was in respect of a matter of conduct as to which the advice of the solicitor was founded on the opinions of competent surveyors as to the value of the property, and those opinions submitted to the judgment of the client, the Court dismissed the bill; and as fraud and improper motives were charged without evidence to support those charges, the bill was dismissed

concealed material facts from the pursuer, *e.g.*, that reduced rents had been accepted for some of the premises; and that some of the tenants had given

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with costs.' In giving judgment Vice-Chancellor Stuart said (p. 296),—'In a question between solicitor and client as to loss from negligence, there must be negligence of a gross and palpable kind to give a right to relief. But where, as in this case, the conduct complained of is more properly to be described as imprudent or indiscreet than as negligent, and every transaction was referred to the judgment of the client himself, who concurred in it, there seems to me to be no right to equitable relief. The advice which the defendants gave was founded on the reports of surveyors communicated to the plaintiff, and whatever may be said of the prudence or imprudence of the course advised by the defendants, I can see no reason to doubt the honesty of the advice. It was upon a matter which did not require professional skill, and the grounds upon which the advice was given were submitted to the plaintiff's judgment, and approved by him.'

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"The most recent case in our own Courts upon this subject is that of *Ronaldson and Others (Gray's Trustees) v. Drummond & Reid*, 7th June 1881, 8 R. 767, which was pleaded as an authority for the doctrine that a law-agent is responsible not merely for the validity of the title, but also for the sufficiency of the security. That case, however, is no authority for such a doctrine; and none of the Judges carried the responsibility of a law-agent to such an extent. There was in that case omission upon the part of the law-agent—who was himself one of the trustees who were the lenders—to give to his co-trustees such needful information about the nature of the property and the burdens upon it as was necessary to enable them to form a judgment as to the propriety of the intended loan. He possessed this information, but withheld it,—a circumstance that cannot be said to exist in the present case, and which induces me to hold that the one judgment cannot be regarded as a precedent for the other. It cannot be said that in the month of March 1879 the loan of £3000 was an imprudent transaction, far less an act of gross carelessness, and the pursuer must bring it up to a case of that kind before he can fix down an agent's responsibility simply for a suggestion. A broker or a law-agent is the kind of person to whom people who have a little money to invest, almost necessarily—at least, naturally—resort for information and advice, and although the investment turn out to be unfortunate which they have suggested, there is no legal liability for the consequences resting on the professional man. He may, perhaps, from his knowledge of business, more readily forecast the future; but his skill in this respect is very limited after all. No one in 1879 could have anticipated the tremendous fall in the value of property which took place at the end of that year and in the following years, and has continued ever since. If a law-agent were to be made responsible for giving a suggestion to his client, the result would be that no suggestions would ever be made, and a great part of the usefulness of an agent or broker would be destroyed. If an agent is liable, there is no reason why a stockbroker should escape; and, to quote the language of Lord Stair as to the responsibility of a Judge for the soundness of his decision, 'no man but a beggar or a fool' would be an agent, if he answered inquiries as to investments with such responsibility for the consequences.

"I have not followed the course adopted by the Lord Ordinary in the case of *Ronaldson and Others v. Drummond & Reid* in delaying judgment until it be seen by a sale whether there be any loss. It is clear from the evidence that a sale at the present time would be a very imprudent proceeding, and would result in a loss. The rents of houses in the district have fallen off, and many of the houses and shops round about are unlet. Whether the hope expressed by some of the witnesses of recoverable value shall be realised, must in the meantime be treated merely as a hope which may or may not come to pass. In some streets, such as Sauchiehall Street, there has been an increased value in house property since 1879; and as Stirling Square is in the very heart of the business portion of Glasgow, it may also take a start. But of the prudence of retaining his security and losing his interest in the meantime till the arrear of ground-annual

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notice of an intention to leave. (3) The defenders were guilty of negligence. They knew the property thoroughly, as they had been Findlay's agents. This knowledge they were bound to disclose.¹ It was part of their duty to make allowance for the falling market, and to acquaint themselves with the value of the security,² and the fact that the client desired an investment to yield five per cent of interest did not absolve them of this duty.^{1 & 2} Besides, a knowledge of special facts might impose a special duty upon those possessing that knowledge.³ Here the defenders took upon themselves a greater than a law-agent's duty.

Argued for the defenders;—(1) The relations which subsisted between the parties were not those of agent and client. In these friendly communications as to investments there was no employment of the defenders as law-agents. Besides, the pursuer was always the judge of his own investments. (2) But assuming that the defenders were the pursuer's law-agents, all the statements made by them were true. At the date of their letter the property was let. The valuation sent by them bore its date, and the offer to buy the subjects from Findlay for £6000 was proved. Even supposing the rental was reduced and the property partially untenanted as alleged, there was an ample margin. (3) The responsibility of the defenders as law-agents was confined to liability for defect in the titles, or for gross negligence in making investments.⁴ An inquiry into the value of securities was not part of a law-agent's duty.

At advising,—

LORD RUTHERFURD CLARK.—In 1879 the pursuer invested £3000 on house property in Glasgow. The defenders were his agents in the transaction. The security has proved to be insufficient, and by this action the pursuer seeks to make the defenders responsible for the loss.

The grounds of action are, first, that the defenders made false representations to him; second, that they concealed from him material facts; and, third, that they were negligent.

The note of the Lord Ordinary gives a very full detail of the circumstances in which the case was entered into, and it is unnecessary to go over the same ground a second time. It is sufficient to consider the several grounds of action on which the pursuer relies.

1. I do not think that the defenders made any false representations.

The pursuer says that the defenders stated that the property was all let, when in point of fact it was not all let. But the statement of the defenders was true. The property was all let down to Whitsunday 1879, and I must take the statement of the defenders as referring to the period of time of which they were speaking. Their statement was made in a letter, dated 14th March 1879, and at that time the property was all let.

be cleared off, the pursuer himself must be the judge. The pursuer's case is no harder than that of the many thousands who invested in stocks and shares, and in house property and land property, during the period of prosperity of the country nine years ago; and he must submit, like all these people who invested at the prices of those days, to the consequences of an unfortunate investment."

¹ Stewart v. M'Clure, Naismith, Brodia, & Macfarlane, July 7, 1886, 13 R. 1062.

² Ronaldson v. Drummond & Reid, June 7, 1881, 8 R. 767.

³ Raes v. Meek, &c., June 29, 1886, 13 R. 1036; Craig v. Watson, April 28, 1845, 8 Beavan, 427; Green v. Dixon, March 6, 1837, 1 Engl. Jur. 137.

⁴ Chapman v. Chapman, Jan. 20, 1869, L. R., 9 Eq. 276.

The pursuer charges the defenders with having represented to him that the property was "recently" valued, when in point of fact it had not been valued since 1875. But the charge falls to the ground when it is considered that the defenders sent to the pursuer the valuation which was referred to in their letter. It bore the date 25th May 1875.

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The defenders stated in their letter that they knew the proprietor had refused £6000 for the property. It was urged in the argument before us that this was a false statement to the knowledge of the defenders. I do not find any such allegation on record. But be this as it may, I do not think that the allegation has been proved. Mr Findlay, the proprietor, says,—“I have no doubt I got a verbal offer of £6000 for the property, but I don't know from whom.” That he should, after so great a lapse of time, have forgotten the name of the proposing buyer is not at all surprising.

These are all the alleged misrepresentations.

2. The concealment of material information. This consists in the fact that at the time of the proposal for the loan some of the tenants had given notice to quit, and that the current rents had been considerably reduced for the future. But it was not maintained to us that these facts were within the knowledge of the defenders. Indeed, no charge of dishonesty was made against them, and if made, no such charge could have been substantiated. But in the absence of such a charge the allegation of concealment is of no relevancy. The agents were of course bound to communicate to the pursuer every material fact within their knowledge, but they could not be guilty of any fraud in not revealing what they did not know. They might have been negligent in not acquiring the knowledge, but not fraudulent.

3. I come now to the last ground on which the pursuer relies,—the alleged negligence of the defenders,—and here there is room for more consideration and discussion.

The defenders maintained that they had no responsibility except as conveyancers, and that as no fault had been imputed to them in that respect they were entitled to our judgment. I cannot adopt this view. I think, on the contrary, that they were bound to take all reasonable care in seeing to the sufficiency of the security which they recommended to their client. The pursuer alleges that they failed in this respect, and it is on this question that the chief difficulty exists.

The subjects over which the loan was to be taken yielded a rental for the year ending at Whitsunday 1879 of £581 or thereabouts, but they were burdened with a ground-annual of £214, 17s. If that rental were maintained there was a surplus of £366 to meet the interest of the loan of £3000, and this would of course be amply sufficient. But the pursuer contends that if the defenders had made due inquiry they would have found that the rental of the following year would be materially reduced, and that there was a probability of a part of the subjects being unlet, as turned out to be the case.

The pursuer urges that the defenders were bound to make inquiries into the chances of the existing rental being reduced, and that they could readily have obtained the requisite information by going to the landlord or tenants, but I do not think that they were under a duty to enter into such an investigation. It is not usual for the agents of a lender to do so, and I do not see that the defenders were bound to follow an exceptional course. They had ascertained that the property was all let, and that the margin was a very ample one. They were entitled,

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I think, to conclude that the property in its actual state furnished a good security, and in consequence were justified in recommending the loan to their client.

In my judgment they were not guilty of negligence because they did not prosecute their investigation further. It is said that property in Glasgow was then falling in value. So it was. But the defenders saw that there was a large margin to cover contingencies, and were entitled to rely on it as sufficient to cover the risks to which a security of this kind is necessarily subject.

But there is another fact of great importance. The subjects were already burdened with a loan of £4000, and the transaction with the pursuer took the form of an assignation of £3000 of this loan under the condition that it was to be preferable to the remaining £1000. The property had been taken as sufficient for a loan of £4000, and the defenders were recommending it as sufficient for £3000 only. It is said that the creditors in the existing bond wished to call it up. That is true. But it is in evidence that this desire was not due to any misgiving as to the sufficiency of the security, but to the fact that they required the money. It is further urged by the pursuer that the defenders were agents for the existing creditors and for the proprietors of the subjects. So they were, but this of itself cannot be a ground of liability. It will lead us to scrutinise the conduct of the defenders, and to inquire narrowly whether they omitted any reasonable precaution for the safety of their client. I am bound to say that I do not think that they did. The security seemed a very ample one, though, of course, subject to those risks which the pursuer was willing to incur.

Considering therefore that the property shewed an ample rent to cover the loan and to meet contingencies, I am of opinion that the defenders were justified in recommending the loan to the pursuer, and that they were not guilty of negligence.

The security was one of a speculative nature. The pursuer desired such a security in order to obtain a high rate of interest. He has lost money because the security became insufficient. That was just the risk he voluntarily undertook. That he should lose is not the uncommon result of such an investment. He must blame himself for desiring to obtain a large return from a hazardous security. At least he cannot, I think, with justice blame the defenders, who, in my opinion, failed in no duty which they owed to him.

I think, therefore, that the interlocutor should be affirmed.

LORD YOUNG.—I think this is a difficult case—at least I have had great difficulty about it. I think it very much on the border-line between such negligence (for I think there was negligence) as infers liability, and such negligence as is merely to be characterised as not good or zealous agency in the interests of the client. I do not think the interests of the client here were well protected. I think the reverse—that the interests of the client were not well protected; but then, as I have indicated, the conclusion that there is legal liability for such negligence is another matter. I should not have been greatly surprised if the result arrived at by your Lordships had been otherwise—if it had been to the effect that there was legal liability for the loss sustained by the client on account of the want of these inquiries and communications which I think it was the duty of the agent to have made. But with the judgment of the Lord Ordinary in favour of the agent against liability, and the decided and clear views to the same effect entered and expressed by my brother Lord Rutherford Clark, I could not bring to the conclusion that liability ought to attach to the agents. Therefore,

I may be held as concurring in the judgment. But I repeat that it is with difficulty, and with the conviction that there was not good agency here, and that the client has severely suffered in consequence.

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LORD JUSTICE-CLERK.—I share in the doubts Lord Young has expressed, but I think that in a case of this kind, where there is an attempt to make a law-agent responsible for negligence, the matter should be clearly established. I am of opinion with Lord Rutherford Clark, if your Lordships will allow me to repeat his opinion, that that has not been established, and therefore I concur in the result of that opinion.

LORD CRAIGHILL was absent.

THE COURT adhered.

DAVIDSON & SYME, W.S.—F. J. MARTIN, W.S.—Agents.

WILLIAM FRASER, Pursuer (Respondent).—*D.-F. Mackintosh—Murray.*

No. 42.

ALEXANDER MACDONALD, Defender (Appellant).—*Balfour—Low.*

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Lease — Crofter — Diligence — Jurisdiction — Statute — Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29), sec. 6, subsec. 5.—Held, on a construction of the Crofters Holdings (Scotland) Act, 1886, particularly sec. 6, subsec. 5, thereof, that the jurisdiction of the ordinary Courts of law to grant decree for payment of arrears of rent is not suspended by the presentation of an application to the Commissioners under the Act to fix a fair rent and to deal with arrears.*

Question (per Lord Rutherford Clark), whether the landlord is entitled to do instant diligence on such a decree for recovery of the full sum named therein, or whether his remedy, pending the determination of the Commissioners, is limited to diligence in security.

On 9th October 1886 Colonel Fraser of Kilmuir, in Skye, brought an action in the Debts Recovery Court at Portree against Alexander Macdonald, a crofter on his estate, for payment of the sum of £30, 17s. 6d., being the amount of the rent of his croft alleged to be due by the defender for the five half years ending Whitsunday 1886, with interest.

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Decree in absence was pronounced on 21st October. The decree ordained "instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after a charge of ten free days."

On 11th November the defender applied for a rehearing, and lodged a certificate by the principal Clerk to the Crofter Commission, bearing that the said Clerk had on that date received an application from the defender asking the Commission "to fix a fair rent for the holding occupied by him, and to deal with the matter of arrears."* The defender

* The following provisions of the Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29), were founded on in argument:—

"1. A crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions), but he shall have no power to assign his tenancy. (1) The crofter shall pay his rent at the terms at which it is due and payable. . . . (6) The crofter shall not do any act whereby he becomes notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, and the Debtors (Scotland) Act, 1880, and shall not execute a trust-deed for behoof of creditors."

"3. When one year's rent of the holding, but less than two years' rent, is

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also offered "to find security that the amount of arrears, as fixed by the said Commission, under the said application, will be duly paid at the dates fixed by the said Commission."

The defender pleaded;—That the defender has made an application to the Commissioners appointed by the Crofters Holdings Act to fix a fair rent, and to deal with the matter of arrears, and that until these Commis-

due and unpaid, the crofter shall be liable to be removed in manner provided by section twenty-seven of the Agricultural Holdings (Scotland) Act, 1883.

"When two years' rent of the holding is due and unpaid, or when the crofter has broken any other of the statutory conditions, he shall forfeit his tenancy, and shall be liable to be removed in manner provided by the fourth section of the Act of Sederunt anent removing of the fourteenth day of December one thousand seven hundred and fifty-six."

"4. The rent payable, as one of the statutory conditions, shall be the present rent,—that is to say, the yearly rent including money and any prestations other than money, payable for the year current at the passing of this Act, unless and until the present rent is altered in manner provided by this Act.

"5. The rent may be altered by agreement between the landlord and the crofter to such amount and for such period as may be agreed on; and the rent so agreed on shall be the rent payable by the crofter so long as such agreement subsists, and after the expiry thereof so long as no different rent shall have been fixed by the Crofters Commission upon the application of the landlord or the crofter, and so long as no new agreement between the landlord and the crofter shall have been made.

"6. (1) The landlord or the crofter may apply to the Crofters Commission to fix the fair rent to be paid by such crofter to the landlord for the holding, and thereupon the Crofters Commission, after hearing the parties and considering all the circumstances of the case, holding, and district, and particularly after taking into consideration any permanent or unexhausted improvements on the holding and suitable thereto which have been executed or paid for by the crofter or his predecessors in the same family, may determine what is such fair rent, and pronounce an order accordingly.

"(2) The rent fixed by the Crofters Commission (in this Act referred to as the fixed rent) shall be deemed to be the rent payable by the crofter as from the first term of Whitsunday or Martinmas next succeeding the decision of the Crofters Commission, and shall come in place of the present rent, and, save by mutual agreement, the fixed rent shall not be altered for a period of seven years from such term.

"(3) Where the Crofters Commission shall fix a rent which shall be less in amount than the present rent, the crofter shall be entitled, at the next payment of rent, to deduct from the amount of the fixed rent such sum or sums as he may have paid over and above the amount of the fixed rent in respect of the period between the date of the notice of application to fix the fair rent and the date when such rent was fixed.

"(4) When an application is lodged with the Crofters Commission to fix a fair rent, it shall be in the power of the Crofters Commission, either under the same or under another application of the crofter, to sist all proceedings for the removal of the crofter in respect of non-payment of rent till the said application is finally determined, upon such terms as to payment of rent or otherwise as they shall think fit.

"(5) In the proceedings on such application the Crofters Commission shall take an account of the amount of arrears of rent due or to become due before the application is finally determined, and may take evidence of all the circumstances which have led to such arrears, and shall decide whether, in view of such circumstances, the whole or what part of such arrears ought to be paid, and whether in one payment or by instalments, and at what dates the same should be paid, and the amount and dates so fixed shall be deemed to be the total amount of such arrears due by the crofter, and the terms at which the same become payable."

Commissioners have pronounced an order on that application, and the same has been presented to the Sheriff, it is incompetent for him to give the decree asked in the case, and offers by minute lodged in process to find security for sum which may be fixed by Commissioners.

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The pursuer pleaded;—The present action not coming within the provisions of the Crofters Act, the rehearing should be dismissed, with expenses.

The pursuer also stated by minute that, provided the defender consigned before the 15th October, or paid two-thirds of the arrears of rent sued for, the pursuer would take no further proceedings for the balance of the arrears until the Crofters Commissioners should have had an opportunity of considering the question of arrears.

Neither the defender's offer of security nor the pursuer's to take consignment was accepted.

On 15th November the Sheriff (Ivory) dismissed the rehearing, and affirmed the original decree, with expenses.

The defender appealed, and argued;—The remedy which the appellant here asked for was that the action should be sisted until the Commissioners had pronounced judgment in his application to them. He offered to find security for the amount of arrears, as fixed by the Commissioners. That was a reasonable offer, though not one which he was by statute obliged to make. The leading object of this part of the statute was to convert customary year-to-year tenants into tenants in perpetuity, upon certain reasonable conditions. The first of these statutory conditions was that the crofter should pay his rent. That made it necessary to determine what his rent should be. It might be the old rent—sec. 4, or a new rent fixed by agreement—sec. 5, or lastly, a new rent fixed under an application to the Commissioners—sec. 6. It was only in the last case that the Act gave power to deal with arrears. But in that case the measure of liability for arrears was what the Commissioners fixed it to be. They were to "take account of the amount of arrears of rent due or to become due before the application is finally determined." That meant that they were to take account, first, of the arrears due when the application was presented, and, secondly, of arrears becoming due pending its determination. The Act swept away the arrears under the old contract, and substituted what the Commissioners thought the fair amount of arrears. Consequently, until the Commissioners had determined the quantum of the debt no arrears could be sued for. The action, therefore, was incompetent, or, at least, must be sisted. If all diligence was open to the landlord except removal, the tenant might be made bankrupt, and that would be a breach of the 6th statutory condition, and would in effect be the same as removal. [LORD RUTHERFURD CLARK.—I should like you to consider this: Assume that the amount of the debt is certain, and that there is nothing in the Act inconsistent with decree for that amount being pronounced now—may you not nevertheless argue that to allow anything else than diligence in security to proceed on that decree, pending the determination of the Commissioners, would be inconsistent with the whole purpose of the Act?] That was the defender's alternative position if he failed on his main ground of defence. The landlord's interests in competition with the tenant's other creditors would thereby be sufficiently protected, and the injustice of allowing the landlord to carry off the whole arrears when the Commissioners, had they chanced to come to this district first, might have determined that half only ought to be paid, would be prevented.

The arguments for the pursuer sufficiently appear from the opinions of the Judges.

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LORD JUSTICE-CLERK.—This case is in itself important and interesting, and I shall state shortly the grounds on which, not without difficulty, I come to the conclusion that we ought to adhere to the judgment of the Sheriff, and repel the pleas urged on us by the appellant.

It is not necessary for me to resume the facts at length. In the month of October 1886 the respondent, Colonel Fraser, obtained a decree in absence against the appellant, who is his tenant, before the Sheriff of Inverness, for certain arrears of rent. After this decree had been pronounced, and in the month of November thereafter, the tenant presented an application to the Commissioners under the recent Crofters Act for the purpose of having a fair rent fixed in terms of that statute. That application has not yet been considered or disposed of by the Commissioners. In the meantime, the decree which had been pronounced in absence was appealed by the tenant to the Sheriff, and was affirmed by him, and that judgment has now been brought before us by appeal.

The ground on which that judgment is challenged does not rest on any allegation that the debt for which decree was given was not due when it was pronounced. But it is maintained by the appellant that the provisions of the Crofters Act, sec. 6, subsection 5, operate as a suspension or sist from the date of the application of all legal proceedings for the recovery of rent, until the Commissioners have considered and determined all questions in regard to arrears, under the powers conferred by that statute. There is thus raised a very large and extensive question.

It will not escape observation that if the presentation to the Commissioners of an application under the statute has the effect of rendering all further proceedings incompetent until the application is disposed of, one effect of the principle would be to make the appeal to the Sheriff, and to us in this case, incompetent, seeing that the decree in absence was pronounced before any application was made to the Commissioners. But that is a technical view. The broad question which has been argued, and which I think we must decide, is whether on a sound construction of the terms of this statute the presenting of an application to the Commissioners has the effect contended for. It is needless and inconclusive to say that this construction would involve interference with proprietary rights. To leave the landlord without the ordinary remedies of a creditor for an indefinite period is an interposition by the Legislature not to be presumed or inferred, which even under this statute might, in possible cases, strike against the tenant also. But I can quite understand that the ends of public policy may require the subordination of private rights to important public objects. This statute, by overriding private contracts between landlord and tenant, proceeds, to a certain extent, on that principle, nor should I have been surprised if it had contained a clause regulating the rights of the parties concerned for the period during which the application remained undetermined.

But, while it is no part of our province to discuss the policy of the statute, and while we assume that the public ends in view justified its provisions, I draw one conclusion from the fact that the statute is meant to be in some degree in derogation of private right. I feel that I am not entitled to extend the plain words of the statute by inference to matters which are neither expressed nor clearly implied, and that all the more that the nature of the provision which we are asked to imply is one which, had it been intended, would natu-

nly have been expressed. In this instance, I think, the legitimate inference is that it was not intended to make any provision on the subject. No. 42.

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I give weight to the argument that when a Court of law, or other tribunal, is authorised to decide between debtor and creditor, ordinary legal procedure should be stayed until judgment. I see also that if it were not so here the object of this statute might in some cases fail. On the other hand, to adopt the view of the appellant would be to do certain injury. There are three results which might follow from the Commissioners' consideration of the arrears. First, they might find that none of them should be paid; secondly, they might find that a certain proportion of them should be paid; and lastly, they might see no reason at all for interfering with the amount. Now, in the two last cases, according to the construction now put upon subsection 5, the landlord is left wholly without remedy. Assuming that the Commissioners are of opinion that the arrears should be paid in full, before that opinion is given effect to by the Commissioners' judgment all chance of recovery on the part of the landlord might have come to an end. And the same thing may be said of the proportion which possibly the Commissioners may find ought to be paid, supposing that they did not find that the whole was due. Now, my Lords, that is a great hardship. I cannot assume that it was so intended. But it must be kept in mind that the Commissioners have no statutory power to stay proceedings, or to attach conditions on which they should be stayed. They are not authorised to deal with any such matter. In reference, and in contrast to this, I may refer to the precise power which is given in this statute to the Commissioners to interpose to stay removals, and to attach such conditions as they think fit, in the 4th subsection of section 6. I think I may also, without impropriety, refer to an analogous case—we have but few cases of such statutes—in the Irish Arrears Act, 1882; and I find in that statute that the two things which are in question were dealt with by that statute—I mean the power of removal on the one hand, and the power to take proceedings for the recovery of arrears on the other. The Act to which I refer is chap. 47 of 45 and 46 Victoria, 1882. Section 13 provides that “where any proceedings for the recovery of the rent of a holding to which this Act applies, or for the recovery of such holding for non-payment of rent on account of the rent in respect of the year expiring as aforesaid and antecedent arrears, have been taken before or after an application under this Act in respect of such holding, and are pending before such application is disposed of, the Court before which such proceedings are pending shall, if the provisions of section 1, subsection *a*, have been complied with, and on such terms and conditions as the Court may direct, postpone or suspend such proceedings until the application under this Act has been disposed of.” That is an express power given. Now I should have looked—if the construction put upon the Crofters Act was intended—for words of that kind. And I think reasonably, because, although it may have been a perfectly justifiable policy to suspend or limit the landlord's right, this should be expressly stated in words. Therefore my impression is that under this statute the presenting of an application to the Crofter Commissioners does not necessarily suspend or sist procedure on the part of the landlord for the recovery of his rent.

I to a large extent agree with the view that has been suggested by Lord Young, that the word “arrears” means the arrears due, and that in the provisions of the Act they mean arrears due when the Commissioners come to consider an application to fix a fair rent, thus necessarily implying that

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the landlord may take all ordinary remedies for his rent in the meantime. Then it has been suggested on the part of the tenant that the landlord is not without his remedy, because he may, if he pleases, propose to remove the tenant for non-payment of rent for two years, and that will let in the dispensing or discretionary power of the Commissioners to annex conditions. That is a very clumsy way of arriving at a result which is not expressed in words. I do not think, upon the construction of the statute, I could give that effect to its provisions. I think the provisions about removing were intended to apply to removing and nothing else, and that if they were intended to apply also to the recovery of arrears that only makes the observation stronger—why was that not expressed? I think the statute said all which it was intended to say, and that it was left to the common law to construe those words of subsection 5, and give them their proper and due effect. I must say for myself I should have been perfectly satisfied to have recalled or sisted procedure if consignment had been made. I think that would have removed those apprehensions of the landlord, and would sufficiently have satisfied the statute. As that has not been done, we must decide the case, and I have expressed my opinion upon it.

LORD YOUNG.—I am of the same opinion, and if I add anything to what your Lordship has said it is not because I think the case is attended with any difficulty, but because we have been told that it is a case interesting to a number of people, having been selected as a specimen case in order to determine a variety of others depending upon the same considerations, and I make the observations which I am going to make only to shew to those who are interested, as clearly and distinctly as I can, the grounds upon which my opinion rests.

The action, which originated in the Sheriff Court of Inverness, is by a landlord against his tenant for payment of two and a-half years' rent of his farm. No defences were given in, and decree in absence was pronounced on 21st October last. An application was then made to the Sheriff to re-hear the case, and determine it otherwise upon this, the defender's, plea, which is the only plea that was ultimately disposed of by the Sheriff, and the only plea now before us,—“That the defender”—that is, the tenant against whom the decree for the amount of the rent had been pronounced in absence—“has made an application to the Commissioners appointed by the Crofters Holdings Act to fix a fair rent, and to deal with the matter of arrears, and that until these Commissioners have pronounced an order on that application, and the same has been presented to the Sheriff, it is incompetent for him to give the decree asked in the case.” I do not read the offer of security any more than the offer on the other side to take consignment. These are really of the nature of extrajudicial communings between the parties with the view to a settlement, and if they come to nothing we have no concern with them. And they have come to nothing. Now, it is not said that the rent was overstated, or that it had been paid in whole or in part. There is no defence to the action, except only this plea that the action was incompetent, an application to the Crofters Commission having been made. The Sheriff repelled that plea, and the case having been brought here upon appeal, the only question before us consequently is whether the Sheriff was right in repelling that plea or not. I am of opinion that he was.

The rent sued for is for the two and a-half years terminating at Whitsunday 1886, the term immediately preceding the passing of the Act. Therefore it is

rent due before the Act passed. Consequently the question comes to this: Is the landlord by the statute precluded from suing a crofter to whom the statute applies—and it is not disputed that the statute does apply here—for rent due to him prior to the passing of the Act? Now, I think there is a rule of the common law, with which we are very familiar, and constantly apply, sufficient for the decision of this question. It is the legal right of the landlord to whom his tenant is owing money, as it is of any creditor to whom a debtor is owing money on any ground, to sue him for payment. If this Act of Parliament deprives the landlord of that legal right which he has at common law of suing his tenant for rent due to him before the passing of the Act, then this plea is well founded, and otherwise not. Now, here, again, in the construction of the Act, we have a rule of common law, with which we are quite familiar, which is sufficient for the determination of the matter, and that rule is, that the legal right of a party at common law shall remain to him unless it is expressly taken away. It is according to the practice of the Legislature when a distinct familiar legal right at common law is meant to be taken away from an individual, or class of individuals, that it is done in terms expressly. I do not say that it is impossible to do it by implication—that is, by some provision which is manifestly inconsistent with the continued subsistence of that legal right; but the custom of the Legislature is, where a familiar legal right at common law is intended to be taken away, that that is done in express terms. Now, I think all will agree that in this Act there is no express provision saying that a crofter's landlord shall be deprived of his common law rights of proceeding by an action against the crofter who, as his tenant, is owing him money for rent. Then is there any provision which is inconsistent with the continued existence of that most familiar legal right of the landlord to whom his tenant is indebted? There is none, unless it be subdivision 5 of clause 6.

Now, on this point I notice first of all that the statute provides that the rent which the crofters are to continue to pay is the "present rent," subject to that present rent being altered by agreement or by the Commissioners appointed under the Act. Until there is an agreement altering it, or a judgment of the Commissioners under the Act altering it, the "present rent" is to continue—that is, the rent payable before the Act passed. It is then provided by clause 5, somewhat superfluously, that the parties may alter by agreement. I should not say "superfluously" perhaps, because the statute does make somewhat free with agreements, I do not doubt, upon considerations satisfactory to the Legislature, in regard to which I express, and, indeed, have no opinion. But the parties interested are nevertheless, by clause 5, left at liberty to make such new agreements as they please with respect to the rent. Either party however—either the crofter or his landlord—may apply to the Commissioners to fix fair rent, and this subsection 5 of clause 6 provides that "in the proceedings on such application the Crofters Commission shall take an account of the amount of arrears of rent due, or to become due, before the application is finally determined, and may take evidence of all the circumstances which have led to such arrears, and shall decide whether, in view of such circumstances, the whole or what part of such arrears ought to be paid, and whether in one payment or by instalments." This undoubtedly gives the Crofters Commission power to deal with arrears due when the application is finally determined. What, then, is the meaning of this expression "arrears of rent." We had an argument on the one side to the effect that it includes, to begin with, all rent due by the tenant

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at the passing of the Act, which is not to be exacted by the landlord, and is not payable by the tenant until the application—which, I suppose, the tenant would delay as long as he could—is disposed of by the Commissioners. It is a perpetual Commission. I had an impression that it was limited to five years. I see that it is only their power with reference to the enlargement of the crofters' holdings that is so limited. While the Commission continues to exist, either the landlord or the tenant may make an application, and that will be an application to which this subsection refers, and in every application the Commissioners may deal with arrears of rent due. When an application is disposed of, the determination of the Commissioners is to continue in force for seven years; but there may be renewals by the one party or the other, and in every application there is a power to deal with arrears. Now, "arrears of rent" is an expression with which we are quite familiar. We are not so familiar with the notion of restraining landlords from suing for rent due to them, or from using the diligence which the law allows to recover payment out of their tenants' property. But the argument upon the one side here is that this provision that the Commissioners may deal with the matter of arrears signifies that the landlord is to be deprived of his remedies for recovery, and that during a period of years. The argument upon the other side is that the arrears here dealt with are those which the tenant's circumstances have not enabled him to pay voluntarily, or enabled the landlord to recover after using all his ordinary legal remedies. That is the familiar idea of arrears, and the Commissioners, the argument is, are authorised to remit these or to reduce them, being satisfied that it is really the tenant's poverty and want of property, whether in money or goods, that have left these as arrears, so that the arrears may not be a burden upon his prosperity. That is the argument upon the other side, and it is the argument which I prefer. I cannot read this provision as being inconsistent with the landlord having the right to bring an action to ascertain what arrears are due to him, if any, and to get an order by the Court upon the party indebted to pay them. The plea before us goes to this, that the action is incompetent—that the Sheriff cannot even inquire what is the amount of rent due under the contract between the landlord and tenant; that he cannot inquire whether any part of this rent has been paid, or whether there is a balance unpaid. Now, that approaches the extravagant—indeed, encroaches upon it, and is extravagant. Therefore the action is competent, and the decree is competent, which ascertains that a sum in name of rent is due to the landlord, and orders the tenant to pay it.

I may add that I see no reason at present—but this is matter merely of opinion, the question not being properly before us—why the decree should not be enforced, as the common law of the land allows, against the tenant's property. It cannot be enforced if he has no property, if he has property why it should not be enforced does not occur to me. It was stated that it might be enforced cruelly, so as to ruin him. But the common law right of all creditors may be enforced cruelly and in an ill-hearted manner. It is the common law right of using diligence, and if the crofter has cattle or money, is the landlord to be precluded for an indefinite period from attaching one or other of these for the rent legally due him? I can see no reason for that. I think the common law principle which I have stated is sufficient for the determination of this matter also. Neither by express terms nor by necessary implication does the statute take away the landlord's common law right of using his decree in the ordinary way. I think, therefore, this and all similar actions are quite competent, and I think that

this, or any similar decree which may be pronounced, is enforceable against the tenant's goods and money, like any ordinary decree for payment of a debt.

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LORD CRAIGHILL.—I am of the same opinion. I confess that at one time I felt some difficulty in regard to the interpretation of the 5th subsection of section 6, but in the end any difficulty I have experienced has been displaced. It is admitted that there is no express provision in the Act by which the rights which a landlord has at common law in regard to the recovery of arrears of rent have been taken away or restrained. If such a provision exists at all, it exists by implication merely, and the implication must certainly be very clear before we can give effect to such a construction as that for which the defender contends. According to the defender's reading of the Act the landlord is not to be entitled to put himself abreast of the tenant's other creditors until after the determination of the Crofters Commissioners has been pronounced. That would be quite an exceptional hardship to which to subject the landlord. He would be deprived of the power which all the other creditors of his tenant enjoy of doing what he could to protect his own interests by securing the property of his tenant. Of course, if there had been a positive enactment to this effect we must have given effect to it. But there is no such positive enactment, and I think it is the fair inference from the 5th subsection, read along with the previous subsection, that the landlord may sue for his rent for the whole period, even although an application has been presented to the Crofters Commissioners. No doubt the tenant is protected, and very properly protected, according to the view of those by whom the Act was framed, from suffering any hardship in consequence of the landlord's proceedings. It is at least a question whether the old contract rent will be found to be more than the fair rent, and after an application has been presented, while there is nothing to prevent the landlord from suing for his contract rent between the date of the application and the date of the determination of the Commissioners, still the tenant is to be entitled to recover what he may have overpaid according to the rent fixed by the Commissioners when the next rent becomes due to the landlord. Then provision is made for the case of a removing. An action of removing is not made incompetent—in itself it remains competent, but on an application being made to the Commissioners they are empowered to consider whether the remedy shall be followed up, and if they think it ought not to be followed up, they are to fix the terms on which the sist asked for by the tenant is to be granted. It is important to observe that the sist is not to be granted unconditionally. Then we come to the last case in which, in the proceedings on an application to them, the Crofters Commissioners are to "take an account of the amount of arrears of rent due or to become due before the application is finally determined." Now, there is an alternative here, but I think that the true reading is not that there are to be two inquiries,—one as at the date when the application is presented, and the other when the Commissioners come to consider the application,—but that there is to be one inquiry only. The thing, and the one thing to which the consideration of the Commissioners is to be given, is the amount of arrears due when the application is disposed of, although the alternative is not without importance. The tenant may be able to pay the arrears, and if he can pay it is the intention of the statute, as I read it, that he ought to pay. When they take up the application the Commissioners have a duty to perform; they have to inquire into the whole circumstances of the case, and decide

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whether the whole or only a part of the arrears then existing shall be paid, and whether the payment is to be by instalments, and at what dates payment is to be made. That is the protection which the statute gives to the tenant, and I think it is a protection against any evil consequences which may happen to the tenant from the course pursued by his landlord. The Commissioners look back to the time at which the application was presented to see what the tenant has paid in the interval. They see that all the payments have been on the scale of the old rent, and taking that among other circumstances into account they settle what the tenant ought to pay for the future. Here there is a debt due by the tenant, and he ought to pay it if he can. If he has the means and does not pay it, then I think diligence ought to be used against him for the recovery of the debt.

LORD RUTHERFURD CLARK.—I have had some difficulty in this case, and I confess my difficulty has not been entirely removed. At the same time I think I see my way clearly enough to be able to concur with your Lordships in the judgment you are now about to pronounce. It is matter of concession on both sides that the right to raise an action and use diligence for the recovery of rent is not taken away from the landlord in express terms, but it is said that it is taken away by necessary implication, because the existence of that right or the use of that right would frustrate and render inoperative the 5th subdivision of the 6th section of the Act. Now, it was pleaded that in consequence of that statute the rent ceased to exist as a debt, because the landlord was only entitled to recover of that rent so much as the Commissioners thought it proper or right that the tenant should pay. Up to that point I cannot agree with the argument of the appellant. I do not think that the statute has any effect on the legal quality of the landlord's right, and therefore the rent remains, necessarily remains, a debt due under the lease by the tenant to the landlord. At common law, therefore, it is plain enough that he can raise an action for the purpose of obtaining decree for that debt, and I do not think that in pronouncing a decree for that debt we are doing anything which frustrates or renders inoperative the 5th subdivision of section 6. So far, therefore, I am clear enough that your Lordships are right in affirming the interlocutor of the Sheriff which is now under review. But a further question remains behind—namely, to what use that decree may be put without frustrating or rendering inoperative the section of the clause of the statute to which I have referred, and on that question I prefer to say nothing, because it may possibly, though I hope it may not, come again before us. I am concerned with this question, and with this question alone—whether the decree shall stand? For the reasons which I have stated, I think the decree ought to stand.

THE COURT pronounced this interlocutor:—"Having heard counsel for the parties on the appeal, dismiss the same, and affirm the judgment of the Sheriff appealed against: Find the pursuer entitled to expenses, and remit to the Auditor to tax the same and to report: Of new ordain the defender to make payment to the pursuer of the sum of £30, 17s. 6d., being the sum of rents and interest thereon concluded for, and also the sum of £1 of expenses found due by the Sheriff, and decern."

PROVOST, MAGISTRATES, AND TOWN-COUNCILLORS OF DUNDEE, Pursuers
(Respondents).—*D.-F. Mackintosh—Gloag—Hay.*

JOHN MITCHELL KEILLER, Defender (Appellant).—*Pearson—
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JOHN MITCHELL KEILLER, Pursuer (Reclaiming).—*Pearson—
C. J. Guthrie—Macfarlane.*

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PROVOST, MAGISTRATES, AND TOWN-COUNCILLORS OF DUNDEE, Defenders
(Respondents).—*D.-F. Mackintosh—Gloag—Hay.*

THE LORD ADVOCATE (as representing Her Majesty's Commissioners of
Woods and Forests) AND OTHERS, Defenders.

MRS JANE SCOTT, Pursuer (Reclaiming).—*Pearson—C. J. Guthrie—
Macfarlane.*

PROVOST, MAGISTRATES, AND TOWN-COUNCILLORS OF DUNDEE, Defenders
(Respondents).—*D.-F. Mackintosh—Gloag—Hay.*

Property—Burgh—Foreshore—Title of Magistrates to resist declarator of property of foreshore.—In an action raised in 1885 against the magistrates of a burgh (and also against the Crown, which did not defend) by the proprietor of lands within the burgh for declarator of property in the foreshore *ex adverso* of these lands, the pursuer produced as his immediate title a disposition from a subject to the foreshore dated in 1884. *Held* (1) that as the inhabitants of the burgh had been in use from time immemorial to resort to the foreshore for purposes of recreation, that was sufficient to give the magistrates a title to challenge the disposition of 1884; and (2) that as the prior titles produced shewed that the disposition of 1884 flowed *a non habente potestatem*, the defenders fell to be assoilzied.

Property—Burgh—Foreshore—Jus spatiiandi—Act to extend the royalty of Dundee, 1831 (1 and 2 Will. IV. cap. xlv.)—*Held* that the above Act did not transfer the property of the foreshore *ex adverso* of the extended royalty of the burgh of Dundee from the Crown to the Magistrates as representing the burgh.

A proprietor of land within the extended royalty of the burgh of Dundee held a conveyance from the Crown, dated in 1853, "of all right, title, and interest of Her Majesty, her heirs and successors," in a portion of the foreshore *ex adverso* of his property, lying between high-water mark and a line of railway formed along the foreshore. *Held*, in a declarator at his instance against the Magistrates (1) that the pursuer had a right of property in this piece of foreshore; but (2) that, as the inhabitants of Dundee had used it from time immemorial for purposes of recreation, he had no right to exclude them from resorting thither for such purposes.

Process—Interlocutor—Appeal—Findings in fact—Appeal from Sheriff Court of possessory judgment and declarator in Court of Session.—A possessory judgment granting interdict was pronounced by a Sheriff after a proof. Pending an appeal against this judgment the defender raised a declarator of property, in which he was ultimately unsuccessful. The pursuer having stated that in the event of an appeal to the House of Lords his case might be prejudiced by findings of fact in the interdict process, the Court pronounced an interlocutor dismissing the appeal in respect of the judgment in the declarator.

In 1846-7 the Dundee, Perth, and Aberdeen Junction Railway Com-
pany (afterwards incorporated with the Caledonian Railway Company),
under authority of the Act 8 and 9 Vict. c. clvii. (1845), constructed a rail-
way from Dundee to Perth along the north bank of the River Tay. After
leaving Dundee the railway passed to the south of an open piece of recrea-
tion ground called Magdalen Green, over which the burgh had vindicated
certain rights of recreation (*Magistrates of Dundee v. Hunter*, June 4, 1858,
20 D. 1067), and was then carried on an embankment below high-water mark

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for a considerable distance up the river, *i.e.*, westward. The foreshore to the north of this embankment, although thus shut off from the rest of the foreshore, continued subject to the ebb and flow of the tide, at first by means of culverts, and afterwards (when the culverts had become filled up) by percolation through the embankment. A line of villa properties extended along the foreshore for some distance to the west of Magdalen Green, and, among others, the properties of Binrock and Binns, which were co-terminous, Binrock lying immediately to the west of Binns. By 1884 the boundary walls of Binrock and of the properties to the west thereof had been extended so as to include the portions of foreshore (down to the railway embankment) severally *ex adverso* of each property, thereby shutting off all public access to these portions of the foreshore. The corresponding portions of foreshore *ex adverso* of Binns, and the properties to the east of Binns, were not included within the boundary walls of these properties, but remained open to access by the public from Magdalen Green. The total extent of foreshore lying between the east wall of Binrock on the west and Magdalen Green on the east, and bounded on the north by the walls of Binns and the villas to the east thereof, and on the south by the railway embankment, was about three acres.

In 1884 Mr J. M. Keiller, who had shortly before bought the property of Binrock, acquired also that of Binns, and began to enclose the foreshore *ex adverso* of Binns down to the line of the railway embankment. The Magistrates and Town-Council of Dundee thereupon applied to the Sheriff of Forfarshire for interdict, alleging that the inhabitants of Dundee had, in virtue of their charter and otherwise, a right of way over this foreshore, and also rights of recreation, such as bathing and walking, or, at all events, that the uses they had had of the foreshore were such as to entitle them to a possessory judgment. On 17th October 1884 the Sheriff-substitute (Cheyne), after a proof, found the pursuers entitled to a possessory judgment in respect of the uses which he found that the public had had of the foreshore for purposes of recreation (the alleged right of way having been abandoned), and granted interdict. Keiller appealed to the Court of Session, but the Court, on 22d January 1885, superseded consideration *in hoc statu*, to allow him, if so advised, to bring a declarator.

Keiller accordingly, on 18th May 1885, brought an action against the Provost, Magistrates, and Town-Councillors of Dundee (who alone defended), the Caledonian Railway Company, William Crockatt, merchant in Glasgow (whose interest in the subjects is explained in the epitome of the proof, *infra*), and the Lord Advocate, on behalf of the Commissioners of Woods and Forests, concluding for declarator "that the subjects following, namely, All and Whole that piece of ground bounded as follows, viz :— By the line, formerly of the Dundee, Perth, and Aberdeen Junction Railway Company, now of the Caledonian Railway Company, on the south, . . . which subjects above described comprehend (firstly)"—(Then followed a description of the grounds of Binns down to high-water mark, as to which there was no dispute)—"And (secondly) that area or piece of ground, extending to 2 roods and 30 poles imperial measure or thereby, lying between the said subjects 'firstly' above described and the line, formerly of the Dundee and Perth and Aberdeen Railway Junction Company, now of the Caledonian Railway Company, which area or piece of ground formerly formed part of the shore or *alveus* of the River Tay, but has since the formation of the said line been reclaimed, and now forms part of one common subject along with said subjects 'firstly' above described,—pertain heritably in property and belong exclusively to the pursuer, and that the defenders have no right or title in or to the said subjects, or any part thereof, or to exercise any right

of property therein, and that the pursuer is entitled to enclose the same, No. 43.
 or any part thereof, at his pleasure"; and also for declarator "that neither
 the defenders, nor any of them, nor the inhabitants of the burgh of Dun- Dec. 7, 1886.
 dee, nor the public, have any right of way or of recreation, or bathing, or Keiller v.
 any other right, servitude, or privilege in, to, or over the said subjects, or Magistrates
 any part thereof"; and for interdict against the Provost, Magistrates, and of Dundee.
 Town-Council "obstructing or interfering with the pursuer in enclosing Scott v.
 the said subjects, or any part thereof, or in exercising his rights of pro- Magistrates
 perty therein." of Dundee.

The pursuer produced as his immediate title a disposition, dated May 1884, by the trustees of Hunter of Blackness, by which they conveyed to him, in express terms, (1) the piece of ground first described in the summons, and (2) that secondly described, and it was not disputed that this was an effectual conveyance, not only of the former, but of the latter piece of ground if Hunter's trustees were themselves *in titulo* to grant such a conveyance. On that point the pursuer made the following averments, and produced the titles referred to therein:—

(Cond. 4) "The pursuer's said property, including the foreshore of the River Tay *ex adverso* thereof, was and is part of the barony of Blackness. The subjects first described are part of 'All and Whole 7 acres and 5 falls of ground or thereby, together with the houses built thereon, being part of the lands and estate of Blackness, and commonly known by the name of the West Binns, . . . bounded . . . by the sea-flood on the south, . . . ' which were feued by David Hunter, Esq., of Blackness, to George M'Lagan, farmer and gardener at West Binns, near Dundee, by feu-charter dated 21st July 1807, on which the said George M'Lagan was infeft, conform," &c. (Cond. 5) "By virtue of the original crown grant, and of the immemorial possession which followed thereon, the rights of the proprietor of the lands and barony of Blackness extended to, and included the right of property in, the foreshore of the River Tay *ex adverso* of the estate, and the feu of the said subjects to the said George M'Lagan extended to, and included the right of property in, the foreshore *ex adverso* of the feu." (Cond. 6) "By missives of sale, dated 2d September 1847, the said subjects were sold by the said George M'Lagan to William Scott, on behalf of the Dundee and Perth and Aberdeen Railway Junction Company, who had statutory powers for the construction of the said line of railway between Dundee and Perth." (Cond. 7) "In 1854 the eastmost part or division of the said subjects, extending to 2 acres 3 roods and 15 poles imperial measure or thereby (being the subjects first described in the conclusions of the summons), was sold to the said David Hunter of Blackness by Charles M'Lagan, mason (grandson and heir-at-law of the said George M'Lagan), with consent of the said William Scott and the said railway company, conform to disposition by Charles M'Lagan, with consents therein mentioned, to and favour of the said David Hunter, dated 24th October and 22d November 1854. The said David Hunter was infeft therein, conform," &c. "Besides the said subjects, extending to 2 acres 3 roods and 15 poles, there was also conveyed by the said disposition 'my, the said Charles M'Lagan's, and our, the said The Dundee and Perth and Aberdeen Railway Junction Company's, rights to the shore or *alveus* of the River Tay *ex adverso* of said ground above disposed, extending south to the line of the Dundee and Perth and Aberdeen Railway Junction, and measuring 2 roods and 30 poles or thereby,' being the piece of ground second described in the conclusions of the summons. The pursuer is thus, by virtue of his titles, proprietor of the subjects described in the conclusions."

The Crown titles of Blackness, so far as produced, did not expressly include the foreshore in question, and the defenders denied that it formed part

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of the barony of Blackness, averring (what the pursuer did not dispute) that the earliest express description of it in the titles was that in the disposition of 1854; and they further made the following averments in their statement of facts :—

(1) By various ancient royal charters, and by Acts of Parliament specified, the defenders hold the burgh of Dundee and liberties thereof, with the salmon-fishings and other fishings on the north side of the River Tay, and, *inter alia*, *ex adverso* of the lands of Blackness, including the subjects in dispute. "They have, in virtue of said titles, from time immemorial appropriated and possessed the *solum* or shore of the river gained from the sea, and a large portion of the southern part of the town has been erected on *solum* ground so acquired. (2) By Act of Parliament 1 and 2 Will IV. cap. xlv. (23d August 1831), the territories of the royal burgh of Dundee were largely extended towards the western boundary, and by this extension the lands of Blackness opposite the river were included in the royalty.*

The defenders have since exercised various rights of property on part of the foreshore within the extended royalty. (3) From time imme-

* The following were the provisions of the Act 1 and 2 Will. IV. cap. xlv. founded on :—

Sec. 1.—"Whereas the town of Dundee has of late years greatly increased in size and population, and large suburbs, in which a great extent of trade and manufactures is carried on and great numbers of persons reside, have been formed beyond the boundaries of the ancient burgh, and beyond the territory over which the jurisdictions, civil and criminal, of the magistrates of the said ancient burgh extend: And whereas great advantage would arise, both to the ancient burgh itself and also to the suburbs and adjacent territory, if the whole were united and incorporated into one burgh, with proper regulations for the election of the magistrates and council thereof in place of those now in observance under the present sett of the ancient burgh, which has been found by experience to be the source of many questions and difficulties, and to be very defective and imperfect in its provisions; but the same cannot be accomplished without the aid and authority of Parliament: May it therefore please your Majesty that it may be enacted, and be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That, from and after the passing of this Act, all the territory situated beyond the boundaries of the ancient royalty of the said burgh, and locally comprehended within the limits following, . . . " southward along a march described "down to the River Tay and thence along the margin of the river eastward to" a point described, "shall be added and annexed to the territory composing the ancient royalty of the said burgh; and the said territory composing the ancient royalty of the said burgh, and the additional territory comprehended within the limits before described so added and annexed as aforesaid, shall be and the same are hereby united and incorporated into one royal burgh, under the name of the Royal Burgh of Dundee; and the burgh so enlarged shall be in the place of the ancient burgh, and shall enjoy in every respect the same rights and privileges as the ancient burgh now enjoys or is entitled to enjoy."

Sec. 3.—"Provided also, and be it further enacted, that the feudal tenure or tenures by which the respective parts and portions of the territory of the said burgh, as enlarged, are at present held shall not be altered by the operation of this Act, and all seisins, renunciations, and reversions of lands, and all other writs relating to heritage lying within any part of the said territory shall be taken, expedite, and registered in the same form and manner as if the present Act had not been passed."

Sec. 6.—"And be it further enacted that . . . the rights, powers, and privileges of the magistrates and council, acting under the authority of this Act, shall be applied to and extend over the whole of the enlarged burgh, including the ancient burgh, equally and in all respects to as full extent and effect as those

morial the inhabitants and public of Dundee have used the river and fore-
 shore opposite the said lands of Binns of Blackness, without objection, for
 purposes of passage, bathing, and recreation. The said foreshore has been
 a public place beyond the memory of man, and has been used and enjoyed
 by the public for time immemorial for the purposes of walking, bathing, and
 recreation. It adjoins and is entered from the streets of the burgh and the
 Magdalen Green, also a public place, and is within the burgh and under the
 jurisdiction of the municipal authorities." The defenders also founded on
 negotiations between the town and the railway company in 1845, which
 quoted in the provision of the railway Act quoted below.*

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The pursuer pleaded;—(1) In virtue of the titles and of the possession
 which has followed thereon the pursuer is proprietor of the subjects in
 question, including the whole ground southward to the railway company's
 property. (2) There being no right of way, and no right, servitude, or
 privilege in the defenders or the inhabitants of Dundee or the public in
 or over the pursuer's property, or any part thereof, he is entitled to have
 decree of declarator and interdict as concluded for.

The defenders pleaded;—(1) The averments of the pursuer are not
 relevant to support the conclusions of the summons. (2) The pursuer
 having no right or title to the foreshore of the River Tay wherever the sea
 ebbs and flows, or to reclaim or enclose the same to the exclusion of the
 defenders and the inhabitants of Dundee, the defenders are entitled to
 absolvitor. (3) The defenders have by their charters and Acts of Parlia-
 ment, and possession and use following thereon, a sufficient title and
 interest to oppose the conclusions of the summons. (4) The defenders
 and the inhabitants of Dundee having from time immemorial used the
 said foreshore for the purposes specified, the pursuer has no right to the
 interdict craved in the summons.

A proof was allowed, at which the foregoing titles were put in. The
 parole evidence was to the following effect:—The pursuer proved no acts
 of possession of the ground in question, either by himself or his authors.
 The defenders, on the other hand, proved that, like the foreshore generally
 in the neighbourhood of Dundee, the portion enclosed by the railway had
 been from time immemorial used by the inhabitants of the town as a place
 of recreation—for walking, being practically a continuation of Magdalen
 Green, and also for bathing—though the fair result of the evidence was
 that it had latterly become a somewhat undesirable place for such pur-
 poses, sewage and rubbish of all sorts having collected in it. It still how-
 ever, according to some of the defenders' witnesses, continued to be con-
 siderably used for bathing at high tide, though mainly by children. Mr
 Hay, the town-clerk, spoke to the great want of places of public recrea-

of the magistrates and council, ordinary or extraordinary, of the ancient burgh
 extended over the territory thereof: And the magistrates and council acting
 under the authority of this Act shall, under the exception hereinafter mentioned,
 respectively have the same jurisdiction, powers, and authorities over the enlarged
 territory as are at present or might have been enjoyed or exercised by the magis-
 trates and council, ordinary and extraordinary, of the ancient burgh within the
 same, whether at common law or under any Act or Acts of Parliament, local
 or general, royal charters, or otherwise."

* The Railway Act of 1845 (8 and 9 Vict. cap. clvii.), sec. 26, provided that
 the railway company should be bound to construct the embankment "so as to
 admit of the water ebbing and flowing every tide within the space to be left by
 the company to the north of the line of the said railway, and for that purpose
 to leave such openings in the said embankment as shall be agreed upon between
 the company and the Magistrates and Town-Council of Dundee," and failing
 such agreement, as should be determined by the Sheriff.

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tion near Dundee, and stated also that the ground here in question was a much safer bathing place than that outside the embankment, where the shore was steep and the current strong. There was a public bathing pond. The wall of the pursuer's other property of Binrock made it impossible to pass westward from the ground in question without crossing or going along the railway, and there was no other direction in which a right of way could exist. Mr Hay also gave evidence, and produced documents in corroboration of his evidence, to shew that the magistrates had treated the foreshore *ex adverso* of the old royalty as burgh property. Mr Hay deponed that he had, from the burgh records, traced the history of (with a single exception) every portion of this foreshore, and had found that it had either been appropriated by the magistrates to public purposes, *e.g.*, streets, or had been disposed by the magistrates to private persons, who had reclaimed what they thus acquired and had built upon it. Their holding was burgage. In one case the Board of Customs, took a disposition from the magistrates of a piece of this foreshore. There was little similar evidence of the exercise of proprietary rights by the magistrates over the foreshore *ex adverso* of the royalty as extended under the Act of 1831 (to which the present question related), but the Dundee Harbour Trustees took conveyances from the magistrates of subjects which included foreshore partly *ex adverso* of the old royalty and partly of the new; the North British Railway did the same for the purposes of their Tay Bridge Line; and in 1868 the Caledonian Company paid the magistrates £4000 for a confirmation of the crown grant of the foreshore on which their line was built. This also was partly within and partly without the old royalty. The railway company had paid the Crown £1500 for this grant, and it included the whole rights of the Crown in the foreshore between Dundee and Perth, so far as required by the railway company. The Crown had, from about 1853 onwards, made grants of its rights in the portions of foreshore *ex adverso* of several villas adjoining the pursuer's property of Binns, including that immediately adjoining on the east belonging to Mrs Scott, as explained in the action to be narrated *infra*. The defender Crockatt was a predecessor of the pursuer in the property of Binns, which he held on a personal title about the year 1851. He had entered into negotiations with the Crown for a grant similar to those just mentioned, but these negotiations were allowed to lapse. They were resumed by the pursuer, but the Crown authorities when they heard of the pursuer's dispute with the burgh refused to go on. The draft conveyance signed by the pursuer and Crockatt when tendered in evidence was rejected by the Lord Ordinary.

On 2d February 1886 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the pursuer has not established a title to the foreshore, being the subjects second described in the conclusions of the action: Finds that the defenders do not dispute, and have not disputed, the pursuer's title to the subjects first therein described: Therefore assoilzies the defenders from the conclusions of the action, so far as applicable to the subjects second described, and decerns: *Quoad ultra* dismisses the action, and decerns: Finds the defenders entitled to expenses: Allows an account thereof to be given in, and remits to the Auditor to tax the same and to report."*

* "OPINION.—The pursuer, Mr Keiller, has instituted this action of declarator in consequence of having been interdicted at the suit of the Magistrates of Dundee from enclosing the portion of the shore of the Tay which is situated *ex adverso* of his villa at Dundee. The subject in dispute is insignificant in extent, and I should imagine of no value to anyone except the pursuer. Its enclosure would not stop the way to any place, because the proprietors lying to

The pursuer reclaimed, but on the case being put out for hearing, stated that a similar action of declarator at the instance of Mrs Scott, his

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the west,—that is, in the direction leading from the town,—have already enclosed their portions from high-water mark to the embankment of the railway, which skirts the shore, and have thus completely barred all passage to the west. The subject in dispute, although called the foreshore, has no frontage to the sea, because the railway embankment lies between it and the estuary. While, in a sense, it is land over which the tide ebbs and flows, it appears that the tidal waters get access to and from it only by percolation through the stones of the railway embankment; and between this embankment and mean-tide there is a deposit of several feet of sewage and other mud, which is doubtless left by the receding tide, and accumulates there in consequence of its flow being obstructed by the railway embankment. Between mean-tide and high-water there is a narrow belt of shingle or gravel over which the public have been in use to walk; but, as I interpret the evidence, this particular corner of the seashore is much less in request as a place of public recreation since it has been hemmed in between the embankment and the walls of the adjacent property in the manner described. One of the witnesses described it as a ‘dirty hole’; and no one speaking to the property in its present condition has said anything to the contrary. I think that the pursuer’s wish to enclose and embank this ugly corner is very natural, seeing that the Magistrates of Dundee, who claim a right in it, have utterly neglected it, and have allowed it to become a receptacle for rubbish and a place offensive to the eye and senses. I should therefore very willingly have given decree in favour of the pursuer if I could have found any legal ground for a decision in his favour, because it sometimes happens that zeal for public rights is in excess of the occasion for its display, and I am inclined to think it is so on this occasion.

“I am, however, of opinion, that the pursuer is not entitled to the declaratory decree which he is seeking, because the titles which he produces give him no right to the foreshore.

“The original grant, which is dated 21st July 1807, describes the property as bounded ‘by the sea-flood on the south,’ and this bounding characteristic is repeated in the subsequent investitures. The disposition in favour of the pursuer also contains a conveyance of 2 roods and 30 poles (being the ground in dispute), which, it is said, formerly was part of the shore or *alveus* of the Tay, but has since been reclaimed. The deed is dated May 1884, and unless the granters of the deed had a right to the 2 roods and 30 poles, their insertion of the subject in the title-deed is of no value whatever. Evidently they had no such right. They are the trustees of Mr Hunter of Blackness, who feued out the property in 1807, and afterwards reacquired it. But Mr Hunter’s crown title does not give him the foreshore, and it is as clear as possible on the evidence that neither he nor his feuar have acquired it by prescriptive possession, because the possession or use (such use as the seashore admits of) has all along been on the part of the public. There is evidence that the pursuer has sought a title from the Crown. But the officers of the Crown, on it being brought to their knowledge that the town claimed a right in the seashore, very properly declined to proceed further until the question should be settled, and the draft conveyance was rejected when tendered in evidence. It will thus be seen that I look upon this declaratory action as the assertion of a heritable right by a person who has not a title to the property which he claims.

“I am not satisfied that the defenders (the Magistrates of Dundee) have a title to this bit of seashore. Their case stands thus: The ancient royalty of Dundee is vested in the Magistrates by charters dated before the Union, which, besides containing express grants of the harbour and pertinents, contain expressions importing a concession of liberties and privileges of a wide and undefined character over the waters of Tay. Under those charters the Magistrates have, without dispute, prescribed or acquired the property of the foreshore *ex adverso* of the ancient royalty, and have formed a part of it into a public promenade.

“By an Act of Parliament of the present reign the royalty was extended;

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immediate neighbour on the east, was pending in the Outer-House, and moved the Court to delay the hearing in his action until Mrs Scott's action should have been brought up by a reclaiming note. The Court granted the motion.

Mrs Scott's action, which was raised on 18th June 1885, had conclusions with reference to her property above high-water mark (as to which there was no dispute), and as to the foreshore *ex adverso* of that property, similar, *mutatis mutandis*, to those of Keiller's action, but it was directed against the corporation of Dundee only.

Like Keiller she averred that her property, including the foreshore, was part of the barony of Blackness; that it had originally been feued out by Hunter of Blackness in 1785 to William Chalmers, and that "by virtue of the original crown grant and of the immemorial possession which followed thereon, the rights of the proprietor of the said lands and barony extended to and included the right of property in the foreshore of the river Tay *ex adverso* of the estate; and the feu of the said subjects to the said William Chalmers extended to and included the right of property in the foreshore *ex adverso* of the said subjects." She also made the following specific averments of possession,—“The pursuer's said husband had acquired all the said subjects in 1869, and in the course of that year he enclosed part of the said subjects second described [*i.e.*, the ground in dispute], by building a substantial retaining wall, which still exists. The part of the said subjects so enclosed on the south, east, and west parts was twenty-three feet in width or thereby, and this was thereby thrown into the subjects first above described, and has ever since been possessed as part thereof. The tide at high water of ordinary spring tides rises about eighteen inches on the said retaining wall, and before the wall was

and with respect to the extended royalty the Act of Parliament makes a concession of the like liberties and privileges which had previously been given in connection with the ancient royalty. The defenders say that this is to be interpreted as a title to the foreshore.

“If I were considering the argument founded on this title in a question with the Crown, I should most probably have to consider along with it certain adverse arguments which would be pleaded with more effect by the Crown than by the present competitor. It would be said that the acquisition of the foreshore of the ancient royalty was either by prescription, or by usage explanatory of the meaning of an ancient grant. Neither of these grounds would apply to the Act of Parliament extending the royalty. Nevertheless, I am of opinion that a burgh title, whether constituted by charter or by Act of Parliament, is a title *ejusdem generis* with a barony title. It is a sort of barony or regality, flowing from the Crown, and as such is a good title on which to prescribe a right to foreshore. It is in evidence that the burgesses have been using the foreshore of the extended royalty exactly as they have used the other foreshores within their domain; and while I am not in a position to decide that they have acquired it, because there is no declarator at the instance of the burgh, I am of opinion that the Magistrates have produced something which they may reasonably represent to be a title, and which, whether it is or is not a valid title, is at least sufficient to entitle them to be heard on this question.

“The case is indeed reduced to this narrow issue. The pursuer's action for want of a title must fail, unless he can shew that the defenders have no title to contest his conclusions. There are cases, no doubt, where the pursuer of a declaratory action may prevail in respect of the mere want of interest on the part of the defender. But in this case, so far as I see, the defenders have the better title of the two. They have their Act of Parliament and the possession of the seashore. The pursuer has nothing. I am therefore of opinion that the pursuer has failed in his case, and that the defenders are entitled to be assolized.”

built it flowed over the said space of twenty-three feet or thereby. A door was left in the wall when the same was built, which has been used exclusively by the pursuer and her predecessors for access to and from their remaining subjects. There is also a sewer led from the house and offices to the said wall which carries all the pursuer's domestic sewage, and discharges it through the wall upon the subjects second described." No. 43.
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Chalmers' titles had a "sea-flood" boundary on the south.

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Mrs Scott further founded—and in this her case was distinguished from that of Keiller—on an express crown grant of the foreshore in question, as contained in a disposition by the Commissioners of Woods and Forests, in favour of one Lithgow, a predecessor of Mrs Scott in the subjects originally feued out to Chalmers. This disposition, which was dated 5th November 1852, and was recorded 9th February 1853, bore that "I, the Right Honourable Thomas Francis Kennedy," the Commissioner having charge of the Crown Revenues in Scotland, "in consideration of the sum of £12, 19s. paid" to the said Commissioners by Lithgow, "have sold, alienated, and disposed, as I by these presents, on behalf of Her Majesty, sell, alienate, and dispose to and in favour" of Lithgow, "All and Singular the right, title, and interest of Her Majesty, and her heirs and successors, of, in, to, and over that piece of ground, shore, or alveus of the River Tay, now either wholly or partially under water, or as the same may be embanked or filled up, containing 74 poles or thereby, according to a measurement furnished by the said" Lithgow, "and extending from the ancient high-water mark *ex adverso* of the present property of the said" Lithgow "southwards to the north limit of the Dundee and Perth Railway Company's embankment on the south, and bounded as follows, viz., on the north by the said" Lithgow's "present property. . . . To be holden and to hold the whole space hereby disposed by the said" Lithgow "of Her Majesty and her successors in free blench, farm, fee, and heritage for ever: Giving therefor a penny Scots money at Whitsunday yearly if asked only."

The pursuer's immediate title to the whole subjects described in the summons was a conveyance to her by her deceased husband's trustees, dated in 1881, and duly recorded, which proceeded on a conveyance, dated and recorded in 1869, to her husband by Lithgow of, first, the whole subjects above high-water mark claimed by her, and secondly, "All and Whole that piece of ground, shore, or alveus of the River Tay, now either wholly or partially under water, or as the same may be embanked or filled up, containing 74 poles or thereby, according to a measurement." Then followed the description and boundaries as in the crown grant,— "Together with . . . all and singular the right, title, and interest of Her Majesty, and her heirs and successors, or of me, as now having right under conveyance from Her Majesty of, in, to, and over the said piece of ground, shore, or alveus of the River Tay hereinbefore disposed."

The pursuer's pleas were in the same terms as Keiller's.

The defenders denied the alleged possession, and otherwise made generally the same defence as in Keiller's case.

In addition to pleas in the same terms as those stated by them in Keiller's action, the defenders pleaded;—(5) The alleged grant by the Commissioners of Woods and Forests does not affect, and, *separatim*, is incompetent to prejudice or affect the rights and uses of the public and of the inhabitants of Dundee over the said foreshore.

A proof was allowed. The evidence was in substance to the same effect as that led in Keiller's case, but in addition the pursuer substantially instructed her averments of possession of the foreshore.

On 2d June 1886 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the pursuer has not established her averments to

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the effect that the defenders and the inhabitants of Dundee have not a right of way, or of recreation, or bathing in or over the subjects second described: Assolizies the defenders from the last declaratory conclusion of the action, and from the conclusion for interdict, and decerns: *Quoad ultra*, finds it unnecessary to proceed further in the cause: Finds the defenders entitled to expenses.*

* "OPINION.—This case, like the previous action, *Keiller against The Magistrates of Dundee*, relates to the property and use of the foreshore *ex adverso* of the pursuer's residence, which is within the extended royalty of Dundee. I understand that the present case is to be considered by the Inner-House along with the case of *Keiller*, which is at present depending there on a reclaiming note against my interlocutor. It is therefore unnecessary that I should enter on a review of the evidence, which is substantially to the same effect as the evidence adduced in the case of *Keiller*.

"The chief distinction between the cases is that Mrs Scott, the present pursuer, is in a position to found upon a crown title to the piece of foreshore in dispute. Her title is a disposition by the Commissioners of Woods, Forests, and Land Revenues, dated 5th November 1852, and recorded in the Register of Sasines 9th February 1853. In the case of *Keiller* I held that the pursuer had no title, real or formal, to the foreshore in dispute, and that he was not *in titulo* to challenge the use of the shore by the public or the community of Dundee. In the present case the pursuer has a formal title flowing from the Crown. But prescriptive possession has not followed upon it, and it is for consideration whether the defenders, the Magistrates of Dundee, by prior grant followed by possession, have not acquired a right to the use of the shore within the royalty, which is inconsistent with the concession of the unqualified right claimed by the pursuer.

"In the former action I expressed the opinion that the community of Dundee, by their charters and possession, had acquired the right to all the foreshore *ex adverso* of the ancient royalty to which individual burgesses could not establish a patrimonial right. I see no reason to alter that opinion. In that case I did not offer a positive opinion on the questions whether a similar right existed in relation to the foreshores opposite the extended royalty, or whether a right less than property had been acquired by the community—I mean the right of using the shore as a place of public recreation for the inhabitants. In the present case it is necessary to consider these questions. The title of the community to the extended royalty is the Act of Parliament (Local and Personal) 1 and 2 William IV. cap. xlv., passed in the year 1831.

"It appears to me that the title acquired by the magistrates and council under this Act of Parliament is essentially an administrative title, and it is not necessary that I should enter on an analysis of its provisions to support this opinion. The royalty was extended because the area occupied by the inhabitants of this flourishing community had extended, and it was desirable that the authority of its magistrates and its governing body should be extended so as to embrace the whole of the actual town. In one respect the extension of the royalty is a title less favourable to the acquisition of foreshore than the crown charters by which the ancient royalty is constituted. The Act of Parliament does not contain a dispositive clause, or words vesting the royalty *modo et forma* in the magistrates and council. The royalty is extended, but only, as I understand, for administrative purposes, and I have difficulty in conceiving how a purely administrative title can be a foundation for the acquisition of a proprietary right in foreshore or waste land within the royalty as extended.

"I think, however, that it is a reasonable construction of the Act of Parliament that it transferred from the Crown to the community the right of administration and use of the shore within the royalty for public purposes, subject to the limitations which attach to the title of the Crown connected with the uses of navigation. It has been held that the title of the Crown to the seashore is an absolute title, and not a mere trust for the public, and it is convenient that it should be so treated, otherwise the Crown would not be able to give a title to railway companies, burghs, or other promoters of works of public utility. But the greater title

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The pursuer reclaimed.

The arguments in the two cases were heard simultaneously, that of Scott being regarded as the leading case.

Argued for the pursuers;—I. Both the pursuers claimed (1) a right of property in the foreshore *ex adverso* of the rest of their respective properties; and (2) that that right of property was not burdened by any servitude or other right in favour of the magistrates, as representing either the community of Dundee or the public generally. Alternatively, they claimed that they were entitled to declarator of property burdened by such rights as the Court might think the defenders had proved.

I *Scott's case*.—(1) This pursuer's claim to the property of the foreshore in question was based on her crown title of 1853, and alternatively on her barony title from Hunter of Blackness. The crown title probably was not in strict feudal form,¹ but it was sufficient to bar any subsequent grant by the Crown. The terms of the Act of 1831, on which the defenders founded, were not habile to convey property. It contained no disposition nor anything that could reasonably be construed to imply a disposition of the foreshore *ex adverso* of the new royalty.² Further, the assent of the Crown to the conveyance of its property in the foreshore had not been expressly given, and that was fatal.³ If the defenders failed on their claim to the property

includes the less, and it is always in the power of the officers of the Crown to allow the foreshore to be used as a place of public resort where the public interest points to this kind of use as the necessary and appropriate use in the locality.

"In the case of *Smith v. The Officers of State*, 8 Dunlop, 718, the title of the Crown was sustained as a good title to support the immemorial use by the public of the Portobello Sands in the vicinity of Edinburgh. Nor is there any instance, so far as I know, of the Crown asserting its right of property to deprive the inhabitants of a populous place of their customary use of the seashore. The extension of harbours may be said to be an exception, but it is one of those exceptions which prove the rule. In such cases, where the seashore has been immemorially used by the inhabitants of a town as a place of public resort, I think it may fairly be held that the Crown has abandoned the shore to the use of the public, retaining only the naked property, and possibly a right to resume for the uses of navigation. This is only applying to the title of the Crown the principle that has been often applied to the case of superiors who are held upon evidence of immemorial use to have dedicated to the use of the public unenclosed commons, links, or waste ground, which the community of feuars have been permitted to appropriate.

"In the present case there is evidence, to my mind clear and conclusive, of the use of the seashore within the extended royalty for the whole period subsequent to the Acts of Parliament—a period considerably exceeding that of the long prescription. The people who have used the shore are the community of Dundee, the grantees under the Act of Parliament. Taking this use into account as explanatory of the grant of the extended royalty, my view is, as I stated in the outset, that the Act of Parliament constitutes a good title of administration, enabling the magistrates and council to maintain and to regulate the use of the seashore by the inhabitants so far as the royalty extends.

"If the Act of Parliament does not confer that right upon the magistrates and council, then I am of opinion that the Crown, while retaining the property, has abandoned the use of the foreshore to the inhabitants of Dundee, and is thus disabled from granting anything more than a naked property to the pursuer, whose title will therefore not prevail against the use which the inhabitants have enjoyed for purposes of health and recreation."

¹ See 3 and 4 Will. IV. cap. 69, sec. 4.

² *Scrabster Harbour Trustees v. Sinclair*, March 19, 1864, 2 Macph. 884, 36 Scot. Jur. 442.

³ *In re Cuckfield Burial Board*, Dec. 14, 1854, L. J. 24 Chanc. 585; Maxwell on Statutes, pp. 161-7.

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they had no title to challenge the pursuer's titles, which *ex facie* carried the property.¹ In point of fact, however, she had had such possession of the foreshore as its circumstances admitted of, and this brought her within the principle of the recent case of *Young*.² The circumstance that the Crown had granted dispositions of this foreshore was also important.³ It was said, however, (2) that the public had the right to use the foreshore here for the purposes of recreation although the pursuer might have the right of property. Now, the foreshore was not in the strict sense a public place,⁴ but even assuming that any member of the public had a right to recreate himself on any portion of the foreshore of the country to which he could legally get access, that was not so much an independent right which the public had or might acquire by prescription, as an accessory of the primary uses of the foreshore, *e.g.*, fishing and navigation, of which the Crown was the guardian for the public. When any piece of foreshore ceased to be available for these primary uses and became private property—and it could not on the authorities be disputed that it might legally become so when the primary uses did not suffer thereby—the accessory rights, so called, disappeared too;⁵ no amount of use could fortify them. That was what had occurred here. Through the construction of the railway embankment this strip of foreshore had ceased to be available for fishing and navigation, and so had ceased in legal effect to be foreshore, and had become the pursuer's private property. The result here corresponded with this legal change of character, for, with the primary uses, the secondary had almost entirely disappeared as matter of fact. Some bathing was still carried on, but it was almost entirely confined to children, and people also continued to walk over this piece of ground, but rather in exercise of a supposed right of way, which was now given up, than because of the pleasure the place itself afforded, for it had become an eyesore rather than benefit to the public. No other uses were now made of it. The *Portobello*⁶ case and cases of that class therefore were not authorities for the present. The proposition of the defender came to this, that the magistrates of a burgh might vindicate a *jus spatiandi* over private property on behalf of the public, and also a right of bathing. There was no authority for that proposition in the law of Scotland. Most of the cases founded on by the other side to prove the existence of a *jus spatiandi* and of bathing related to something totally different—namely, the regulation of the common good of burghs, and the right of using the common good in particular ways, which the burgesses might acquire, and of which the magistrates could not deprive them.⁷ There was no such relation between

¹ See cases *infra*, note 8, p. 203.

² *Young v. North British Railway and Lord Advocate*, Dec. 8, 1885, 13R. 314.

³ *Magistrates of Montrose v. Commercial Bank*, June 11, 1886, 13 R. 947, *per* Lord President, p. 955.

⁴ *Darrie v. Drummond*, Feb. 10, 1865, 3 Macph. 496, 37 Scot. Jur. 245, and *Scott v. Drummond*, June 12, 1866, 4 Macph. 819, 38 Scot. Jur. 433, May 17, 1867, 5 Macph. 771, 39 Scot. Jur. 395 (*Coldingham cases*); *Duncan v. Lees* (*Kinkell case*), Dec. 13, 1870, 9 Macph. 274, 43 Scot. Jur. 107, June 20, 1871, 9 Macph. 855, 43 Scot. Jur. 503.

⁵ *Bell's Princ.* secs. 645-7.

⁶ *Officers of State v. Smith*, March 11, 1846, 8 D. 711, 18 Scot. Jur. 364, aff. July 13, 1849, 6 Bell's App. 487, 21 Scot. Jur. 534.

⁷ *Sinclair v. Magistrates of Dysart*, 1779, M. 14,519, aff. 2 Pat. App. 554; *Cleghorn v. Dempster* (*St Andrews case*), 1805, M. 16,141; *Magistrates of Earlsferry v. Malcolm*, Nov. 23, 1832, 11 S. 74; *Home v. Young* (*Eyemouth case*), Dec. 18, 1846, 9 D. 286, 19 Scot. Jur. 109; *Kelly v. Magistrates of Burntisland*, 1812, reported in the Lord Ordinary's note in *Home v. Young*, 9

the pursuer here and the magistrates, as existed between burgesses and No. 43.
the magistrates of their burgh. The only case which gave the semblance of
authority in the defender's favour was that of *Hunter*,¹ relating to foreshore Dec. 7, 1886.
adjoining the present—viz., that *ex adverso* of the Magdalen Green; but that *Keiller v.*
case was the termination of a litigation, or series of litigations, extending *Magistrates*
over nearly two centuries; and was really decided on a plea of *res judicata* of Dundee.
based on an ambiguous judgment pronounced in 1678. On the other hand, *Scott v.*
there were several authorities which distinctly negatived the possibility of *Magistrates*
of a *jus spatiandi*,² and also of a right of bathing,³ of curling,⁴ and of trout-
fishing.⁵ The circumstance that this foreshore was within the extended
royalty, assuming it to be so, was of no importance unless on the assumption
that all private property in a burgh was liable to become subject to
a *jus spatiandi*.

II. *Keiller's case*.—This pursuer's title was not a direct crown grant—it was a disposition from Hunter of Blackness—a barony title. A barony title was presumed to carry foreshore *ex adverso* of the barony until the contrary was proved by some one *in titulo* to do so. Here Hunter had already established his right to the adjacent piece of foreshore *ex adverso* of the Magdalen Green,¹ and possession of part of a barony was possession of the whole.⁶ The original conveyance by Hunter in 1807 had a "sea-flood" boundary on the south. That carried the foreshore as in a question with Hunter, who could not interpose himself between his grantee and the sea.⁷ But if it did not that was really immaterial. The foreshore either remained in Hunter, or was re-conveyed to him in 1854. In any case he gave it off again *per expressum* to the pursuer in 1884. The Crown or a disponent from the Crown might challenge the disposition of 1884, but they alone had a title to do so.⁸ The Crown had been called as a defender and had not appeared, and no disponent of the Crown was suggested except the defenders—the magistrates—under their Act of 1831. If they failed on that Act, any use which they might prove the public to have had gave them no title to object to the pursuer obtaining declarator of property, however relevant a ground it might be for qualifying that declarator.

Argued for the defenders;—I. *Scott's case*.—Whether or not the defenders were proprietors of the piece of ground claimed by Mrs Scott, they, at all events, had a sufficient title as guardians of the public interests to

D. 293, and 19 Scot. Jur. 152; *Sanderson v. Lees* (Musselburgh case), Nov. 25, 1859, 22 D. 24, 32 Scot. Jur. 14.

¹ *Magistrates of Dundee v. Hunter*, June 4, 1858, 20 D. 1067, 30 Scot. Jur. 646.

² *Dyce v. Hay*, July 10, 1849, 11 D. 1266, 21 Scot. Jur. 506, aff. May 28, 1852, 15 D. (H. L.) 14, 24 Scot. Jur. 465, 1 Macq. 305; *Magistrates of Edinburgh v. Magistrates of Leith*, July 10, 1877, 4 R. 997; *Rankine on Landownership*, 2d edit. p. 294.

³ *Blundell v. Catterall*, Nov. 7, 1821, 5 Barn. & Ald. 268.

⁴ *Harvey v. Lindsay*, June 23, 1853, 15 D. 768, 25 Scot. Jur. 461.

⁵ *Fergusson v. Shirreff*, July 18, 1844, 6 D. 1363, 16 Scot. Jur. 581.

⁶ *Lord Advocate v. Lord Blantyre*, June 19, 1879, 6 R. (H. L.) 72, 4 App. Cas. 770; *Lord Advocate v. Lord Lovat*, Feb. 27, 1880, 7 R. (H. L.) 122, 5 App. Cas. 273.

⁷ *Hunter v. Lord Advocate*, June 25, 1869, 7 Macph. 899, 41 Scot. Jur. 513.

⁸ *Pirie v. Ross*, Feb. 1, 1884, 11 R. 490; *Paterson v. Marquis of Ailsa*, March 11, 1846, 8 D. 752, 18 Scot. Jur. 370; *Cameron v. Ainalia*, Jan. 21, 1848, 10 D. 446, 20 Scot. Jur. 130; *Cuthbertson v. Young*, Jan. 25, 1850, 12 D. 521, 22 Scot. Jur. 152, aff. Feb. 24, 1854, 17 D. (H. L.) 2, 26 Scot. Jur. 310, 1 Macq. 455; *Colquhoun v. Paton*, June 17, 1859, 21 D. 996, 31 Scot. Jur. 550; *Young v. North British Railway and Lord Advocate*, Dec. 8, 1885, 13 R. 314.

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resist the alternative declaratory conclusion, and the conclusion for interdict. There could be no reasonable doubt on the evidence that this piece of foreshore was largely used by the inhabitants of Dundee as a bathing place, and for purposes of recreation generally, like the Magdalen Green, of which it was a practical continuation, and that these uses went back beyond the memory of man. The construction of the railway, though it had cut this piece of ground off from the rest of the shore, had not made it cease to be foreshore, either legally or as matter of fact; the tide continued to ebb and flow over it; the railway was not in its nature a permanent change—it might be taken away—indeed, such an alteration was by no means improbable here; and lastly, the provisions of the railway Act carefully reserved the defenders' rights.¹ The case, therefore, was precisely within the *Portobello* case.² Except that, in addition, the Portobello sands were used as a militia parade ground, the uses of the foreshore by the public there were exactly of the same kind as those founded on here, and it was held that the Crown, on behalf of the public, was entitled to vindicate these rights of use against one who, in virtue of a feu of part of the barony, proposed to enclose part of the shore. That case did not—at least the fair reading of it was that it did not—proceed on the mere right which every member of the public had to walk about on any portion of the foreshore to which he could lawfully get access; it was rather a vindication of rights acquired by the public in a particular piece of foreshore, in virtue of the immemorial use of that piece of foreshore. Nor were the rights of use which were there vindicated what might be called the primary uses of the foreshore, such as navigation; they were solely uses of recreation such as were founded on here. The case of *Darrie*³ was not adverse to the defenders. It was there held, indeed, that a mere averment in a declarator of right of way that the alleged way terminated in the seashore would not sustain action, but it was clear from the leading opinion of Lord Deas that the Court would have sustained the action if there had in addition been an averment that the public had used the foreshore for purposes of recreation from time immemorial. In short, the law recognised that the public might by prescriptive use acquire a *jus spatiandi* over a specific piece of foreshore. *Dyce v. Hay*⁴ was said to establish that a *jus spatiandi* was not known to the law, but that case decided only that there could not be a servitude (in the strict sense) *spatiandi*, and the Lord Justice-Clerk (Hope)⁵ reserved the question whether the public might not acquire rights of recreation in the foreshore or in vacant pieces of ground lying along the shore; and in the case of *Hunter*⁶ the town of Dundee vindicated such a right over the Magdalen Green, as well as over the foreshore *ex adverso*. That case related practically to the same piece of foreshore as the present, and was a complete authority for the Magistrates' contention here—for their lesser contention of a *jus spatiandi*, that was to say; undoubtedly they did not there plead the higher right of property in the foreshore which they now said the Act of 1831 gave them. The defenders' case, on these authorities alone, would have been established, but it was greatly fortified by the

¹ See *supra*, p. 195, note *.

² *Officers of State v. Smith*, March 11, 1846, 8 D. 711, 18 Scot. Jur. 364, aff. July 13, 1849, 6 Bell's App. 487, 21 Scot. Jur. 534.

³ *Darrie v. Drummond*, Feb. 10, 1865, 3 Macph. 496, 37 Scot. Jur. 345.

⁴ *Dyce v. Hay*, July 10, 1849, 11 D. 1266, 21 Scot. Jur. 506, aff. May 28, 1852, 15 D. (H. L.) 14, 24 Scot. Jur. 465, 1 Macq. 305.

⁵ 11 D. 1269.

⁶ *Magistrates of Dundee v. Hunter*, June 4, 1858, 20 D. 1067, 30 Scot. Jur. 646.

fact that the foreshore here was part of the territory of the burgh—for that it was so was sufficiently plain from the following considerations. The case of *Smart*¹ decided that the foreshore *ex adverso* of the old royalty was within the burgh boundaries, and that it was burgh property. The case had been so understood,² and the magistrates had exercised their rights in that foreshore in the most ample manner, by appropriating parts of it to public purposes, and by granting dispositions of other parts—including a disposition to the Board of Customs, *i.e.*, to the Crown. Then the Act of 1831, in defining the boundaries of the extended burgh on the south, used the words “margin of the River Tay,” which, if the foregoing conclusion was correct, necessarily included the foreshore *quoad* the old royalty, and must consequently have the same meaning *quoad* the added territory. Further, the expression the “River” Tay instead of the “Firth” of Tay pointed to the same conclusion, *viz.*, that the foreshore *ex adverso* of the new royalty was added to the burgh territory, whether or not it had also become, like the old foreshore, part of the burgh property. The title of the magistrates to vindicate a *jus spatiandi* over ground so situated could hardly be doubted in principle, and was amply supported by the authority of the numerous cases in which the title of individual citizens to vindicate rights of golfing, &c. was sustained.³

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The Lord Ordinary's interlocutor, therefore, was well founded, and the defenders did not desire to state their case higher—they had not brought a declarator of property—but if the pursuer insisted in her demand for a declarator of property—qualified, it might be, by a declaration that her right was under burden of such rights of use as the defenders might have established (a form of decree not within the letter at least of the summons)—then the defenders were driven to maintain that the property of the foreshore was theirs. Mrs Scott's alleged crown title was not a proper feudal disposition—it merely conveyed “all right, title, and interest” which the Crown might have in the subjects—which shewed that the crown authorities suspected that what they were conveying was of no value. But assuming that in form it was a valid disposition of the foreshore to Mrs Scott, it was dated long posterior to the Act of 1831, and consequently it could not compete with the title conferred by that Act. That the Act did confer a title of property in the foreshore on the magistrates appeared (a) from the terms in sec. 1, descriptive of the southern boundary of the new burgh, as already explained; (b) from the proviso in sec. 3 about tenure, which would be meaningless unless property, and not merely jurisdiction, were dealt with by the Act; and (c) from sec. 6, which gave the magistrates the same rights, powers, and privileges over the enlarged burgh as they had had over the old burgh; and the magistrates had acted on this view of their rights by granting dispositions of portions of the foreshore of the new

¹ *Smart v. Magistrates of Dundee*, Nov. 22, 1797, 3 Pat. App. 606, 8 Brown Parl. Cases, 119.

² *Berry v. Holden*, Dec. 10, 1840, 3 D. 205, 13 Scot. Jur. 79; *Todd v. Clyde Trustees*, Jan. 23, 1840, 2 D. 357, 12 Scot. Jur. 284, aff. June 8, 1841, 2 Rob. 333, 14 Scot. Jur. 509; *Jameson v. Dundee Police Commissioners*, Dec. 10, 1884, 12 R. 300.

³ *Sinclair v. Magistrates of Dysart*, 1779, M. 14,519, aff. 2 Pat. App. 554; *Cleghorn v. Dempster* (St Andrews case), 1805, M. 16,143; *Magistrates of Earlsferry v. Malcolm*, Nov. 23, 1832, 11 S. 74; *Home v. Young* (Eyemouth case), Dec. 18, 1846, 9 D. 286, 19 Scot. Jur. 109; *Sanderson v. Lees* (Musselburgh case), Nov. 25, 1869, 22 D. 24, 32 Scot. Jur. 14.

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royalty to the railway company and to the harbour trustees. The intention of the Act therefore was clear; but it was said that its effect failed because, first, it contained no disposition of the foreshore. The charter of erection of a burgh usually contained a dispositive clause, but that was not essential, and all land within burgh was presumed to be the property of the burgh until the contrary had been proved.¹ Secondly, it was objected that the consent of the Crown to the transference of the foreshore had not been expressly given. But in answer to that it was to be observed (a) that what was alleged to have been transferred here was foreshore, and foreshore over which the public had acquired so many rights of use as to leave merely the bare right of property, or little more, in the Crown. And (b) the disponees were the magistrates of a burgh, who, as regarded burghal property (the common good of the burgh was not here spoken of), were not so much grantees of property, in the strict sense, as commissioners for the Crown. They did not dispossess the Crown as a buyer dispossessed a seller. Considering, therefore, the nature of the subject transferred and the character in which the transferees acquired it, there was not the same reason as existed in ordinary cases for applying the rule that the Crown must assent expressly to the transference of its property by Act of Parliament. The Act here was fairly to be read as having the same effect as a charter of erection by the Crown of the new and enlarged burgh.

Mrs Scott also founded on Acts of alleged possession. Possession was unnecessary to fortify her crown title, which was unambiguous. It might avail her in so far as she placed her case on the foreshore being part of the barony of Blackness, but the possession here proved was quite insufficient in amount to bring her within principle of the case of *Young*,² on which she founded. She had by no means made every use of the subjects of which they were reasonably capable.

II. *Keiller's case* differed from Mrs Scott's in this, that he had no crown title. If Hunter of Blackness could convey the foreshore to him, then he had it in property, but his whole case depended on Hunter's right. Now, about this alleged barony of Blackness absolutely nothing had been proved beyond this, that there was such a barony. That it included the foreshore in question had certainly not been proved. There was neither express title nor possession from which that inference could be drawn. The title of 1884 was, no doubt, in itself express and unambiguous, but it plainly proceeded *a non domino*. The Magistrates were entitled to get behind it and shew that. In the first place, the pursuer could not with one hand call them as defenders in this declarator, and with the other deny their right to challenge the titles he produced; but apart from that, the rights of use which the defenders had proved gave them a title to challenge the pursuer's title of property, even if they did not allege a property title of their own. The magistrates of a burgh could not be regarded as mere trespassers, and it was necessary to shew that they were mere trespassers to bring them within the case of *Pirie* and cases of that class.³

At advising on 30th November,—

LORD JUSTICE-CLERK.—Your Lordships have these cases of Keiller and Scott which raise analogous questions, and they may be considered at the same time.

¹ Bainbridge v. Magistrates of Rutherglen, March 10, 1886, 13 R. 745.

² Young v. North British Railway and Lord Advocate, Dec. 8, 1885, 13 R. 314.

³ See cases *supra*, note 8, p. 203.

In regard to Keiller's case, there are two actions, one an application for interdict at the instance of the Magistrates of Dundee against Mr Keiller, and the other a declarator at his instance of his alleged right. The subject-matter of this discussion really lies within a very narrow compass. The Dundee and Perth Railway obtained parliamentary powers for the construction of a line along the north bank of the Tay from Dundee, and in the operations following out that Act of Parliament they carried their line right through the foreshore at one particular point of the bank. They cut off a portion of the ground that had been covered only at high-water, but was cut off from the Tay by the line of railway. Whether by arrangement or otherwise, which seems doubtful, although there is now an embankment on the line of railway between this ground and the river, the tide still ebbs and flows over it, by percolation or openings. There are a variety of proprietors along the bank in front of whose properties the railway runs, and these proprietors have been ornamenting their residences, and in various ways endeavouring to make use of that old portion of the foreshore which lies between them and the railway. In the two actions that we have before us—namely, Keiller's case and Scott's case—the point is whether they have gone beyond their rights. Mr Keiller derives his right from Mr Hunter of Blackness. The rights granted by the Blackness estate have been more than once the subject of judicial examination in questions of this character. Keiller acquired his land since the date of the construction of the railway. He was proceeding with certain operations which would have intercepted any person going along the ground which I have described from Magdalen Green, when the Magistrates of Dundee raised the objection that the inhabitants of the burgh have had from time immemorial the right of going along that piece of ground for the purpose of recreation,—along this portion of the shore,—and that their right remains although the ground is cut off from the rest of the foreshore by the railway embankment. It is maintained that Mr Keiller had no right to perform any operations which should put an end to the recreation which it is said the public enjoyed, and so interrupt that enjoyment. Accordingly the Magistrates of Dundee brought a process of interdict against Mr Keiller, and in that process they prevailed, and the Sheriff granted interdict to a certain extent, not altogether to the full extent claimed. The Sheriff affirmed the right of the Magistrates, representing the community, to prevent those operations. That interlocutor has been appealed to this Court. In the meantime Mr Keiller raised an action of declarator for the purpose of having it declared that he has a right to this portion of the foreshore, and concluding that it should be found and declared “that neither the defenders nor any of them, nor the inhabitants of the burgh of Dundee, nor the public have any right of way, or of recreation, or of bathing, or any other right, servitude, or privilege into or over the said subjects or any part thereof.” The question is, which of these pleas is to prevail? Has Mr Keiller acquired a right to this portion of ground, consisting of former seashore, or are the Magistrates entitled to have their alleged right sustained, and thus prevent the destruction or interruption of the right of passage and recreation which they say has existed so long?

The Lord Ordinary has decided in favour of the Magistrates in the case of Keiller, and he has substantially found that Keiller has no title to the seashore, and that consequently he is not entitled to perform the operations in question, he not being the proprietor of the ground on which he proposed to

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construct works which would have prevented the continuance of the enjoyment which the public have had. I concur in that view. I think Mr Keiller has no right to the seashore. I think that he or his predecessors had none before the construction of this railway, and the construction of the railway does not seem to have in any way enlarged the right of the adjoining proprietors. Mr Keiller makes his claim upon two grounds. He says his title from Mr Hunter of Blackness describes his rights as bounded on the south by the sea-flood, which, he maintains, permits him to follow the waters of the Tay down to low-water mark. There is little doubt that such is the legal effect of a boundary by "the sea," but a boundary by the sea-flood excludes the grantee from going beyond high-water mark. That is laid down in many cases, and I think in a comparatively recent case,—the case of *Hunter* in 1869,—a very strong opinion was expressed that such was the effect of a boundary by the sea-flood, although it was found in that case, which related to titles worded very much like that in question, that Mr Hunter of Blackness, the grantor of the titles, had no right to get between his own disponee or vassal and the seashore. The second ground upon which the claim of Keiller is maintained is, that the ground is part of the barony of Blackness which had been disposed by Hunter's trustees to him. That may be. It is possible that it is part of the barony, although I see no evidence that it is so. But a barony title is of no service at all without possession, and it is clear in this case that neither Keiller nor his authors have ever had possession of the foreshore in any way. A barony title may have the effect of sustaining possession which has been enjoyed, even when not prescriptive. But the mere fact that this was part of the barony will not avail, and it is not said that the proprietor of Blackness ever had such possession of the foreshore adjacent to his land as would convey this right to the present disponee. I have come to the conclusion that Keiller has no right to the privilege which he claims here, and I quite concur with the Lord Ordinary in his view of the evidence. I think that the ground has been used for the purpose of recreation by the inhabitants of Dundee from time immemorial, and that the Magistrates are entitled, in this particular contention, to represent the community. Therefore, upon these grounds, I concur in the view that the Lord Ordinary has taken.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK.—In Scott's case the view I take depends entirely on facts in which it differs from the case of Keiller. Mrs Scott or her predecessors applied to the Woods and Forests, and obtained a crown right to the foreshore. To that extent, therefore, my observations in the last case would not apply. She has a title, but then, I think, that title is burdened with the established rights of the inhabitants, and that the Magistrates of Dundee, as representing the inhabitants, are entitled to exercise all the rights which they have previously enjoyed. I do not think the right of the magistrates under the Act of 1833 is a title to land or a title to real right. It is a title of administration solely. I refer to the Act by which this portion of the ground along the Tay was brought within the municipality, and the magistrates' right of administration was extended over it, subject to that right. I am inclined to sustain Mrs Scott's title as far as that ground is concerned. Only she

must not limit or interrupt the rights acquired by the inhabitants. The form No. 43. of the interlocutor will be considered.

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LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The defenders moved for expenses in all the cases. Mrs Scott objected to being found liable in expenses, on the ground that she had been successful in getting decree of declarator.

LORD JUSTICE-CLERK.—We find the Magistrates entitled to expenses, subject to modification, in Mrs Scott's case, and to full expenses in Keiller's case.

In the interdict case the draft of the interlocutor which it was proposed to pronounce, after a number of findings in fact, including " (3) that neither the defender nor his predecessors ever had possession of the said subjects, and no grant to him or them has been instructed," affirmed the judgment of the Sheriff-substitute, and of new granted interdict.

On 7th December *Pearson*, for Keiller, moved the Court to delete the findings in fact, at least No. 3, above quoted, on the ground that, being final, they might prejudice him in the event of his successfully appealing the declarator.

THE COURT, holding that after the judgment in the declarator a possessory interdict was unnecessary, pronounced this interlocutor:—

"In respect of the judgment of this Court of the date hereof, pronounced in the action of declarator at the instance of the defender against" the Provost, Magistrates, and Town-Council of Dundee, &c., "dismiss the appeal: Find the defender liable in expenses," &c.

The interlocutors in the declarators had been signed at the date of this motion. They both simply refused the reclaiming note, and adhered to the Lord Ordinary's interlocutor, finding the defenders entitled to additional expenses—in Mrs Scott's case "subject to modification."

Pearson, for Mrs Scott, moved that the interlocutor should be altered so as to include an express declarator of her right, and also that the modification of the expenses should be expressed so as to apply to the whole expenses, both Outer and Inner-House.

The defenders gave no consent to any alteration.

THE COURT refused the motion.

HENDERSON & CLARK, W.S.—DRUMMOND & REID, W.S.—Agents.

MRS NARCISSA AINSLIE AND OTHERS, First Parties.—*C. J. Guthrie*.

No. 44.

MISS JANE SUFFIELD AINSLIE, Second Party.—*J. C. Lorimer*.

Dec. 8, 1886.

Ainslie, &c. v
Ainslie.

Trust—Executor—Trusts Act, 1861 (24 and 25 Vict. c. 84), sec. 1—Power to assume new trustees.—A testator in his will nominated certain persons as "executors," and directed them "to make and continue" certain annual payments to certain persons "till death or marriage," and to pay the liferent of his estate to his widow and a niece, and, on the death of the survivor of these two, to close their accounts at as early a date as practicable, and to divide the proceeds among specified persons. A "house, stable, and their fixtures," were to be sold soon after the testator's death. The executors were further directed to retain, or to realise for reinvestment, in their discretion, various securities, &c., held by him. There was no clause conveying any part of the estate to the executors. *Held* in a question between the co-executors, that though called

No. 44. "executors" in the deed, the executors were truly "gratuitous trustees nominated in a deed," and that therefore they were entitled to exercise the powers of assumption conferred on such trustees by sec. 1 of the Trusts Act, 1861.

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1st DIVISION.
B.

By holograph last will and testament, dated 7th March 1878, James Ainslie, Esq., Edinburgh, nominated his wife, Mrs Narcissa Ainslie, and Miss Jane Suffield Ainslie, as his "executrices," and Mr Clement Simpson, and Mr William Scott as "executors."

The will directed the "executors named hereafter to make and continue till death or marriage the following payments," viz., certain annuities to a niece, and another lady. The will then directed his "executors to divide whatever sum my estate may yield annually between" his wife and his niece, Miss Jane Suffield Ainslie, in certain proportions, "the survivor to have the liferent of the whole estate, and at her death my accounts to be closed at as early a date as possible, and the proceeds divided into" certain shares and apportioned as there directed, "house, stable, and all their fixtures to be sold soon after my death, but not a day before it quite suits the convenience of my wife."

The deed also contained this clause,—“I direct my executors to pay out of my estate the whole legacy and Government duties on the bequests in favour of my wife and my niece, Jane Suffield Ainslie, and also the whole expenses attending the executory and the annual expenses of management. I direct my executors either to retain and hold the various securities and investments on which my means and estate may be invested at my death, it being my wish, without however being imperative on my executors, that the investments and securities chosen by me should remain undisturbed as far as possible, or to realise the same, or such part thereof, as they may deem necessary or expedient, or to reinvest the same in such way and manner, and on such securities, heritable or personal, as they may deem best, including stock, funds, or securities of the Government of India, debentures, or debenture stock, preferential or guaranteed stock, declaring that my executors shall not be liable for any loss that may arise from their retaining and holding any securities or investments on which my means and estate may be invested at the time of my death. I leave to each of my executors £100 free of all taxes, for the trouble they have kindly undertaken on my account.”

There was no clause in the will conveying any part of the estate to the executors.

All the executors accepted, but in 1885 Mr Simpson died, and in 1886 Mrs Ainslie and Mr Scott, being a majority of the surviving executors, came to be of opinion that one or more persons should be assumed to act along with them in the administration of the estate of the deceased, if such assumption were competent under sec. 1 of the Trusts Act, 1861.*

Miss Ainslie objected to the proposed assumption, and a special case was, on 10th June 1886, presented for the opinion and judgment of the Court, Mrs Ainslie and Mr Scott being parties thereto of the first part, and Miss Ainslie party of the second part.

* Sec. 1 of the Act (24 and 25 Vict. c. 84) enacts,—“1, All trusts constituted by virtue of any deed or local Act of Parliament, under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed: that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees; a provision that the majority of the trustees accepting and surviving shall be a quorum; and a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions.”

In the case the foregoing facts were stated, and the following question of law was submitted to the Court,—“Whether, on a sound construction of the said last will and testament, the first and second parties are entitled to exercise the power of assumption conferred on trustees under the terms of the Act 24 and 25 Vict. cap. 84, sec. 1?”

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The first parties maintained that the effect of the provisions of the deceased's will was to put them in the position of trustees, and therefore to invest them with the powers of gratuitous trustees conferred by the Trusts Act, 1861. The second party maintained that the parties to the case being only nominated executors by the will were not entitled to the benefits of the Act.¹

LORD PRESIDENT.—This question rises on the 1st section of the Act 24 and 25 Vict. chap. 84, which applies to all trusts constituted by any deed or local Act of Parliament under which gratuitous trustees are nominated. There is in that section nothing as to conveyance of subjects to trustees, it is enough if the trustees be nominated. The question, therefore, comes to be whether the first and second parties to this case have been nominated as gratuitous trustees under this will. What they are called in the deed is “executors,” and if the idea of an executor was entirely exclusive of the possibility of the same person being at once a trustee and an executor, the Act would not apply; but that is far from being the case. All executors are in a certain sense trustees; they are charged with the realisation and distribution of the deceased's estate, and, though they are not properly speaking trustees, but mere debtors to the deceased's creditors, yet it is easy to engraft on them duties which no one but a trustee can carry out. We have therefore to have regard not to what they are called, but to what their duties really are. Now, the first thing to notice is that by this will the testator intended to dispose of heritable estate, because there is included in the estate a house, stables, and all the fixtures therein, and these things are directed to be sold. There is no conveyance of this property to the executors, but on the authority of several cases, and particularly the case of *M'Leod's Trustees v. M'Luckie*, 10 R. 1056, it is quite well settled that a direction to trustees to sell a part of an estate which includes heritage is equivalent to a conveyance of heritable property. In the second place, and perhaps this is more important, the testator contemplated a continuing management quite foreign to the duties of executors. An executor's duty is to administer the estate with a view to immediate distribution; he is bound to pay the creditors within a certain fixed time, and if he does not do so he is liable in interest. His liability, no doubt, is limited to the amount of the estate, but otherwise he is simply a debtor. Here the executors are directed to hold the estate for the purpose of paying the income thereof to his widow, and to another *persona predilecta*, viz., a niece, and that may involve holding the estate for a considerable length of time, and it is only after the death of the survivor of these two that the estate is to be divided. I think, therefore, that if this testator had called these persons trustees he would not have misnamed them, looking to the duties assigned to

¹ *Authorities cited.*—Ersk. Inst. ii. 2, 3, and iii. 9, 27; Jur. Styles, ii. 648; Act 34 and 35 Vict. c. 27; Lewin on Trusts, 6th edit. p. 555; Tochetti v. City of Glasgow Bank, March 7, 1879, 6 R. 789; Jameson v. Clark, Jan. 24, 1872, 10 Macph. 399, 44 Scot. Jur. 225; *M'Leod's Trustee v. M'Luckie*, June 28, 1883, 10 R. 1056; *M'Leod's Trustees v. M'Leod*, Feb. 28, 1875, 2 R. 481; Urquhart v. Dewar, June 13, 1879, 6 R. 1026.

No. 44. them, and is it to be said that because he has called them executors they are to be deprived of the benefits of the statute? That, I think, would be a very narrow construction of a beneficial statute, and therefore I think they fall under the description of gratuitous trustees nominated under a deed.

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LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT answered the question in the affirmative.

COWAN & DALMAHOY, W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 45. JAMES TWEEDIE (*MacMaster's Curator Bonis*), Petitioner.—*J. Burnet*.
THE ACCOUNTANT OF COURT, Compearer.—*Low*.

Dec. 8, 1886.
Tweedie.

Process—Judicial Factor—Curator bonis—Petition for recall.—Held (following *Kyle*, 24 D. 1083) that the appointment of a *curator bonis* made by the Junior Lord Ordinary may competently be recalled by him.

1ST DIVISION.
Lord Trayner.
B.

JAMES TWEEDIE having presented a petition to the Junior Lord Ordinary for recall of his appointment of *curator bonis* to Miss Jane MacMaster, and for delivery of his bond of caution, the Lord Ordinary (Trayner), on 16th November 1886, being in doubt as to the competency of his dealing with such a petition, appointed it to be printed and boxed to the First Division.* The appointment had been made on 30th October 1885 in the Outer-House, and the application was now made as the ward had recovered her health.

The petitioner referred to the cases of *Kyle*,¹ *Lockhart*,² and *Sinclair*.³

Low, for the Accountant of Court, stated that in such petitions as the present the case of *Kyle* had been invariably followed.

At advising,—

LORD PRESIDENT.—The doubt which is raised by the Lord Ordinary is whether his Lordship has jurisdiction to grant the recall of a curatory. I entertain no doubt upon the question, and I believe your Lordships have none either, that in conformity with the case of *Kyle* the Lord Ordinary making the appointment has jurisdiction to recall it, and therefore that the whole subject-matter is competently before Lord Trayner.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT accordingly remitted to the Lord Ordinary "to recall the appointment of James Tweedie as *curator bonis* to Miss Jane MacMaster, and to proceed with the case as may be just."

KNIGHT WATSON, Solicitor—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

* "NOTE.—It appears to me that this petition, in so far as it prays for the recall of the curatory, is one with which I cannot competently deal—(*Kyle*, 24 D. 1083; *Lockhart*, 24 D. 1086; *Sinclair*, 23 S. L. R. 737). I have therefore reported it to the Court. If the curatory is recalled I can dispose of the remaining part of the prayer of the petition."

¹ *Kyle*, June 10, 1862, 24 D. 1083, 34 Scot. Jur. 541.

² *Lockhart*, June 24, 1862, 24 D. 1086.

³ *Sinclair*, Petitioner, June 25, 1886, 23 S. L. R. 737.

THE BANK OF SCOTLAND, Nominal Raisers.

MARIE ISABELLE GUDIN (Baroness Gudin), Real Raiser and Claimant (Respondent).—*Low—Moody Stuart.*

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THEODORE JAMES GUDIN (Baron Gudin), Claimant (Reclaimer).—*J. C. Thomson—G. R. Gillespie.*Dec. 8, 1886.
Bank of Scotland v. Gudin.

Foreign—Jurisdiction—Foreign decree—Prorogation.—A wife sued her husband in the English Courts under the Married Women's Property Act, 1882, and the action was compromised by an agreement between the parties, by which their respective rights in their properties were defined, and the husband undertook to make over certain property to his wife. The agreement bore that an order of Court should be taken to that effect. Thereafter the husband returned to France, where both spouses had been domiciled at the date of the marriage, and where he alleged he was still domiciled, and refused to implement the agreement. The wife raised an action in England to enforce implement, in which she obtained decree in absence. In an action in the Court of Session to enforce implement of this decree, *held* that the husband could not be heard to plead that the English Court had no jurisdiction, in respect that he had prorogated their jurisdiction.

Foreign—Forum non conveniens—Decree conform—Husband and Wife.—A wife raised an action in the Court of Chancery against her husband to have certain property deposited in a bank in Scotland declared to belong to her in virtue of an antenuptial marriage-contract in French form, executed in France, where the parties were domiciled at the time. For some time before the raising of the action the spouses had been resident in England. The action was compromised by an agreement, providing, *inter alia*, that the parties should execute a deed of separation, and that the property in question should belong to the wife. The husband thereafter raised an action in France to have the agreement declared null as being *ultra vires* of the spouses. The wife obtained from the Court of Chancery a decree in absence ordaining implement of the agreement, and in Scotland raised a multiplepounding in name of the bank in which she claimed the property deposited. The husband, a competing claimant, pleaded that the action should be sisted to await the result of the action depending in France, as a more convenient *forum* for determining the question between the parties. *Held* that the wife was entitled to be preferred *de plano*.

BARON AND BARONESS GUDIN were married in France in September 1882. At the date of the marriage they were both domiciled in France, and they entered into a marriage-contract in the French form by which they declared that they submitted themselves to French law. They adopted the principle of the "separation des biens" in that contract. It further provided,—(3) As matter of information merely, the future husband declares that he possesses at present in furniture, jewels, moveable effects and plate to the value of 35,000 francs, and in objects of art and curiosities, including pictures, armour, arms, bronzes, and old china, the value of 96,000 francs." (4) Presumption of Property.—"The effects and jewels for the use of the intended wife, the furniture belonging to her described in the statement hereto annexed, as well as all other goods, objects, and securities of which she may prove the property in her person, either by inscription in her own name, writings of the intended husband, invoices or receipts, shall belong to her; in regard to all other goods, moveable and immoveable, corporeal or incorporeal, they shall belong of full right to the intended husband, without any evidence."

In the contract the Baron was described as a British subject.

About six weeks after their marriage the spouses came to London. Failing, however, to find a place suitable for their permanent residence, they returned to Paris for the winter. On 1st April 1883 they came

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No. 46. back to London, bringing with them their furniture. Shortly afterwards they came to Scotland for some months, and at different dates between Dec. 8, 1886. 14th April and 10th August 1883 the Baron deposited with the Bank of Scotland in Glasgow bonds and securities payable to bearer to the value of £15,000, and placed two sums of £1000 on deposit there. On 23d June 1883 he acquired right to a lease for twenty-one years of a house in London.

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land v. Gudin.

The spouses continued to live in London, and on 25th September 1884 the Baroness raised an action against her husband under the Married Women's Property Act, 1882, in the High Court of Justice, Chancery Division, to have her title to these securities, &c. declared. Before that action had proceeded far the parties compromised it by concluding an agreement, dated 5th November 1884, which was signed by themselves and their counsel. That agreement bore,—“(1) The parties shall execute a deed of separation, which shall contain all usual clauses, and override the terms of the marriage-contract. (2) The Baron, at the cost of the Baroness, shall immediately take all proper steps for vesting, in the sole name of the Baroness, all his interest, if any, in a sum of 15,000 francs, and interest, or thereabouts, alleged to be due from the Baron's mother, and also any property standing in the joint names of the Baron and Baroness, or in the name of either of them. (3) Pending the settlement of all matters in dispute, the injunctions shall continue. (4) All the property referred to in the affidavits and exhibits to be the property of the Baroness.” These affidavits included the bonds, &c. deposited in the Bank of Scotland, and the pictures, jewels, &c., referred to in the marriage-contract. Then followed various provisions as to letters, papers, and outstanding debts, as well as a provision of an annuity of £300 to the Baron, and the settlement of a capital sum of £8000 in the hands of trustees to secure this. The last article was in these terms:—“(12) By consent an order of the said Court to be taken to the above effect, and a stay of proceedings in ‘*re Gudin*’ to be taken on these terms.”

After concluding this agreement the Baron left England. He returned to Paris, and raised an action there against his wife for declarator that the pictures, jewels, &c., were his property, and for an order on his wife to restore them, pleading that the agreement was null by the law of France. Madame Gudin did not appear, and on 7th March 1885 decree in default was pronounced against her after counsel had been heard and the documents in the case considered. Madame Gudin subsequently applied to be reponed against this judgment, and on being reponed, pleaded as a preliminary plea that the French Courts were incompetent, her husband having lost his French nationality, and the suit therefore being a suit between foreigners. The Court of first instance sustained this plea on 4th November 1885.

Meantime on 16th December 1884, Madame Gudin had raised an action in England to enforce specific implement of the agreement. This action was served upon the Baron by leaving a copy of the writ of summons with his solicitor in Paris, but no appearance was made for him. Thereafter the Court decreed specific implement of the agreement, and, in pursuance of an order of the Court, the Chief Clerk of Court executed certain transfers, deeds and other documents, vesting the bonds, &c., deposited with the Bank of Scotland, partly in trustees to secure the Baron's annuity, and partly in the Baroness. A document of request and authority was also executed, requesting the bank to deliver to the trustees and the Baroness the property deposited with them.

The Baroness having demanded delivery of the property deposited with the bank, and the Baron having intimated to the bank that he had raised

proceedings in France to set aside the English proceedings, the bank refused to pay without judicial authority, and the Baroness accordingly raised a multiplepounding in name of the bank.

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The Baroness and the trustees appointed by the English Court to hold the capital of the Baron's annuity claimed the whole fund, setting forth the proceedings in England, and stating that it had been arranged before the marriage that the spouses should leave France and settle in England or Scotland, and that they had taken their London house as a permanent residence.

She pleaded;—In respect of the agreement between the spouses, and of the decrees of the High Court of Justice, conveyances and transfers in favour of the claimants following thereon, the claimants are entitled to be ranked and preferred in terms of their respective claims.

The Baron also claimed the fund *in medio*. With regard to the marriage-contract he stated;—"The meaning and effect of the said contract, and the powers and rights of parties under it, are all questions which can only be determined according to the law of France."

With regard to the agreement he stated;—"The said agreement is by the law of France null and of no effect; by that law no modifications could be made by the spouses upon the provisions of the marriage-contract *stante matrimonio*, and it was illegal for the spouses to enter into any voluntary contract of separation."

He also stated that he had raised further proceedings in the French Courts with reference to the fund *in medio*, and that it had not been included in the first action raised by him in France on account of the expenses of extract there, these being *ad valorem*. He admitted that the judgment decreeing specific implement of the agreement could have been appealed up to a date subsequent to the closing of the record in the present action.

He pleaded;—(1) In the circumstances set forth, the Court of Session is not a convenient *forum* for the determination of the questions raised between the parties. (2) The bonds, obligations, certificates, and sums of money, forming the fund *in medio*, being the property of the claimant, he should be ranked and preferred to the whole fund. (3) The claimant having right to the said bonds, obligations, certificates, and sums of money under the provisions of the marriage-contract between him and the real raiser, he is entitled to be ranked and preferred to the whole fund *in medio*. (4) The pretended agreement of 5th November 1884 being null and of no effect, the claimant is entitled to be ranked and preferred to the whole fund *in medio*. (7) The pretended decrees and orders of the High Court of Justice in England having been pronounced in the absence of the claimant by a Court not having jurisdiction, and proceeding upon a pretended agreement which is null, the rights of the claimant are not affected thereby.

The Lord Ordinary (M'Laren), on 20th May 1886, pronounced this interlocutor:—"In respect of the agreement, decrees, conveyances, and transfers referred to in their claim, No. 36 of process, ranks and prefers the claimants Marie Isabelle Gudin and others upon the fund *in medio*, in terms of their said claim."*

* "NOTE.— . . . I take for granted that deeds of judicial transfer, whether expressed in words of conveyance or in the form of a procuratory or authority to pay (the latter form being properly applicable to money in account), have the force of a decree of adjudication, although by English procedure they are signed by the chief clerk, and not by the Judge. There is indeed little difference in this respect between an English and a Scottish adjudication of property—

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The Baron reclaimed, and argued;—The Court of Session was not the convenient *forum* for determining the questions between the parties. These must be determined by French law, as France was the Court of the domicile of the parties, and the spouses had elected that law as regulative of their contract.¹ Proceedings were pending in France, and the French Courts alone could determine them, for the questions were of a consistorial character, and such questions belonged to the Courts of the domicile.² That the questions were consistorial was plain, for the first article of the agreement provided for the execution of a deed of separation. The Court was bound to consider this question of jurisdiction all the more carefully in a multiplepinding where several parties were called, and should not entertain such an action unless all the parties were subject to its jurisdiction.³ The effect of sustaining the plea of *forum non conveniens* was not pressed to the effect of dismissing the action, but merely to the effect of sisting it to await the decision of the French Courts.

The Courts of England had no jurisdiction, for the decrees now sought to be enforced had been pronounced in an action to which the Baron had not been cited in any way that a foreign Court—and the Court of Session was a foreign Court—would recognise. The jurisdiction asserted proceeded on the footing that the Baron had executed an agreement in England. That was a good ground of jurisdiction, by the general principles of international law, if coupled with personal citation in the territory, but not otherwise.⁴ The English Courts no doubt had power by their own

the actual decree in our practice being signed by the Extractor of Court, although proceeding on an interlocutor or order signed by a Judge. The only question is whether we are to give effect to the decree, transfer, and authority.

“On this question I have very little to say, because it does not present any difficulty to my mind.

“It may be, and I think is, the law of Scotland that a decree or judgment of the Superior Courts of England is examinable when founded on for execution in this part of the United Kingdom. But it is to be executed, if after examination it is found to be regular.

“By examination I do not understand to be meant a re-trial of the cause on issues of fact or of law. It is not necessary, nor in my view would it be altogether convenient, to attempt to define the kinds of irregularities in decrees which would make it the duty of this Court to deny effect to them.

“Instances of such irregularities, whether as to jurisdiction, form, or substance may be figured; and no doubt a superior Court may be imposed upon, so as to be induced to issue a decree which, when the truth came to be known, neither it nor any Court whose aid was sought would be willing to enforce. But nothing of the kind is suggested here. The case for the competing claimant is, that he was entitled to plead his own disability in the English High Court; and that, not having done so, he should be allowed to do so here. Why did he not maintain the plea of disability in England? or, if decree was given against him in absence, why did he not move to have the case opened up? No explanation is given on these points. The pursuer's case resolves into this, that he is to be allowed to re-try the case on its merits. On principle and authority, I conclude that he is not entitled to this indulgence. I accordingly prefer Baroness Gudin and others in terms of their claim.”

¹ Corbett v. Waddell, &c., Nov. 13, 1879, 7 R. 200.

² Per Lord Shand in Stavert v. Stavert, Feb. 3, 1882, 9 R. 519, Lord Shand at p. 534.

³ Per Lord Neaves in Thomson v. North British and Mercantile Insurance Co., Feb. 1, 1868, 6 Macph. 310, Lord Neaves at p. 316, 40 Scot. Jur. 170, Lord Neaves at p. 174.

⁴ Sinclair v. Smith, July 17, 1860, 22 D. 1475, L. J.-C. Inglis at p. 1481, 32 Scot. Jur. 671, L. J.-C. at p. 674.

municipal law (the Judicature Act) to cite defenders in such a case *vis à vis* *et modis*, but such citation was a mere nullity out of England.¹ The Lord Ordinary had said he might have pleaded this in England, but the English Courts would have been bound in England to apply their own rules of jurisdiction, although they would not be recognised elsewhere. It was said that by consenting that an order of Court might be taken to enforce the agreement, the Baron had prorogated the jurisdiction of the English Courts. That consent had reference to the first action, and could not be extended to the second, particularly as the agreement might have to be put in force long afterwards, and in a foreign country.

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It was averred that the agreement was null by the law of France. Proof of that might be ordered, but a reference to the Code² and to the decisions pronounced in France shewed that, *prima facie*, it was so. The question was one of capacity under the marriage-contract, and that must be determined by the law of the domicile,³ viz., of France.

Argued for the Baroness;—The question of the jurisdiction of the Court of Chancery to pronounce the judgments in question must be left to that Court to determine. This Court would not interfere except in altogether exceptional circumstances. Any error in judgment could be set right by appeal, which admittedly was open to the Baron, and which he had failed to take.⁴ The Baron's claim was an attempt to set aside in this Court a judicial compromise of the action in the Court of Chancery without any proceedings having been taken to set it aside in that Court. He must shew that the judgments were bad, not merely in form but in substance, and would be bad even according to the law of England.⁵ Further, it was clear that the Court of Chancery had jurisdiction to adjudicate between the parties in regard to the fund in question. Assuming, contrary to what the Baroness averred, that the spouses were not domiciled in England, yet the Baron had prorogated the jurisdiction of the English Courts. Prorogation might be tacit or express, and was competent even in proper consistorial causes where no collusion was suspected.⁶ Here there was tacit prorogation of jurisdiction in the original action, as the Baron had not demurred to the jurisdiction, and express prorogation in regard to the second action, as he had consented to the agreement being made an order of Court.

As to the question of a convenient *forum*, there was no longer any question raised requiring foreign law for its solution. The rights of the spouses under the marriage-contract, according to French law, was the *de quo queritur* in the original action, which had been compromised by the agreement. What effect was to be given to the decree for implement of the agreement was now the question, and no aid on this point could be got from a French Court. Even if the agreement would have been treated as null by a French Court, the balance of authority was in favour of the view that the *lex loci*, and not the *lex domicilii*, was to be looked to.⁷

¹ Story, sec. 546.

² Code Civil, secs. 1394-5.

³ Wharton on the Conflict of Laws, sec. 199, and note; cf. also Westlake, sec. 35; Lord Brougham in *Anstruther v. Adair*, 1834, 2 M. and K. 513; and Vice-Chancellor Knight Bruce in *Guepratte v. Young*, 1851, 4 De G. and S. 217.

⁴ *Wilkie v. Cathcart*, Nov. 19, 1870, 9 Macph. 168, 43 Scot. Jur. 88; *Waygood & Co. v. Bennie*, Feb. 17, 1885, 12 R. 651, per Lord Young, p. 657.

⁵ *Whitehead v. Thomson*, March 20, 1861, 23 D. 772, 33 Scot. Jur. 401; *Gladstone v. Lindsay*, Nov. 5, 1868, 6 S. L. R. 71.

⁶ *Ersk. i. 2, 27*; *Murray v. Lindley*, March 8, 1805, Mor. "Forum Competens," App. No. 5.

⁷ *Fraser, Husband and Wife*, vol. ii. pp. 1317 and 1299; *Story's Conflict of*

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LORD PRESIDENT.—The fund *in medio* in this case consists of certain bonds, money, &c. lodged in the Bank of Scotland (who are the nominal raisers of the action) by the claimant, Baron Gudin, in April, May, July, and August 1883. What was the object of Baron Gudin or his wife, the other claimant, lodging these securities in the bank we are not distinctly informed, nor is it of great importance to inquire whether it was for safe custody or with any other object. It was not, however, till after they were lodged that any judicial proceedings took place. The first movement in the Court of Chancery was on 25th September 1884, when the lady raised an action against her husband, under the Married Women's Property Act, 1882, to have her title to these investments and property declared. The Baron says that though he was then in England, and held a twenty-one years' lease of a house in London, yet he was not then subject to the jurisdiction of the Court of Chancery, being a Frenchman domiciled in France. That may be the case, but it is of little importance now, for he appeared in the suit as a defender, and took no objection to the jurisdiction, but pleaded on the merits, and therefore whatever might be said against the jurisdiction there certainly was *jurisdictio in consentientes*, for both parties went into Court and joined issue on the question whether this money, &c., did or did not belong to the lady. That case did not go to judgment, because it was settled by parties by memorandum of agreement, the import of which is not open to doubt. There is no doubt that under the terms of that agreement, which was signed by the husband and wife and by their counsel, the property was to be the property of the lady and not of the husband. That, however, was not all that was agreed, for it was further stipulated that the husband was to have an annuity of £300, and that £8000 was to be lodged in the name of trustees as security for that amount. In short, without going into detail, it is as distinct a case of settling an action in Court as can well be. Such a settlement is known to the law as a "transaction," and of all kinds of contracts that is the most difficult to set aside. It has often been said that there is scarcely any ground on which it is possible to set aside such a transaction except fraud pure and simple, or force and fear. We must therefore hold that up to this point there is no doubt of the binding character of the proceedings, for, first, the jurisdiction of Chancery was admitted by both parties, and its aid invoked by both, and secondly, the case which was before the Court was settled by the parties among themselves by a memorandum, one of the articles (the 12th) of which was that an order of Court should be taken "to the above effect."

According to what appears to be the practice of the Court of Chancery, the order of the Court confirming the agreement requires to be obtained in a separate action, and accordingly the lady raised a new suit to make it effectual, but in that suit the Baron did not think fit to appear. It was served on him, and he had opportunity to appear if he chose. For my own part, I do not think that it is of much consequence whether he appeared or not, for he had consented that the agreement should be confirmed by order of Court, and he thereby had subjected himself to the jurisdiction of the Court in a suit for that purpose. Accordingly, in the second suit, proceedings were taken effectually to enable the Baroness and the trustees for the Baron's annuity to take possession of the

Laws, sec. 102; *Simonin v. Mallac*, April 26, 1860, 2 Swab. and Tr. 67, 29 L. J. P. and M. 97; *Sottomayor v. De Barros*, Aug. 6, 1879, L. R., 5 P. D. 94, *per* Sir James Hannen, p. 100.

securities, &c., in the hands of the Bank of Scotland, and the object of this action is to authorise the bank to pay over the money and hand over the securities to the Baroness and the trustees respectively. The answer to this demand raises the question now before us.

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In the first place, it is contended that this is not a convenient *forum* for trying the question. But it seems to me that there is no question remaining to be tried, for any question has already been decided between the parties in the Court of Chancery, no objection being taken of want of jurisdiction, the full force of the judgment in the second suit being simply to give the Baroness and the trustees the right to get possession of the money and securities. It is further maintained that the whole proceeding of the agreement is totally inconsistent with the provisions of the marriage-contract, and that the Baron, being a Frenchman, was incapable in law of doing what he has done. I do not know how far that may be a possible ground for setting aside the agreement, but it meantime stands unreduced, and so long as it so stands I do not see how we can refuse to give effect to these decrees, and to prefer the Baroness and the trustees to the whole fund *in medio*.

LORD MURE concurred.

LORD SHAND.—Although this case comes before us in the form of a multipointing it is really in substance an action by Baroness Gudin for delivery of certain securities, &c., the husband being merely a claimant for his interest to state any objection. The question is simply whether we are to give effect to the decision of the Court of Chancery which gives the Baroness a right to the securities, &c., and entitles her to delivery of them. She comes here with this decision, and asks decree conform, and the husband appears to oppose her. The question is, Has he stated reasonable grounds of objection? In the first place, he says that this is *forum non conveniens*, and what he maintains is that this Court should practically sist procedure, not to enable him to try any question in England, or to open up the decisions of the Courts there, but that he may go to France to see whether the Courts of that country will decide that the English decision should receive effect in Scotland. That is rather an extraordinary motion. I could understand it if it had been said that it was proposed to open up the English decision. He might have good ground for saying, "The proceedings in England were in absence, and I propose to open up that question, and it is more convenient to do so in England," but the proposal being to go to France, I cannot see how the French Courts can be regarded as a more convenient *forum*.

The question, however, remains, Is the decision of the English Court to receive effect? It is said that it ought not to do so, on the ground that that Court had no jurisdiction. If it appeared that a foreign Court had usurped jurisdiction to which they had no right, this Court would very likely interfere, but, on looking at the circumstances, it appears to me that the English Court had various grounds of jurisdiction. The parties had a long lease of a house in London. In the first action the Baron at once entered appearance, and, though he did not do so in the second action, we find in the agreement that it is stipulated that the terms of the agreement are to be confirmed by an order of that Court. Considering all those circumstances, it seems to me hopeless to suggest that that Court had no jurisdiction. The Baron did not in England plead want of jurisdiction, and I do not think he can be allowed to raise the point here.

No. 46. But is he to be allowed to get into the merits of the case? He says that by his marriage he acquired right to these securities and money, and that by the law of France no agreement could deprive him of it. He might, however, have raised that question in the English case, but he did not do so. That being so, I see no possible ground on which we can stop the decree in the English Courts to enable him now to raise the question, and therefore I think we must prefer the Baroness and the trustees to the fund *in medio*.

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LORD ADAM.—Whether the Court of Chancery would have had jurisdiction other than that afforded by the Baron prorogating the jurisdiction, I do not know, but that he did prorogate the jurisdiction, and that he is bound by what happened in that Court, I have no doubt. The first action there ended in the agreement, by article 12 of which an order of that Court was to be taken in terms of the preceding articles. The second action was raised with a view to carrying out that 12th article, and there has been nothing said to satisfy me that the proceedings in that second action were not according to the ordinary practice in England when effect has to be given to such an agreement. The Baron knew all along of these proceedings, and if he had any objection to them he should have appeared and stated it, but, as he did not do so, I see no ground for refusing effect to the decisions of the English Court. The result of giving effect to them is to sustain the claim of the Baroness and the trustees. It has been suggested that the proper way would be for the Baron to go to the Court of Chancery, and get the proceedings set aside if he can. If a motion for delay to allow of that being done had been made, I do not know whether we should have acceded to it or not; but no such proposal was made, and I am not prepared to listen to a motion for a sist to enable the Baron to resort to the Courts in France.

THE COURT adhered.

MITCHELL & BAXTER, W.S.—DONALD MACKENZIE, W.S.—Agents.

No. 47. ENGLISH'S COASTING AND SHIPPING COMPANY, LIMITED, Pursuers
(Reclaimers).—*J. C. Thomson—Watt.*

Dec. 10, 1886. BRITISH FINANCE COMPANY, LIMITED, Defenders (Respondents).—*Darling.*

English's
Coasting and
Shipping Co.
Limited, v.
British Fin-
ance Co.
Limited.

Foreign—Jurisdiction—Decree of foreign Court—Judgments Extension Act, 1868 (31 and 32 Vict. c. 54), sec. 2—Process.—*Held* that a certificate of a judgment of the "High Court of Justice, Queen's Bench Division, Liverpool District Registry," could be registered in the Books of Council and Session in terms of section 2 of the Judgments Extension Act, 1868.*

Held that to entitle a creditor who holds a judgment of the High Court of Justice in England to register the same in Scotland, under section 2 of the Judg-

* Section 2 of the Judgments Extension Act, 1868, enacts that "where judgment shall hereafter be obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer, at Westminster, . . . for any debt, damages, or costs . . ." on production at the office in Edinburgh for the registration of deeds, &c., registered in the Books of Council and Session, of a certificate of such judgment in statutory form, such certificate shall be registered in a book kept for that purpose, and "every certificate so registered shall, from the date of such registration, be of the same force and effect as a decreet of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate as if the judgment, of which it is a certificate, had been decreet originally pronounced in the Court of Session. . . ."

ments Extension Act, 1868, to do diligence thereon, it is not necessary that the debtor should be subject to the jurisdiction of the Scottish Courts. No. 47.

Arrestment—Ship.—Observations (per Lord Fraser) on warrants for arresting and dismantling ships. Dec. 10, 1886.

English's
Coasting and
Shipping Co.
Limited, v.
British Finance
Co. Limited.

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M.

(*Vide ante*, Jan. 13, 1886, 13 R. 430.)

On 4th November 1884 the British Finance Company, Limited, obtained a judgment against English's Coasting and Shipping Company, Limited, for a sum of £69, 2s., the amount of a debt found due to them, with costs, in an action raised in the High Court of Justice, Queen's Bench Division, Liverpool District Registry.

On 10th November 1884 the British Finance Company registered the judgment in the Books of Council and Session in Edinburgh, in terms of section 2 of the Judgments Extension Act, 1868.

The certificate on which the judgment was registered was granted by Mr Thomas Edmund Paget, District Registrar at Liverpool of the Queen's Bench Division of the High Court of Justice, and bore that the judgment was granted "in default of delivery of a defence by" English's Coasting and Shipping Company, Limited.

On 15th November 1884 the Lord Ordinary on the Bills (Kinnear) granted "concurrence and authority for putting the within warrant of arrestment" (i.e., the warrant contained in the extract registered certificate of judgment) "into all due and legal execution so far as regards maritime subjects, and grants warrant to dismantle arrested vessels if necessary." English's Coasting and Shipping Company had no domicile in Scotland, and no steps had been taken to found jurisdiction against them.

Subsequently the ship "Magdala," in which English's Coasting and Shipping Company had a beneficial interest, was arrested and dismantled when lying at the port of Grangemouth.

On 16th February 1885 English's Coasting and Shipping Company raised an action in the Court of Session against the British Finance Company, concluding for reduction of the extract registered certificate of judgment, and the warrant of arrestment following thereon, and for damages.

The pursuers averred,—(Cond. 3) "The defenders, instead of following out the ordinary method of procedure in England, on or about the 10th day of November 1884, wrongously and illegally registered the said judgment in the Books of Council and Session at Edinburgh. The said judgment is not registrable under the Judgments Extension Act, 1868, or any other Act, and the registration thereof in Edinburgh, and whole proceedings of the pursuers thereon after mentioned were illegal. In any event, it was not registrable against the pursuers, who had no place of business in Scotland, and against whom no jurisdiction of a Scotch Court existed."

The defenders answered,—"(1) The allegations introduced in the 3d article of the condescendence for the pursuers are really arguments in law and not statements of fact, but the defenders aver and explain that there is now no Court of Queen's Bench, and no Court referred to in the Judgments Extension Act now sits at Westminster. By the Judicature Acts of 1873 and 1875 however, and relative Orders in Council, the Courts at Westminster were consolidated into the High Court of Justice; the Court of Queen's Bench became a Division of the High Court; district registries of the High Court were established, *inter alia*, at Liverpool, and district registrars were to be deemed officers of the High Court; proceedings in the High Court were to be deemed equivalent to proceedings in any Court whose jurisdiction had been transferred to the High Court; and the powers of district registrars are declared to be equivalent to those of a master of the former Superior Courts at Westminster."

The pursuers pleaded, *inter alia*;—(1) The said registration in the

No. 47. Books of Council and Session at Edinburgh of said judgment, and the arrestment and whole proceedings thereon, being incompetent, wrongous, and illegal, the pursuers are entitled to decree of reduction as craved.

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The defenders pleaded, *inter alia*;—(2) The defenders are not subject to the jurisdiction of the Courts of Scotland. (4) The whole proceedings of the defenders being orderly and legal, the action is unfounded in fact and in law, and the defenders are entitled to absolvitor from the conclusions of the summons, with expenses.

On 9th June 1886 the Lord Ordinary (Fraser) assoilzied the defenders.*

* "OPINION.—The 2d section of the Judgments Extension Act, 1868 (31 and 32 Vict. cap. 54), provides that when a judgment of any of the English or Irish Courts therein mentioned has been pronounced, a certificate of such judgment, in the form annexed to the statute, may be registered at the office in Edinburgh kept for the registration of deeds, bonds, &c., 'in like manner as a bond executed according to the law of Scotland, with a clause of registration for execution therein mentioned; and every certificate so registered shall, from the date of such registration, be of the same force and effect as a decree of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate as if the judgment of which it is a certificate had been a decree originally pronounced in the Court of Session on the date of such registration.' Thus the registered certificate is to be taken as having the same effect as a decree of the Court of Session. Everything can be carried out under it which could be done in virtue of a decree pronounced by the latter Court against a domiciled Scotsman. Now, let us see what such a decree authorises.

"It was long ago settled that an arrestment may be used upon a decree without a previous charge (*Weir v. Falconer*, 2d February 1814, F. C.), and the Personal Diligence Act, 1 and 2 Vict. cap. 114, sec. 1, gives effect to this law, and the schedule No. 1 attached to that statute states it thus:—'And the said Lords grant warrant to messengers-at-arms, in Her Majesty's name and authority, to charge the said A personally, or at his dwelling-place, if within Scotland,

[if to pay money, specify the sum, interest, and expenses], and that to the said B [specify the name of the person in whose favour the decree is pronounced] within [insert the appropriate days] next, after he is charged to that effect, under the pain of poinding and imprisonment, and also grant warrant to arrest the said A's readiest goods, gear, debts, and sums of money, in payment and satisfaction of the said sum, interest, and expenses.' The debtor's goods are not to be poinded, except after a charge; but arrestment may be laid on at once, on the decree being extracted. There was consequently no good ground of objection to the ship of the pursuers being arrested, without a previous charge. But then it is said that, in order to justify the execution of diligence, in virtue of the decree of the Scottish Court, the Court must have jurisdiction over the defender; and such jurisdiction, it is maintained, is not had merely because the foreigner is owner of moveables in Scotland. The objection thus stated is, in the opinion of the Lord Ordinary, untenable. The Court to whom any objection founded upon want of jurisdiction must be stated is the Court that granted the original decree (*Wotherspoon & Birrell v. Conolly*, 10th February 1871, 9 Macph. 510). That Court, in the present case, was the High Court of Justice, Queen's Bench Division, Liverpool District Registry. The Courts of Scotland, whose assistance is now invoked in order to carry out this decree, must proceed upon the footing that it was a decree granted by a Court having jurisdiction to make it; and such being the case, the only question that can be raised is, whether the ship could be arrested under a decree of the Court of Session, the ship belonging to a foreigner, but against whom a decree of the Court of Session had been competently pronounced. In these circumstances, it is out of the question to maintain that before this English decree can be put to execution in Scotland there must be an arrestment to found jurisdiction, as in the case where an action is to be intended against a foreigner. The Court, in such a case, can only entertain the suit upon jurisdiction being constituted by an arrestment. But such is not the present case, for the Court that enter-

The pursuers reclaimed, and argued;—No objection could be taken against the proceedings in the Court at Liverpool; that Court un-

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tained the suit had jurisdiction *ratione domicilii*, and all that then requires to be done is to apply the forms of execution in use in the other part of the United Kingdom, where property of the defenders can be found.

"The extract certificate of judgment has appended to it an interlocutor by the Lord Ordinary officiating on the Bills in the following terms:—'Edinburgh, 15th November 1884.—The Lord Ordinary grants concurrence and authority for putting the within warrant of arrestment into all due and legal execution, so far as regards maritime subjects, and grants warrant to dismantle arrested vessels, if necessary.' In the event of the answer made by the creditor (the British Finance Company) to the objection of want of jurisdiction, stated by the pursuers of this action of reduction, not being sustained, the creditor maintains that this sanction or concurrence of the Lord Ordinary on the Bills to the arrestment of the ship, supplies any defect, if such existed. It is right, therefore, that this point should be considered. The concurrence of the Lord Ordinary on the Bills gives no additional force to the certificate and to the warrant appended to the extract, which is in these terms:—'And the said Lords grant warrant for all lawful execution hereon.' So far as the Lord Ordinary can see, the Bill-Chamber concurrence is without any legal authority, and was unnecessary. It has, no doubt, been the practice for a considerable time back to apply for the sanction or approval of the Lord Ordinary on the Bills; but this has arisen from misapplication of an old practice. When the Admiralty Court was in existence in Scotland it was necessary when arrestment was to be made of a ship, proceeding upon an extract registered protest or upon a horning, that the concurrence of the Judge Admiral should be obtained; and such concurrence was given in the terms of the concurrence of the Lord Ordinary on the Bills in this case (Smith's Maritime Practice, p. 59). The matter is thus noted in the Juridical Styles, vol. iii., of the edition of 1828, p. 993, published before the abolition of the Admiralty Court:—'The Judge Admiral must be applied to for his concurrence when the person or effects of any debtor to be apprehended or attached by the above diligence are aboard of the ship, or otherwise situated within the precincts of the jurisdiction of the High Court of Admiralty. This is obtained, of course, upon production of a caption, or of a horning, or other letters containing warrant of arrestment, duly signeted; and a deliverance suited to the nature of the diligence is granted accordingly.' But all this is now unnecessary, because the whole powers of the Admiralty Court were transferred to the Court of Session and the Sheriff Court by the Act 1 Will. IV. cap. 69, secs. 21 and 22, and any decrees or warrants by them have the same effect as decrees or warrants of the Judge Admiral. Accordingly the ordinary warrant to arrest contained in a summons has been held sufficient for the arrestment of a ship, without any concurrence by the Lord Ordinary on the Bills (*Clark v. Loos*, 17th June 1853, 15 D. 750). The ordinary summons in the Admiralty Court (which was in that Court called a 'precept'), contained, as a usual conclusion, one to arrest all ships, and 'to take the rudders and anchors from the said vessels (the same being always in a safe harbour), to remain under sure fence and arrestment at the instance of the said complainer aye and while sufficient caution and surety be found acted in the books of our said High Court of Admiralty, that the same shall be made forthcoming to the complainer, as accords of the law'—(Boyd's Judicial Proceedings, p. 13). Now, what the Judge Admiral's precept could do, without concurrence from anyone, the Court of Session, which has got all the Judge Admiral's powers, can also do; and it is very absurd to have an extract whereby 'the said Lords grant warrant for all lawful execution hereon' backed up and sanctioned by one of their number, and as a matter of course, too, the Lord Ordinary on the Bills. Perhaps the ordinary warrant to arrest may not include the further right to dismantle. The practice in the Admiralty Court was to insert a conclusion to that effect in the summons—a conclusion both to arrest and dismantle. Now, as already stated, it was enacted by 1 Will. IV. cap. 69, sec. 21, that 'the

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doubtedly had jurisdiction. But the judgment there granted did not fall under the 2d section of the Act of 1868. The judgments which were registrable were judgments of, *inter alia*, the Court of Queen's Bench "at Westminster." The order had under those words to be pronounced "at Westminster," and not when the Court was on circuit. The judgment was not even pronounced by the Court of Queen's Bench itself, but was a mere order pronounced by the Registrar; the case having gone by default never reached the Court itself; up to the very end it was wholly in the Registrar's office. On the assumption, however, that no objection could be taken to the judgment or the certificate and registration, the diligence which followed thereon was incompetent, as the reclaimers had no domicile in Scotland, and there had been no attempt to found jurisdiction against them. A registered certificate of a judgment was by the 2d section of the Act to have the same force and effect as a decret of the Court of Session. That meant of a decree which might have been taken in a similar action in Scotland. But no action for this debt could have been raised in Scotland, because the Court of Session had no jurisdiction.

Argued for the respondents;—The words "at Westminster" in the statute were not referable to the judgment, but were descriptive of the Court—the Queen's Bench "at Westminster." The Court of Queen's Bench at Westminster was now merged in the High Court of Justice, which had no special local habitation. The Registrar of the Liverpool District Registry was an officer of the Court, and was entitled to carry out proceedings in the Queen's Bench Division up to a certain point, when the cause came before the Court itself. It was merely for convenience that he was allowed to conduct formal proceedings to a conclusion. As regarded the argument against the diligence which had been executed, if given effect to, it would lessen the utility of the statute very largely,

High Court of Admiralty be abolished, and that hereafter the Court of Session shall hold and exercise original jurisdiction in all maritime civil causes and proceedings of the same nature and extent in all respects as that held and exercised in regard to such causes by the High Court of Admiralty before the passing of this Act.' In virtue of this enactment the Court of Session can issue all writs in the same way and manner as the former Admiralty Court could do, and there seems to be no good reason why the conclusions of a summons should not be as extensive in the Court of Session—now the Admiralty Court—as they were in the former Admiralty summonses or precepts,—that is, containing a warrant both to arrest and dismantle. Dismantling a vessel is simply completing an arrestment, and making it efficient.

"If no such conclusion be inserted in the summons, but merely a conclusion to arrest, and it should be sought further to dismantle, there might be some ground for applying to the Lord Ordinary on the Bills for a warrant to that effect, because, after the passage already quoted from the Act of Parliament, it is enacted that 'all applications of a summary nature connected with such causes may be made to the Lord Ordinary on the Bills'; and a warrant to dismantle, where such a warrant is not concluded for, might perhaps competently be asked for in virtue of this clause.

"But all this has reference merely to arrestment and dismantling on the dependence. It has no application to the case when final decree has been pronounced, and when execution of it is sought. In such a case the decree carries along with it full power to dismantle, and perform everything else that was competent, in virtue of a final decree of the Judge Admiral.

"The result of all this is that if the arrestment of the pursuers' vessel was invalidly effected in virtue of the warrant in the extract certificate, it was not made valid by anything that was done by the Lord Ordinary on the Bills. The pursuers are entitled to this expression of opinion by the Lord Ordinary."

because no one could obtain any benefit from it unless the defender was subject to the jurisdiction both of the country in which the judgment was obtained and also of the country in which it was to be registered. Further, the Registrar, when a judgment was brought for registration, would have to enter upon a long and possibly intricate inquiry whether the person against whom it was directed was subject to the jurisdiction of the Courts of the country. This could not have been consistent with the intention of the Legislature, which was to make judgments available to creditors in whatever part of the United Kingdom they might find their creditors or their creditors' property.

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At advising,—

LORD PRESIDENT.—The proceedings challenged in this action of reduction were taken under section 2 of the Judgments Extension Act, 1868. The first objection taken by the pursuers is that the certificate does not shew that the judgment intended to be enforced here is a judgment of any of the Courts specified in that 2d section. The provision is that “where any judgment shall hereafter be obtained or entered up in any of the Courts of Queen’s Bench, Common Pleas, or Exchequer at Westminster . . . respectively for any debt, damages, or costs,” a certificate of such judgment may be registered in Edinburgh; and “every certificate so registered shall from the date of such registration be of the same force and effect as a decree of the Court of Session”; and all proceedings may proceed thereon as if the judgment had been a decree pronounced by this Court. Now, the certificate in this case, of which an extract is produced, is made by Mr Paget, who is the proper officer to grant such certificates, and he certifies that the British Finance Company, Limited, on 4th November 1884, obtained a judgment against the pursuers of this reduction in the High Court of Justice, Queen’s Bench Division, Liverpool District Registry, for payment of a debt. Now, the High Court of Justice in England comes in the place of the superior Courts of Law and Equity, viz., Chancery, Exchequer, Admiralty, &c., and though we have no evidence before us of this transference of jurisdiction, it would be mere pedantry to ignore the fact. It therefore appears to me that when we find a certificate of a judgment bearing to be pronounced by the High Court of Justice, Queen’s Bench Division, we are bound to give to it the same effect as we should have given to a judgment by one of the Courts mentioned in the statute.

Objection was further taken that this was not a decree by the High Court of Justice itself, but by the District Registrar; in short, that it is not a judgment of the Court, but merely an entry in a book by the Registrar. I think we need not inquire into the particular regulations of the Queen’s Bench Division of the High Court of Justice as to the mode of entering up or extracting judgments; it is enough for us to know that this is a judgment obtained on a certain date before the High Court of Justice, Queen’s Bench Division, and therefore the objection fails.

But then a second objection is taken, viz., that the Court of Session had no jurisdiction as against the pursuers of this reduction, and that if the defenders had raised an action against them here, it would have been thrown out on the plea of want of jurisdiction, and that no proceedings were taken to found jurisdiction in Scotland. Now, that raises a question of some importance on the effect of the 2d section of the Statute of 1868. If the meaning merely is that an English or Irish decree may be enforced here against any domiciled Scots-

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man, or against anyone over whom we have jurisdiction, it would limit the utility of the Act very much, and in a way which has hitherto not been contemplated. The question therefore is, whether the effect of registering an English judgment here, or a Scottish judgment in England, is merely to enable the party obtaining the judgment to proceed against the person of the defender, or whether it is not also to enable him to proceed against any property of the defender which may be situated in the country where the judgment is registered. The policy of the statute points to the larger construction, viz., that if an Englishman or Irishman holds a judgment obtained in England or Ireland, he may use it and make it effectual against the person and property of his debtor, wherever he may find it within the United Kingdom, and therefore, though here the defenders in the English action had no domicile in Scotland, and the Scottish Courts had no jurisdiction over them, still the proceedings taken under the 2d section of the statute will be effectual to produce every known execution that would follow on a decree of this Court.

Some other matters relating to the mode in which the arrestments were used are noticed in the Lord Ordinary's note, but they were not pressed in argument, and it is unnecessary to say anything about them. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD MURE and LORD SHAND concurred.

LORD ADAM.—One of the objections urged here is that it is necessary that the judgment, the certificate of which is registered, must be obtained "at Westminster." My opinion is that those words "at Westminster," which occur in the statute, do not apply to the place where the judgment is to be pronounced, but are a description of the Court.

The second objection is that the Act does not come into force except where there is jurisdiction over the person against whom the judgment is pronounced in both countries. If that were so, it would greatly limit the usefulness of the Act, and I therefore agree that we should adhere to the Lord Ordinary's interlocutor.

THE COURT adhered.

CLARK & MACDONALD, S.S.C.—DALGLEISH & LUMSDEN, S.S.C.—Agents.

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JOHN BURNETT WILLIAMSON, Petitioner.—*Darling—Ferguson.*
MISS MARY ANN WILLIAMSON AND OTHERS, Respondents.—*H. Johnston.*

Presumption—Presumption of Life Limitation (Scotland) Act, 1881 (44 and 45 Vict. cap. 47), secs. 5 and 8.—Sec. 8 of the *Presumption of Life Limitation Act, 1881*, provides that, for the purposes of the Act, where a person has disappeared and "no presumption arises from the facts that he died at any definite date," he shall be presumed to have died on the day which will complete seven years from the date of his last being heard of.

Held that to exclude the statutory presumption of death on the day completing the seven years, the presumption arising from the facts must be such as would have been sufficient to overcome the presumption of life at common law.

Circumstances shewing the probability of an absent person's death at a date within the seven years after his disappearance, which were *held* not sufficient to overcome the presumption of life at common law.

Observations (per Lord Shand and Lord Adam) on the effect of the words "at any definite date."

ON 15th December 1885 John Burnett Williamson presented a petition to the Court under the Presumption of Life Limitation Act, 1881, in which he prayed for authority to make up a title as heir of provision to his brother, Arthur Stewart Williamson, and to enter into possession of, and enjoy, receive, and discharge the sum of £6000, forming the *surrogatum* for the estate of Arthur Seat which belonged to his said brother, with accumulated rents and interests "from and after the date when your Lordships shall hold that the said Arthur Stewart Williamson must be presumed to have died, in the same manner as if he were dead." The petitioner was not Arthur's heir-at-law.

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1st DIVISION.

B.

The petitioner stated, *inter alia*,—"The said Arthur Stewart Williamson left Scotland for Australia in 1857. He and the petitioner were partners in sheep transactions and in other business there, and were in constant personal intercourse and communication with each other down to the month of July 1865, when they parted at the Peak Downs Mines, in Northern Queensland, the said Arthur Stewart Williamson expressing his intention to proceed with horses overland direct to Sydney, and the petitioner proceeding to the same place by sea from Port Denison. The petitioner never saw or heard of the said Arthur Stewart Williamson again, nor has he ever since been heard of by any of his friends or relatives, although diligent inquiry was made for him at the time, and he has been advertised for both in Australian and New Zealand papers. He was about twenty-six years of age when he disappeared in 1865. . . . In the circumstances above mentioned a presumption arises from the facts that the said Arthur Stewart Williamson died in or about the month of July 1865, having been lost in the bush in the course of the journey on which he was setting out when the petitioner last saw him, or otherwise, for the purposes of the Presumption of Life Limitation (Scotland) Act, 1881, he must be presumed to have died not later than the month of July 1872.* The said Arthur Stewart Williamson having disappeared for a period of upwards of twenty years, and not having been heard of for twenty years, and having at the time of his disappearance been possessed of heritable estate in Scotland, the petitioner, as the person entitled to succeed to him in such heritable estate, presents this petition to your Lordships under the said Act."

Miss Mary Anne Williamson, her two sisters, and their brother, Dr Benjamin Williamson (who claimed their shares of the rents accumulated to the date of Arthur's death as his next of kin), lodged answers to

* Section 5 of the Presumption of Life Limitation Act, 1881, provides that "in the case of any person who has been absent from Scotland, or who has disappeared for a period of twenty years or upwards, and who has not been heard of for twenty years, and who at the time of his leaving or disappearance was possessed of or entitled to heritable estate in Scotland, or who has since become entitled to heritable estate there, it shall be competent to any person entitled to succeed to said absent person in such heritable estate to present a petition to the Court setting forth the said facts, and after proof of the said facts, and of the petitioner being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to make up a title to, enter into possession of, and enjoy and sell or dispose of the said heritable estate in the same manner as if the said absent person were dead."

Section 8 provides that "for the purposes of this Act in all cases where a person has left Scotland or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of at or after such leaving or disappearance."

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the petition, in which they stated,—“The respondents are the next of kin and representatives of deceased next of kin of Arthur Stewart Williamson (other than the petitioner), assuming him to have died at the expiry of seven years from the time of his last being heard of. The respondents admit generally the accuracy of the statements in the petition, except the statement that in the circumstances therein mentioned a presumption arises from the facts that the said Arthur Stewart Williamson died in or about the month of July 1865. The respondents aver that no presumption arises from the facts that the said Arthur Stewart Williamson died at any definite date, and consequently, that by virtue of the 8th section of ‘The Presumption of Life Limitation (Scotland) Act, 1881,’ it falls to be presumed that he died on the day which will complete a period of seven years from the time of his last being heard of, *i.e.*, on some day in the month of July 1872.”

Proof was led on commission, from which it appeared that Arthur Williamson was well educated, and that after he left home in 1857, down to about 1863, he corresponded regularly with his relatives at home, with whom he was on good terms. When he and his brother parted on the Peak Downs in July 1865 he started for Sydney, *via* Brisbane, with a view to getting certain I O U's and cheques cashed. It was arranged that he should meet his brother, the petitioner, at Sydney. He started, riding one horse and leading another, the distance to Brisbane being about 500 miles across a very rough country. He was not a good bushman, and had no knowledge of the country through which he had to pass, and there were no roads through it. It was further proved that the “blacks were very bad” on the Bellyando River, which he had to pass, and that generally the state of the country was unsettled. No tidings of his having reached Brisbane or Sydney were ever got. The petitioner afterwards went to various places, but was not in Sydney till 1869. With regard to Arthur's correspondence with home, it was proved that it had ceased altogether two years before his disappearance, and that at about that date he had heard from home that no remittances would be sent to him for about two years, when the rents of his property would have accumulated.¹

LORD PRESIDENT.—The general rule of the common law was that (within the limits of human life) a man was presumed to be alive until his death was proved, or until facts and circumstances were proved sufficient to raise a presumption that he died at some particular date. The object of the Act of 1881 was to limit the presumption of life, and the expediency of the statute has been very generally recognised, for the old law often kept property in neutral custody for so long a time as to deprive a generation from taking any benefit from a succession which had really opened up to them. The new statute says that after a lapse of a certain number of years a person who has disappeared shall be presumed to be dead. The periods vary under different circumstances, but all proceed on the same footing, *viz.*, that, in the absence of any knowledge of a person being in life for the statutory period, he shall be deemed to be dead. But it was necessary to fix at what time the person is to be presumed to have actually died, for if he had not been heard of for twenty years it did not necessarily follow that he died twenty years ago, or last year, or a month ago, and therefore the Legislature found it absolutely necessary to fix some particular point at which the man is to be presumed to have died. Accord-

¹ *Authorities as to presumption of life at common law.*—Rhind's Trustees v. Bell, Jan. 15, 1878, 5 R. 527, and cases there cited.

ingly, it was fixed that where a person has been absent for twenty years without being heard of he shall be presumed to have died on the day which completed seven years since he was last heard of, or since he left or disappeared. That is a very reasonable provision, but the same section (the 8th) which raises that presumption also points to another, namely, that the Court may act on the presumption arising from the facts that the man died at some "definite date." Under these words "any definite date" this case arises. The petitioner says that it is proved that this man died in July 1865. Now, the presumption arising from the facts contemplated by the statute is, I think, such a presumption as would have been sufficient to overcome the presumption of life under the common law. Under the common law you might overcome the presumption of life by proving facts which raised a stronger presumption that the man died at or about some definite date. Now, is there evidence in the present case to raise such a presumption that this man died at any definite date? The conclusion we are asked to draw from the evidence is that he died in July 1865. He left Rockhampton for Brisbane and Sydney in that month, and undoubtedly the journey was a perilous one through a rough country; and nothing further was heard of him. He had valuable property in his possession, and it is not at all improbable that he was murdered on his journey, but that is not sufficient to raise the presumption I have spoken of; that is merely a general probability. We do not know for certain that the absentee did not arrive in Sydney—he was not known there, and indeed so little importance did his brother attach to not meeting him in Sydney, as arranged when they parted, that he does not seem to have made any special inquiries as to whether he had been seen in the town or district. Suppose that Arthur Williamson did reach Sydney in safety, and that, being unknown, he passed through it unobserved, he may have died elsewhere, and long after the date fixed by the petitioner.

Such a case as this does not rest on a mere balancing of probabilities. We must be satisfied that he died on that journey, and I am therefore very clear that the facts proved are not sufficient to have overcome the presumption of life under the old law.

It may be said that this 8th section leaves us to say which is the most reasonable of the presumptions there mentioned,—the presumption arising from the facts or the statutory presumption. I think, however, that the statute gives the preference to the seven years or statutory presumption, unless there is such proof of death at a definite date as to overcome the presumption of the common law.

I do not attach any importance to the correspondence or want of correspondence in this case. The cessation of correspondence is often of importance in such cases, but here it had ceased two years before Arthur Williamson disappeared. We are further informed of one reason which may explain that discontinuance, viz., that it was not likely that he would succeed in getting any more money from home for some time, and that the obtaining remittances from home was his reason for keeping up the correspondence as long as he did.

On the whole matter I think we are bound to hold that the presumption is that this man died on the day corresponding to a period of seven years after he left Rockhampton.

LORD MURK concurred.

LORD SHAND.—Both parties here have appealed to sec. 8 of the statute. Now, before that statute became law there was at common law a very strong

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No. 48. presumption of life, and the Court rigorously exacted satisfactory proof to overcome that presumption even where the party had been unheard of for a long period, and it may be that in the light of that statute rather less rigorous evidence would now be held to be sufficient to overcome the presumption of life.

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However that may be, the true construction of the words "where no presumption arises from the fact that he died at any definite date," is, in my opinion, that the Court must be satisfied on the evidence that it has been by presumption established that death occurred at or near some definite time. A mere balancing of one date against another will not do, the presumption must amount to this, that the evidence has displaced the presumption of life. The words "at any definite date" do not, I think, tie the Court down to any definite day, week, or even month, for, for instance, where a vessel leaves one port for another, and never reaches its destination, it would be impossible in many cases to fix the death at any absolutely precise date, but the evidence must be sufficient to leave no doubt that the death occurred before the seven years had elapsed.

In the view your Lordship has taken of the facts I concur, and therefore I think the petitioner must take the benefit of the statutory presumption that this man died on that day which completed seven years since he was last heard of.

LORD ADAM.—The statute says that when a person has disappeared for twenty years, if there is no presumption arising from the facts that he died "at any definite date," he shall be presumed to have died seven years after he was last heard of.

In this case Arthur Williamson disappeared twenty years ago, and therefore the statute draws a presumption of death thirteen years ago, unless it is shewn that he died before that. The date here sought to be fixed as the date of death is July 1865. Now, I concur in what your Lordship has said as to the character of the evidence upon which an earlier date than the end of the seven years can be determined. It must be shewn beyond reasonable doubt that death occurred at that date. If that is shewn, then the presumption may be drawn, but it is a totally different thing to say that it is "more probable" that he died then than at any other time. It is, I think, "more probable" in this case that Williamson died in July 1865, than that he survived to get to Sydney and died sometime thereafter, but he may have reached his destination and died there, or merely passed through and died elsewhere—the very possibility of that excludes us from saying that there is any presumption of death at that date.

It is not necessary in this case to interpret precisely the words "at any definite time," but I think what may be sufficiently definite in one case may not be in another, and that the words will be interpreted with reference to the circumstances of each case as they arise.

On the whole matter I concur.

THE COURT pronounced this interlocutor:—"Grant authority to the petitioner to make up a title to, enter into possession of, and enjoy, receive, and discharge the consigned money of £6000 forming the surrogation of the heritable property of Arthur Seat, with the whole free accumulated rents of the said properties, and interests of the said sum from and after 31st July 1872, the date when Arthur Stewart Williamson is to be presumed to have died, in the same manner as if he were dead, and decern."

JAMES ROSS FARQUHARSON, Petitioner (Reclaimer).—*C. N. Johnston.*
 PATRICK BLAIR (A. H. Farquharson's *Curator ad litem*), Respondent.—
Sol.-Gen. Robertson—Blair.

No. 49.

Dec. 15, 1886.
 Farquharson
 v. Farquhar-
 son's *Curator*
ad litem.

*Entail—Disentail—Value of next heir's expectancy—"Proper security"—Entail Amendment (Scotland) Act, 1875 (38 and 39 Vict. c. 61), sec. 5, subsec. 2 (b).—*Sec. 5, subsec. 2 (b) of the Entail Amendment (Scotland) Act, 1875, provides that, in the case of a disentail, the Court shall direct the value in money of the next heir's interest in the estate to be disentailed to be paid into bank in name of the heir, "or that proper security shall be given over the estate which is the subject of application for the amount so ascertained in favour of the heir."

Held that the "proper security" to be given must be such as a prudent lender would accept, and that, failing such security, the sum representing the value in question must be paid into bank.

Circumstances in which the Court *held* that "proper security" was not offered by the disentailing heir, and ordained the sum representing the value of the next heir's expectancy to be paid into bank.

LIEUTENANT-COLONEL J. R. FARQUHARSON, heir of entail in possession of the entailed estate of Invercauld under an entail dated prior to 1st August 1848, presented a petition for disentail of a portion of the entailed estate under the Rutherford Act (11 and 12 Vict. c. 36), and the amending Acts of 1875 and 1882. The next heir, the petitioner's only son, Alexander Haldane Farquharson, a minor, to whom Mr Patrick Blair, W.S., had been appointed *curator ad litem*, declined to give his consent to the petition, and it became necessary, in terms of section 5 of the Entail Amendment (Scotland) Act, 1875, and sections 12 and 13 of the Entail (Scotland) Act, 1882, to ascertain the money value of the son's interest in the estate. Remits having been made for that purpose, the value of the lands proposed to be disentailed was reported to be £48,500, and of the heir's interest £21,930.

1st DIVISION.
 Lord Trayner.
 M.

The petitioner having proposed to secure the heir's interest by granting him a bond and disposition in security over the lands for the £21,930, the *curator ad litem* objected that the security was insufficient, and not a "proper security" under the Act of 1875,* nor such as a prudent lender would accept, there being a prior bond for younger children's provisions to the extent of £21,000 over the entailed estate, including the subjects which were being disentailed. The free rental of the latter was £787, 6s.

The petitioner subsequently by minute offered the additional security of another estate which was held by him in fee-simple, which was valued at £32,000, and burdened to the extent of £21,700.

The *curator ad litem* repeated his objections, and added that the free rental of the lands offered as additional security was £1196, the half of which was a fishing and shooting rental.

The Lord Ordinary (Trayner), on 24th November 1886, pronounced an interlocutor in which he, *inter alia*, ordained the petitioner to pay into bank the sum of £21,930 in name of the next heir.†

* Section 5, subsection 2 (b), of the Act 38 and 39 Vict. c. 61, provides that, upon the value of the heir's expectancy over the lands to be disentailed being ascertained, "the Court shall direct the sum so ascertained to be paid into bank in name of the heir or heirs, the value of whose expectancy or interest has been ascertained as aforesaid, or that proper security shall be given over the estate which is the subject of application for the amount so ascertained in favour of the heir or heirs aforesaid."

† "OPINION.—(After quoting subsection 2 (b) of the 5th section of the Act

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The petitioner reclaimed, and argued that under the 5th section of the statute above quoted the petitioner could not be asked to give more than

38 and 39 Vict. c. 61)—The purpose and intention of that provision is apparent. The Court is to see that the heir's expectancy is secured to him before the lands shall be disentailed, and that either by the value of that expectancy being deposited in bank, or properly secured over the lands themselves. It is said that the latter condition will be fulfilled if a formal and valid bond and disposition in security is granted over the lands in question; and I agree with that, if the lands afford sufficient security for the amount of the expectancy. But I demur to the view that, in all circumstances, an heir of entail in possession is entitled to have lands disentailed simply in return for such a bond. If the lands do not afford sufficient security for the expectancy, the purpose of the statute would not be accomplished merely by granting a bond over them. The words 'proper security' do not, in my opinion, refer primarily to the nature or character of the writ by which the security is constituted. That writ may, in a technical and conveyancing sense, be a proper security, and yet, as regards the next heir, be no security at all, or very inadequate security. In my view, 'proper security' means adequate or sufficient security—security to the heir which is as good as money. In the ordinary case the lands to be disentailed will afford such adequate security, because the expectancy being calculated on the ascertained value of the lands, and being of necessity less than the value of the lands, the lands will afford security for a sum less considerably than they are worth. But it may be otherwise, and accordingly if the Court is not satisfied with the security of the lands, it may order consignment of the value of the expectancy in bank. The question therefore is, whether the lands now sought to be disentailed afford proper—that is, adequate—security for the amount of the heir's expectancy. The curator says they do not, and the reporter to whom the petition was remitted agrees with him. I think they are right. The lands are worth £48,500, but, burdened with a first bond for £21,000, they are only worth £27,500 as security to the next heir. Now, no prudent lender will give a loan to the extent of £21,930 (the amount of the heir's expectancy) on a subject worth £27,500, even on a first bond, much less on a postponed security. There are other reasons against the security in respect of the rental, but on this matter I refer to the objections stated by the curator.

"It is right, however, to notice that the £21,000 bond already existing is one which affects not only the lands in question, but also the whole entailed estate, and it is said by the petitioner that if the creditors in that bond were to do diligence upon it and operate payment out of the disentailed lands, the next heir would have his relief against the other lands. I feel the force of this; but it appears to me to be the duty of the Court, imposed upon it by statute, to give the next heir, in such a case as this, an actual and adequate security, which he can make immediately available, if necessary, for the amount ascertained to be due to him. He is not to be paid, in whole or in part, by a right of relief. Even if such a right of relief were regarded as a security, it would not be the security provided by the statute. It would not be a security over the lands disentailed, but over other and different lands.

"I regard the next heir as a creditor for the amount of his expectancy, who cannot be compelled to take as a security therefor subjects upon which no prudent lender would advance on loan the amount of that expectancy.

"At the discussion before me, I suggested that the petitioner should endeavour to satisfy the curator *ad litem* by the offer of some security additional to the lands to be disentailed. Acting upon that suggestion, the petitioner has offered the farther security of the lands of Auchallater. But I agree with the curator that the offer made does not afford any additional security, or at least such as the curator should accept. The lands of Auchallater (as valued in 1884) are said to be worth £32,000. They are already burdened to the extent of £21,700, and are therefore burdened to the full amount (two-thirds of their value) which any prudent lender would advance. Besides, I cannot compel the curator to accept any such additional security if he is unwilling to accept it.

the best security which the subjects which were being disentailed would yield. But apart from that, the security offered was ample. The £21,000 debt was spread over the whole estate of Invercauld, and the additional security of the lands held in fee-simple was in any case sufficient.

The respondent was not called on.

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LORD PRESIDENT.—I do not entertain any doubt that the Lord Ordinary is right in the view he has taken. The ground of judgment cannot be better stated than in the words which his Lordship has used,—“I regard the next heir as a creditor in the amount of his expectancy, who cannot be compelled to take as a security therefor subjects upon which no prudent lender would advance on loan the amount of that expectancy.” This seems to me to be conclusive against the claimer's contention.

It is only necessary to notice further the supplementary security which has been offered. But, again, the Lord Ordinary's answer is quite conclusive. He says that these additional lands “are already burdened to the extent of £21,700, and are therefore burdened to the full amount (two-thirds of their value) which any prudent lender would advance.” In short, the supplementary security offered is just another example of a security on which no prudent lender would give a loan. It will therefore be necessary that the sum at which the heir's interest has been valued be paid into bank.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT refused the reclaiming note.

TODD, MURRAY, & JAMIESON, W.S.—**HUNTER, BLAIR, & COWAN, W.S.**—Agents.

KEDDIE, GORDON, & COMPANY, Pursuers (Appellants).—*D.-F. Mackintosh* No. 50.
—*MacLennan.*

NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—
Balfour—*C. S. Dickson.*

Dec. 15, 1886.
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Carrier—Conveyance of goods—Reparation—Consequential damages.—A manufacturer forwarded a bale of cloth by rail, consigned to a shipping agent at Grimsby, who was to ship it for Germany. On arrival at Grimsby the package was found to be frayed, and some slight damage done to the cloth. The shipping agent refused to take delivery, being of opinion that the goods could not be safely forwarded in their damaged package. The railway company thereupon returned them to the manufacturer, who re-packed them, and forwarded them to Germany. On arrival there they were rejected as being too late. The manufacturer having sued the railway company for damages for loss of market, held that the shipping agent was entitled to refuse to take delivery, and that the loss of market was the direct result of the damage done to the package by the railway company, who were therefore liable for it.

On 16th January 1884 Keddie, Gordon, & Company, tweed manufacturers at Galashiels, delivered a bale of cloth to the North British Railway Company, to be forwarded to Messrs John Sutcliffe & Son, shipping and forwarding agents at Grimsby, to be sent on by them to Messrs Oppenheimer & Grabowsky in Berlin. A letter of advice was forwarded

2D DIVISION.
Sheriff of
Roxburgh and
Selkirk.
M.

By the statute the Court has only two courses open to it—(1) to order consignation in bank of the amount of the expectancy, or (2) to see that expectancy properly secured over the lands to be disentailed. As I think that the lands to be disentailed do not afford ‘proper security’ for the amount of the heir's expectancy, I have ordered the amount to be paid into bank.”

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to Sutcliffe & Son, bearing "Please forward this bale with all speed, as it is urgently wanted." The bale was packed in a threefold wrapper, two of jute and one of oilcloth, and was stamped with the letters O. & G. B. within a lozenge, indicating that the goods were to be shipped to Oppenheimer & Grabowsky. The goods were made to a special order of these merchants, the price being £62, 1s. The order was a "repeat" order, and the goods were urgently wanted. The North British Railway Company forwarded the bale over their own and other lines of railway to Grimsby, where it arrived on the 19th January, and was tendered to Sutcliffe & Son for shipment to Hamburg. Sutcliffe's clerk, who was checking the goods for shipment, saw that the wrappings of the bale had been chafed through and the cloth damaged. He was of opinion that it was too much damaged to be shipped, and refused to allow it to go on board.

On this Sutcliffe & Son on the same day wrote to the agent of the railway company at Grimsby,—Bale from Galashiels "delivered by you in a damaged state. We must therefore refuse to accept the bale, and request you to return it to senders for repairs. Should any claim arise we shall hold you responsible." The railway company took back the bale, and returned it to Keddie, Gordon, & Co. It was sent off from Grimsby on the 21st, and reached Galashiels on the 25th. Keddie, Gordon, & Company found that the cloth was very slightly damaged, so that they were able to re-pack it at once, and on the day of its arrival despatch it anew to Grimsby, where it arrived again on 29th January. On 4th February Oppenheimer & Grabowsky, who had not received the bale by that time, wrote to Keddie, Gordon, & Company that they would not now take delivery of it. When it did arrive they tried to sell it, but failing to do so they returned it on 21st February to Keddie, Gordon, & Company, who sold it for £29, 14s. 9d.

Keddie, Gordon, & Company, in January 1886, raised an action against the railway company for £36, 1s. 2d., being the difference between the invoice price and the price actually received, along with certain expenses.

The pursuers pleaded the fault of the defenders.

The defenders pleaded, *inter alia* ;—(4) Any loss sustained by the pursuers being purely consequential, the defenders are not liable therefor.

A proof was allowed, from which the facts above narrated appeared, and were not disputed. The question came to be whether Sutcliffe should have sent on the goods or sent them back as he did. He gave evidence as to his practice to the effect that when goods arrived in a damaged condition from a point beyond the system of the Manchester, Sheffield, and Lincolnshire Railway he sent them back. He was agent for that railway company, and the Hamburg steamers belonged to them. When they came from a point on that system he had the damage surveyed, and if a claim arose it was settled by the company's agent in Hamburg. Mr Sutcliffe stated that he shipped about seven-tenths of the cloth that went from this country to North Germany. He and his father had been in business in Grimsby for twenty-four years.

Mr Reed, the company's agent at Grimsby, deponed,—“I don't believe there is any universal custom. Each firm have practices of their own. In cases of slight damage, Messrs Sutcliffe would take a letter from us indemnifying them against any claim. . . . Cross-examined.— . . . It is in the interests of the railway company that damaged goods should be returned rather than forwarded to their intended destination, because when they have got abroad the company would have no means of checking any claim for damage which might arise; I mean except in cases of slight damage. Speaking from memory, I should say a letter of indemnity was

not given by me on behalf of the company to Messrs Sutcliffe & Son in this case, nor offered." No. 50.

The Sheriff-substitute (Spittal), on 18th May, after findings in fact, found in law "that through the fault of the defenders, or those for whom they are responsible, the goods in question failed to reach Messrs Oppenheimer & Grabowsky in due time, and were justifiably rejected by them, whereby the pursuers suffered loss to the amount of £36, 1s. 2d.: Decerns against the defenders for the said sum of £36, 1s. 2d. sterling," &c.¹

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On 29th June the Sheriff (Jameson) recalled his Substitute's interlocutor, and, after findings in fact, found in law "that the loss sustained by the pursuers, in consequence of the said goods not having been timeously delivered to Messrs Oppenheimer & Grabowsky, is not a loss for which the defenders are liable to make reparation to the pursuers: Therefore refuses the prayer of the petition, and assoilzies the defenders," &c.*

The pursuers appealed, and argued;—A carrier was always entitled to refuse to take goods which were badly packed, and not fit to travel.¹ He was not entitled to open the package and examine it.² Sutcliffe was a carrier, and the company was bound to deliver the goods to him in good travelling condition. The goods were then properly sent back, therefore the delay was due to the damage done by the defenders, and the loss of market was due to the delay. There was nothing extraordinary in the despatch required, and no extraordinary measure of damages was asked. The loss was just the loss of the market price, and the amount of despatch required of the company was just the ordinary course of delivery.³

The defenders argued;—The fault here was Sutcliffe's fault, for the damage done was not done to the goods, nor was it serious enough to warrant Sutcliffe sending the goods back. He should have renewed the packing and sent it on. But, in any event, the company were not liable for the loss occasioned by the delay, a loss that was dependent on a special contract between the parties, of which they had no notice.⁴ If any liability

* "NOTE— The defenders, as practically insurers of the goods carried by them, are undoubtedly liable to make good any actual damage done to goods during transit over their own line, or the lines of companies for whom they are responsible, the measure thereof being the diminished value of the goods. But in the present case that damage was trifling, and it is not claimed in this action. In certain circumstances carriers may be liable for more remote consequences of their breach of contract, provided such consequences are the direct, necessary, or natural result of the breach. Now, I cannot hold that the sending back the bale to Galashiels was the direct, necessary, or natural consequence of the damage sustained during the carriage of the goods from Galashiels to Grimsby; and it is further to be observed that the defenders got no information from the pursuers as to the ultimate destination of the goods, or as to the purpose for which they were sold, nor were they told that there was any necessity for special despatch. All the defenders contracted to do was to carry the goods to Grimsby and deliver them there, and this they did with due despatch. This being so, I think that it must be held that the damage caused by the rejection of the goods on account of delay in their reaching Berlin could not have been in the contemplation of both parties at the time the contract was entered into, and was, as regards the defenders, remote and consequential, and therefore cannot be recovered from them. The loss which the pursuers have unfortunately sustained is, in my view, the direct result of the wholly unnecessary actings of J. Sutcliffe & Son, for whom the defenders are not responsible."

¹ Cox v. London and N.-W. Ry. Co., 1862, 3 Foster and Finlason, 77.

² Crouch v. London and N.-W. Ry. Co., 1854, 14 Scott's Common Bench Rep. 255.

³ Collard v. S.-E. Ry. Co., May 24, 1861, 30 L. J. Ex. 393.

⁴ Hadley v. Baxendale, 1854, L. R., 9 Ex. 341, Smith's L. C. ii. 570.

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for special loss was sought to be imposed on the company, they must be shewn to be in knowledge of the special contract.¹ Otherwise, the loss was too remote and consequential to be recovered from the defenders, for the ordinary liability of the company was only for ordinary despatch.²

LORD JUSTICE-CLERK.—The discussion in this case raised incidentally and collaterally some questions of interest, but the real matter we have to decide lies within a very narrow compass of facts. This parcel of goods was forwarded by manufacturers in Galashiels. It was put into the charge of the North British Railway Company, by them it was transferred to an English railway company, who forwarded it to Grimsby, where it was taken possession of by Sutcliffe, a shipping agent. He found that the package was frayed, and the goods it contained partly exposed, and in some measure damaged, and thought that it was in a condition in which it was not suitable for further transmission. On that Sutcliffe refuses to accept the goods for further transit, and sends them back to the railway company to be sent back to the manufacturers.

The bale was sent back, and was repacked in Galashiels and sent on again to Grimsby. It was then shipped and delivered in Berlin, but it arrived too late for the only purpose for which the buyer had ordered it. It is returned upon the manufacturer's hands and sold at a loss by him.

Then comes this action against the North British Railway Company. The pursuers think, and think rightly, that the whole ultimate consequences are the result of the damage done by the railway company. The company say that they are not liable for the consequences of the injury. Sutcliffe, they say, should have sent the goods on, the damage was trifling, and if he had done so, the amount of loss to the manufacturer would have been quite inconsiderable. They say further, that the damage which has been suffered was remote, arising as it did from a stipulation between the manufacturer and the buyer in Berlin as to the time of delivery, and the fact that the market was lost from the delay is not a fact for which they can be responsible.

These are, I think, the main contentions for the defenders, and I can dispose of them very shortly. In the first place the North British Railway Company were bound to deliver the goods to Sutcliffe in good travelling condition. They did not do that. Who was responsible for the next step? Sutcliffe was entitled, thinking as he did that the goods were not in safety to travel further, to reject them. It is said that he should have undone the package and repaired it and the goods. I do not think he had any right to do that, and it is clear that he was not bound to do it. He thought it was better to return them to the manufacturer for that purpose. It is said, no doubt, that Reed thought the goods should have been sent on. He says so, no doubt, but he also says that he would have taken a letter of indemnity from the railway company. If he thought that necessary it shews that he did not consider that it was within the scope of the shipper's ordinary duty to forward them.

Now, is the loss which resulted from the goods not arriving in Berlin in time a loss which falls upon the railway company? I think that it is directly the result of the goods not having been carried by the railway company in safety to Grimsby. I think it is a direct result, and the damage is in no way conse-

¹ British Columbia Saw Mill Co. v. Nettleship, 1868, L. R., 3 C. P. 508; *Horne v. Midland Ry. Co.*, 1873, L. R., 8 C. P. 131.

² *Finlay v. N. B. Ry. Co.*, July 8, 1870, 8 Macph. 959, 42 Scot. Jur. 552.

quential, and therefore I am unable to agree with the Sheriff in the view he takes. He says,—“I think that it must be held that the damage caused by the rejection of the goods on account of delay in their reaching Berlin could not have been in the contemplation of both parties at the time the contract was entered into, and was, as regards the defenders, remote and consequential, and therefore cannot be recovered from them. The loss which the pursuers have unfortunately sustained is, in my view, the direct result of the wholly unnecessary actings of J. Sutcliffe & Son, for whom the defenders are not responsible.” I do not in the least sympathise with that view. I think that Sutcliffe & Son did what was right. I think there is nothing consequential in the damage that was sustained, but that in that damage there was nothing beyond the direct connection of cause and effect. I propose that your Lordships should recall the judgment of the Sheriff and give decree for the amount of the damage claimed by the pursuers.

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LORD YOUNG.—I concur with your Lordship. This question, and this question only is, as I think, presented for our consideration, viz., Was Sutcliffe entitled to reject the goods? Was this shipping-agent, who is bound to forward goods delivered to him in proper condition for forwarding, bound to forward these goods? I think they were not in proper condition for forwarding, and so I am of opinion that Sutcliffe had a sufficient cause for returning the bale. I asked if there was any authority or principle binding one carrier to take from another goods in this condition, and I was told that there was none. Mr Sutcliffe, from his experience and position, is the very best person to refer to upon a question of whether goods are fit to be sent on. He thought these were not. He communes with Mr Reed, and the consequence is that Mr Reed has them sent back.

To say, in these circumstances, that Mr Sutcliffe is to blame is to maintain what I can see no good ground for at all. I say here, as I said in the course of the argument, that if Sutcliffe exercised an honest judgment in the matter, and if delay were caused by his action, the railway company will be responsible for the damage arising from that delay, even if Sutcliffe's judgment were shewn to be erroneous. For if the pursuers suffered damage because the goods were injured and so delayed, they must have a remedy against somebody. Where one is in fault he is answerable for the consequences of that fault, even although these consequences might have been prevented by another person exercising his judgment in a different way from what he in fact did. Even criminal responsibility will attach to the original wrongdoer in such a case.

But the circumstances here do not raise any such case, for, in my opinion, Sutcliffe exercised a right judgment, and if the railway company, who were consulted, thought the goods ought to be sent back, they must take the consequences. If they thought differently they might have remonstrated, but they did not.

LORD CRAIGHILL.—I concur in the judgment proposed, but I confess I have had some difficulty upon one of the points in the case. If Sutcliffe had rejected the goods at once, I could not have hesitated as to the liability of the railway company. But he did not do so. He held on to them for two days, and then gave orders that they should be returned to the manufacturers. That creates some doubt in my mind, but my doubt is not sufficient to lead me to dissent from the judgment your Lordship proposes.

No. 50. LORD RUTHERFURD CLARK concurred.

Dec. 15, 1884.
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THE COURT pronounced this interlocutor:—"Find in fact (1) that, on 16th January 1884, the pursuers delivered to the defenders at Galashiels a bale of goods to be carried to Grimsby, and delivered there to Messrs John Sutcliffe & Son, shippers and forwarding agents, and transmitted by them to Messrs Oppenheimer & Grabowsky, Berlin, the consignees of the goods, to whom they were invoiced, at the price of £62; (2) that the said bale was in good condition when delivered to the defenders, but when tendered to Messrs Sutcliffe & Son was damaged, and was in consequence immediately returned to the pursuers, who received it on 25th January, and, after repacking it, despatched it on the same day to Messrs Sutcliffe & Son; (3) that, on receiving the bale, Sutcliffe & Son forwarded it to Messrs Oppenheimer & Grabowsky, but on 4th February, and before the bale reached them, they intimated to the pursuers that they declined to receive the goods, as their market had been lost by the delay in sending them to Berlin; (4) that the bale was returned accordingly to the pursuers, who, by arrangement with the defenders, sold its contents at the price of £29, 14s. 9d.; (5) that, including charges for insurance and carriage, and interest, the loss sustained by the pursuers on the invoiced price of the said goods amounted at the date of this action to £36, 1s. 2d.: Find in law that Messrs Sutcliffe & Son were entitled to refuse to forward the bale in its damaged condition, and were entitled to return it; that Messrs Oppenheimer & Grabowsky were justified in rejecting the goods because of the delay in forwarding them; and that the defenders are responsible for the loss thereby sustained by the pursuers: Therefore sustain the appeal: Recall the judgment of the Sheriff appealed against, and affirm the judgment of the Sheriff-substitute: Of new ordain the defenders to make payment to the pursuers of the sum of £36, 1s. 2d., with the legal interest thereon," &c.

LITTLE & LAWSON, S.S.C.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

No. 51.

Dec. 15, 1886.
Dodsworth v.
Rijnbergen,
&c.

JEREMIAH DODSWORTH (Superintendent of Customs at Lerwick),
Complainer (Respondent).—*Lord-Adv. Macdonald—Kennedy.*
JAN JAN RIJNBERGEN AND OTHERS, Appellants (Reclaimers).—
Pearson—Galloway.

Revenue—Customs—Prosecution of foreigners for importing contraband goods—Customs Consolidation Act, 1876 (39 and 40 Vict. c. 36), sec. 179—Proof—Evidence of accused.—Certain foreigners were convicted and sentenced before the Justice of Peace Court, upon a complaint under the 179th section of the Customs Consolidation Act, 1876,* charging them with having on board a

* That section enacts,—"If any ship or boat shall be found or discovered to have been within any port, bay, harbour, river, or creek of the United Kingdom, or the Channel Islands, or within three leagues of the coast thereof, if belonging wholly or in part to British subjects, or having the persons on board subjects of Her Majesty, or within one league if not British . . . having on board or in any manner attached thereto, or conveying or having conveyed in any manner, any spirits, tobacco, or snuff, in packages of any size and character in which they are prohibited to be imported into the United Kingdom, or the Channel Islands, or any spirits, or tobacco, or snuff, imported contrary to the Customs Acts . . . or which shall be found or discovered to have been

foreign ship, within one league of the British coast, packages of spirits, tobacco, &c. of a size and character which are prohibited to be imported. No. 51.

In an appeal against the conviction, *held* that the Judge in the inferior Court had rightly declined to admit the evidence of the accused, section 259 * of the Customs Law Consolidation Act, 1876, which admits such evidence in certain circumstances, not being applicable to the case. Dec. 15, 1886.
Dodsworth v.
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&c.

Held further, that it was not a good objection to the conviction that the evidence had not been recorded by the Judge in the inferior Court, the accused not having asked him to do so.

ON 21st August 1886 an amended complaint,† under the Summary Procedure Acts, 1864 and 1881, was presented to Her Majesty's Justices of the Peace for the county of Zetland by Jeremiah Dodsworth, Superintendent of Customs at the Port of Lerwick, against Jan Jan Rijnbergen, master, and four of the crew of the vessel "Merchant," of Schiedam, then lying in Lerwick harbour, who were charged with an offence within the meaning of "The Customs Consolidation Act, 1876," and particularly section 179 thereof, in so far as they, "upon the 12th day of August current, or about that time, being foreigners, were found on board a foreign ship within one league of the coast of the United Kingdom, said ship being named the 'Merchant,' of Schiedam, and being then within the limits of the port of Lerwick, at or near a point in a north-easterly direction or thereby from Sumburgh Head, said point being within a distance seaward of three miles from low-water mark from the shore of the nearest part of the mainland of Shetland, and the said ship being at the time liable to forfeiture, in respect of being thus found within the limits of the port of Lerwick as aforesaid, and then having on board a number of packages of spirits, tobacco, and cigars, of a size and character in which they are prohibited to be imported into the United Kingdom, said packages of spirits being less in size and character than twenty gallons each, and said packages of tobacco and cigars being less than eighty pounds weight each respectively, and the said port of Lerwick not being a port approved by the Commissioners of Customs for the importation and warehousing of tobacco and cigars," whereby they were severally liable to forfeit a sum not exceeding £100, and, in default of payment thereof, to be imprisoned for a period not exceeding six months. Exchequer
Cause.
1st Division.
Lord Fraser.
M.

On 30th August following the accused were tried at Lerwick before

within three leagues of any part of the coast of the United Kingdom . . . every such ship or boat, together with any such spirits, &c. . . shall be forfeited; and every person who shall be found or discovered to have been on board any ship or boat, liable to forfeiture as aforesaid, within three leagues of the coast if a British subject, or within one league if a foreigner . . . having on board any spirits, or tobacco, in such packages as aforesaid, shall forfeit a sum not exceeding £100; and every such person may be detained and taken before any Justice to be dealt with as hereinafter directed."

* Section 259 enacts,—“If, in any prosecution . . . any dispute shall arise whether the duties of Customs have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then, and in every such case, the proof thereof shall be on the defendant in such prosecution, and where any such proceedings are had in the Exchequer Division of the High Court of Justice on the Revenue side, the defendant shall be competent and compellable to give evidence.”

† The original complaint had been objected to by the respondents' agent on the ground of want of specification, and the Justice having intimated that he was of opinion that the objection was well founded, it was amended, the respondents' agent having consented to that being done.

No. 51. Sheriff Cheyne, one of the Justices of the Peace for Zetland. Objections to the competency of the amendment of the complaint in respect that, as originally framed, it was radically bad, and also to its relevancy, were repelled, the former on the ground that the respondents' agent had consented to the amendment, with the view of saving delay and expense. The accused were thereafter convicted of the offence charged as libelled, and the master was ordained to forfeit £50, or suffer sixty days' imprisonment, and each of the crew to forfeit £10, or suffer ten days' imprisonment.

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&c.

The accused appealed to the Court of Exchequer, under the 17th section of the Court of Exchequer (Scotland) Act, 1856 (19 and 20 Vict. c. 56).

The grounds of appeal are set forth, *infra*,* in the note to the inter-

* "NOTE.— . . . 1st, It is maintained that the complaint, as originally presented, was not relevant in respect that it was defective in specification of particulars. This objection was stated to the Justice of the Peace, and the minutes of Court bear that 'the Justice having intimated that he was of opinion that the objection was well founded, Mr Anderson (the solicitor for the prosecutor), with a view to obviate the objection, craved leave to amend the complaint,' by deleting certain portions of it, and inserting new matter. 'Mr Galloway, on behalf of the respondents, consented to the proposed amendments being made, and the Justice accordingly sanctioned their being made, and appointed them to be authenticated by the Clerk of Court in common form.' The objection has been renewed before the Lord Ordinary, while, at the same time, it is admitted that the amended complaint cannot be challenged for want of specification. It is argued, however, that the amendments were incompetent as changing altogether the character of the complaint. The Lord Ordinary is of opinion that it was competent so to amend it; but, farther, that it is not allowable now, after the amendments were consented to, to renew the objection.

"2d. The next ground of appeal is that the captain of the vessel, Jan Jan Rijnbergen, tendered himself as a witness, and the Justice refused to allow his evidence to be taken. This being a proceeding for a penalty, it was incompetent (unless there be some statutory enactment allowing it), to allow the accused in such a proceeding to be adduced as a witness (*Bruce v. Linton*, 13th December 1861, 24 D. 184; *Alison v. Watson*, 2d December 1862, 1 Macph. 87; *Blair v. Mitchell*, 9th July 1864, 4 Irvine, 545). But it is said that, by 'The Customs Consolidation Act, 1876,' section 259, persons accused, like the appellants, are made competent, and are compellable to be witnesses. That section does not apply to the present case. It is only in any prosecution where a dispute shall arise as to whether the duties of customs have been paid, or whether the goods have been lawfully imported or lawfully unshipped, or concerning the place from whence they have been brought, that the accused's evidence may be taken. There is no dispute here about any of these matters. The present case only concerns the having on board, at a prohibited place, certain goods of a character forbidden to be imported into the United Kingdom.

"3d. It is next objected to the conviction that the evidence was not recorded by the Justice of Peace. The prosecution is one under the Summary Procedure Act, 1864, the 16th section of which enacts that 'It shall not be necessary, in any proceeding under the authority of this Act, to record or to preserve a note of the evidence adduced.' But the answer to this section, made by the appellants, is that, where a special statute directs that a note of the evidence shall be preserved, the section of the Summary Procedure Act does not take away the right thereby conferred upon the parties, even although the prosecution is expressly brought under the Summary Procedure Act, and reference is made to the case of *Halliday v. Bathgate*, 1st June 1867, 5 Irvine, 382. Unfortunately for the appellants, there is no provision in the Customs Consolidation Act directing a note of evidence to be taken. It is said, however, that the 243d

locutor of the Lord Ordinary (Fraser), who on 6th November dismissed the appeal, and found the appellants liable in expenses, which he modified to four guineas. No. 51.

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&c.

The appellants reclaimed. Their argument sufficiently appears from the note to the Lord Ordinary's interlocutor.

The respondent was not called on.

LORD PRESIDENT.—I do not think it is necessary to call upon the Crown to answer the objections which have been stated. They have been well disposed of by the Lord Ordinary.

section of that Act shews that a writ of *certiorari* can issue to bring up the proceedings to the Supreme Court, upon complying with the conditions set forth in that section. This provision was in the previous statute, which was in operation when the Court of Exchequer Act passed, viz., 16 and 17 Vict. cap. 107, sec. 290. The writ of *certiorari* can no longer be issued from a Scottish Court, for, by the 17th section of the Exchequer (Scotland) Act, 1856, it is enacted that 'In all cases where, at the date of the passing of this Act, a writ of *habeas* or a writ of *certiorari* might have competently issued from the Court of Exchequer, to the effect of removing any proceedings before, or warrant granted or issued by any inferior Court or magistrate, or public officer to the said Court of Exchequer, in order to examination, it shall be competent to the party against whom such warrant is directed, or to either of the parties to such proceedings, to bring up such warrant or proceedings to the Court of Session, sitting as the Court of Exchequer, to the like effect as by such writ of *habeas* or writ of *certiorari* before the passing of this Act, and that by lodging in the office of the Clerk of Court attached to the Lord Ordinary in Exchequer causes a note of appeal.' The Lord Ordinary has no means of ascertaining under what circumstances a writ of *certiorari* could be issued by the old Scottish Court of Exchequer, prior to the Exchequer Act of 1856. There are no books from which such information can be obtained. This, however, is of little consequence, because the Statute 6 Anne, cap. 26, sec. 6, enacts 'that the said Court of Exchequer in Scotland shall, and may act, do, and proceed therein and thereupon in every respect whatsoever, as by law, or as the Court of Exchequer in England, by the constitution, course or practice of or in the said Court, hath been, or is enabled, or hath used or practised to do in the like cases in England; and upon, and in all such informations, actions, suits, or demands, or touching or concerning any the premisses, or any the proceedings thereupon, shall and may make all such orders and rules, and direct, award, and issue all such writs, precepts, process, and methods of proceedings, as hath or have been, is, are or may be done or practised in the same or like cases in the Court of Exchequer in England.' Now, then, what is competent under a writ of *certiorari* according to the practice and law of England? It is thus stated by Mr Archbold in his *Treatise on the Justice of the Peace*, vol. i., p. 195, 'Summary convictions by magistrates may be removed by *certiorari* into the Court of Queen's Bench for the purpose of moving that Court to quash them for errors appearing upon the face of them. (*R. v. Liston*, 5 T. R., 338.) In this respect the *certiorari* is in the nature of a writ of error, except that a special application must be made to the Court or a Judge for it; and they will not grant the writ until they are first satisfied that the alleged defect appears upon the face of the conviction. (*R. v. Cashiobury*, J. J., 3 D. and R. 35.) It is no ground for a *certiorari* that the Justices came to a wrong conclusion on evidence (*R. v. Bolton*, 1 Q. B. 66; *Anon.* 1 B. and Ad. 382).' Consequently, the result of this is that, if the Supreme Court cannot review the decision of the Justices of the Peace on the merits, there was no object whatever in recording the evidence, nor any obligation on the Justice to do so, nor right on the part of the accused to demand that it should be done; and so the present case does not come within the decision in *Halliday v. Bathgate*.

"The result is that all of the objections to the conviction and sentence being groundless, the appeal must be dismissed, with expenses."

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&c.

As regards the first, the accused parties are barred from raising any objection to the amendments which were made upon the complaint,—because they gave their consent to them. Objections were taken that the original complaint was absolutely worthless, and had no substance in it, and amendments were accordingly made upon it by consent of parties, in order to save time and trouble, a most legitimate reason. It would be out of the question to allow the accused to come here now and raise objections which they have already waived.

The second ground of objection, which is founded upon the 259th section of the Customs Consolidation Act, 1876, appears to me to be perfectly well disposed of by the Lord Ordinary. His Lordship says,—“That section does not apply to the present case. It is only in any prosecution where a dispute shall arise as to whether the duties of customs have been paid, or whether the goods have been lawfully imported or lawfully unshipped, or concerning the place from whence they have been brought, that the accused’s evidence may be taken.” And he adds that there is no dispute about any of these matters. And it is plain that there is none. It is said that the goods in question were lawfully on board the vessel; and that there has thus been no contravention of the statute. But the matter of fact is quite clear. The question was, whether this vessel was within a distance of three miles seaward from low-water mark of the shore of Shetland, and had on board packages of goods which were unlawful, and whether the accused were the persons who were on board. The goods were neither imported nor unshipped, except subsequently to the forfeiture. So that that objection fails.

The third objection is that the evidence in the case was not recorded by the Justice of Peace. But the Justice was not bound to record it unless he was specially asked to do so. Whether he would have been bound to do so if he had been asked, it is not necessary to discuss here. It is enough that he was not bound to do so, either under the Summary Procedure Acts, or under the Customs Act of 1876, unless when specially asked.

On the whole matter, I am for adhering to the Lord Ordinary’s interlocutor.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT pronounced this interlocutor:—“Recall the said interlocutor in so far as it finds the appellants liable in expenses, and modifies the same to four guineas: *Quoad ultra* adhere to the interlocutor, and find the respondents entitled to expenses, both in the Outer and Inner-House, and decern.”

ROBERT PRINGLE, Solicitor of Customs—JAMES SKINNER, S.S.C.—Agents.

No. 52. THE MONKLAND IRON COMPANY, LIMITED, AND LIQUIDATOR, Petitioners.—
Asher—M’Nair.

Dec. 16, 1886.
Monkland
Iron Co.
Limited, v.
Dun, &c.

THOMAS DUN AND OTHERS, Respondents.—*Balfour—R. V. Campbell.*

*Company—Winding-up—Application for supervision order—Relevancy of answer—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 129, subsec. (3).—*At an extraordinary meeting of a limited company resolutions were carried by the statutory majority to the effect (1) that it had been proved to the satisfaction of the company that it could not, by reason of its liabilities, continue its business, and that it was advisable to wind it up; and (2) that the company should be wound up voluntarily. A petition to have the winding-up brought under the supervision of the Court having been presented, certain

shareholders lodged answers objecting to the winding-up, on the ground (1) that the adoption of the resolution in question had been arranged as part of a scheme by certain shareholders to acquire the company estate for their own purposes; and (2) that the company was not unable to carry on its business. *Held* that these were not relevant answers to the petition, and supervision order granted.

No. 52.

Dec. 16, 1886.
Monkland
Iron Co.
Limited, v.
Dun, &c.

Company—Winding-up—Liquidator—Objection to appointment—Relevancy.—*Question*, whether averments that a liquidator appointed by a majority of shareholders at a statutory meeting at which a resolution to wind up had been carried was “conjunct and confident” with certain persons who had promoted the winding-up with a view to securing the property on their own terms, were relevant averments to justify the Court in removing him “on due cause shewn” in terms of the 141st section of the Companies Act, 1862.*

Company—Winding-up—Petition for supervision order by the Court—Confirmation of liquidator’s appointment.—It is not proper in a petition for placing a winding-up under supervision of the Court to pray for confirmation of an appointment of a liquidator.

At an extraordinary general meeting of the shareholders of the Monkland Iron Company, Limited, held in Glasgow on 23d November 1886, resolutions were passed by a majority of not less than three-fourths to the effect (1) that it had been proved to the satisfaction of the company that it could not by reason of its liabilities continue its business, and that it was advisable to wind it up; and (2) that the company should be wound up voluntarily. Further resolutions were carried (1) appointing Mr Laurence Hill Watson, C.A., to be liquidator, and (2) empowering him to apply to the Court if and when he found it expedient to have the voluntary liquidation continued subject to the supervision of the Court.

On 2d December following the company and its liquidator presented a petition to the First Division craving that the liquidation should be forthwith placed under supervision of the Court, in terms of the 147th section of the Companies Act, 1862, and for confirmation of the appointment of Mr Watson as liquidator.

Answers were lodged for Mr Thomas Dun and others, the holders of 2410 out of the 40,000 shares, into which the capital of the company was divided. They stated that the company was not insolvent nor unable to continue its business. They further averred that the resolutions of 23d November 1886 for the winding up of the company, on which the present petition was founded, were the latest step in carrying out the scheme of a syndicate formed by certain shareholders to “acquire the whole works and property of the said company on their own terms by a voluntary winding-up, and the appointment of a liquidator in friendly connection with themselves. The motion for winding-up at the said meeting was stated by the chairman (Mr George Wilson), to be supported by 31,335 votes—each share having a vote—and the negative or amendment to this motion was supported by 2740 votes from the respondents or other shareholders—fourteen in all. The shares in respect of which the votes in favour of the winding-up were given had been acquired largely since the said meeting of 21st April 1885”—(At this meeting a resolution to wind up had failed for want of the requisite statutory majority of votes)—“and are held by the said syndicate or coterie, and persons acting for and with them.” Particulars were added as to the pecuniary position of the company, with a view to shewing that it was not insolvent.

The respondents further objected to the appointment of Mr Watson as

* The 141st section of the Act enacts,—“ . . . The Court may also, on due cause shewn, remove any liquidator and appoint another liquidator to act in the matter of a voluntary winding-up.”

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liquidator, and stated,—“ Mr Watson, who was a clerk in the office of Mr M'Clelland ” (one of the syndicate referred to), “ or of his firm of M'Clelland, M'Kinnon, & Blyth, and who only commenced business for himself as an accountant in 1879 or 1880, was appointed, contrary to the votes of the independent shareholders, by the votes of the same syndicate which wrongfully carried the said motion for winding-up. He is conjunct and confident with Messrs Donaldson, Wilson, and M'Clelland ” (the syndicate in question), “ and is subject to their influence.” In any event, they asked that an additional liquidator should be appointed.

The petitioners argued;—(1) The extraordinary meeting of the company and the resolutions passed thereat having been quite regular and in conformity with the statute, the averments of the respondents were irrelevant as an answer to the petition. The Court could not review the resolutions, and the allegation of *mala fides* was not a relevant objection—at least in the present application—to the liquidation. (2) In regard to the objections to the liquidator, the averments were not sufficiently specific.¹ They did not amount to “ due cause,” in terms of the 141st section of the Companies Act, 1862.* The only reason against the appointment of a second liquidator was that of expense, but if the Court thought it expedient, no opposition would be offered by the petitioners.

The respondents argued;—1. The resolution to wind up had not been carried in good faith, and the question at issue could be disposed of in the present petition. [LORD PRESIDENT.—The Court can only grant or refuse the petition. If it is refused, then the liquidation is simply continued as a voluntary liquidation.] But the resolution was bad in substance. It was averred (1) that the resolution was simply a device, and (2) that the finding that the company was unable to carry on was untrue. If the facts on which the resolution was founded were untrue, then the respondents were entitled to have the liquidation recalled. At anyrate, the present petition should be sisted to allow of an action of reduction being brought. 2. Looking to section 141 of the Companies Act, 1862, it was not a matter of course that the Court should confirm the appointment of a liquidator.² [LORD PRESIDENT.—The form of the prayer in this case, which asks for the confirmation of the appointment of the liquidator, is an entire novelty. The proper form was settled in the case of *Brightwen*,³ and I think that portion of the prayer must be deleted.†] The averments made as to Mr Watson made out a *prima facie* case to the effect that he was not a fitting person to conduct a large liquidation. In any case, an additional liquidator should be appointed, and further, there should be a direction by the Court that the business of the company should be carried on.⁴

LORD PRESIDENT.—This is an application for a supervision order, and the circumstances under which it is asked do not seem to me to be in any way exceptional. The company, on 23d November last, passed certain extraordinary

¹ Sir John Moore Gold Mining Co., June 10, 1879, L. R., 12 Chanc. Div. 325; *In re British National Life Assurance Association*, 1872, L. R., 14 Equity, 492.

* The 141st section enacts,—“ . . . The Court may also, on due cause shewn, remove any liquidator and appoint another liquidator to act in the matter of a voluntary winding-up.”

² Sir John Moore Gold Mining Co., L. R., 12 Chanc. Div. 325.

³ *Brightwen & Co. v. City of Glasgow Bank, &c.*, Nov. 27, 1878, 6 R. 244.

† This portion of the prayer of the petition was accordingly deleted.

⁴ Companies Act, 1862, secs. 133, subsec. 7, 151, and 95, subsec. 2; *Gray's Trustees v. Benhar Coal Co., Limited*, Dec. 2, 1881, 9 R. 225.

resolutions to the effect that it could not, by reason of its liabilities, continue its business, and that it should therefore be wound up voluntarily. At the same time it was resolved that Mr Watson, chartered accountant in Glasgow, should be appointed liquidator, and that it should be an instruction to him to apply to the Court of Session for a supervision order if he found it expedient. The answer which is made to the application is that the resolutions to wind up voluntarily were carried by a very large majority of the shareholders, in pursuance of a scheme to acquire the whole works and property of the company on their own terms, and accordingly to sacrifice the company estate.

If that allegation is founded on fact, it is apparent that a very gross fraud has been committed, but I cannot see that it affords any answer to this application. Assuming that it was an answer, and that we were to give effect to the contention of the respondents, and throw out the petition, it would follow that the voluntary winding-up, which had been obtained by fraud, would continue as before, with the result that it would be in the power of the liquidator to do as he pleased in the liquidation, whereas, if the supervision order which is asked is granted, the liquidation will be in the hands of the Court, under whose supervision it will in future be conducted. The appeal which is made to the Court to set aside the liquidation as a fraudulent transaction is not now competently before us, and if it is to be brought before us for consideration it must be in another shape. There being a standing voluntary liquidation, the only question for us now is whether it should be put under supervision, and I have heard no answer to that application, on the assumption that the voluntary liquidation is to stand.

An attempt has been made to satisfy the Court that the resolution that the company is unable, by reason of its liabilities, to continue its business is ill-founded in fact, and that the company is really not in that position. But all that the Court requires to know is that it has been proved to the satisfaction of the company that it is unable to carry on its business. That fact stands recorded by the resolution which has been arrived at by the great majority of the shareholders. The answer made to the petition is, in my opinion, altogether irrelevant; it raises no valid objection to the voluntary liquidation, however good it may be as an answer to the resolution.

Mr Watson has been appointed liquidator under one of the extraordinary resolutions which were carried, and his appointment is also objected to, but upon what grounds does not appear, except that he is said to be a person who is in sympathy with the great majority of the shareholders, against whom the allegations to which I have referred have been made. I do not know that this is such an objection as we could give effect to, even assuming that we had the jurisdiction to do so, or thought fit to exercise it. But the necessity for that has been removed by the consent which has been judiciously given to the appointment of another person as liquidator to act along with Mr Watson.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT accordingly granted the supervision order, and, of consent, appointed Mr John Graham, C.A., Glasgow, to be an additional liquidator along with Mr Watson, and remitted to Lord Kinnear (Ordinary) to proceed with the winding-up.

DAVIDSON & SYME, W.S.—MORTON, NEILSON, & SMART, W.S.—Agents.

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Monkland
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No. 53.

Dec. 17, 1886.
Bell's Trustee
v. Coatbridge
Tinplate Co.
Limited.

ROBERT SHARP (Bell's Trustee), Petitioner.—*Asher—Ure.*
COATBRIDGE TINPLATE COMPANY, LIMITED, Respondents.—*Balfour—*
Murray.

Company—Shareholder—Retention—Company's lien over shares for debts due by shareholder.—A limited company, incorporated under the Companies Acts, has, at common law, a right of retention over the shares of a partner in security of debts due by him to the company.

The articles of association of a limited company bore that the company should have a first and permanent lien on the shares of members for any debts due by them, and might refuse to register a transfer by such members. The trustee of a bankrupt shareholder, who owed the company money, applied to be put upon the register of shareholders, in respect of the bankrupt's shares, and founded on one of the articles of association, which provided that anyone becoming interested in a share in consequence of the bankruptcy of a shareholder might be registered. *Held* that the company had a lien over the shares in respect of the debt due to them, both at common law and under the articles, and were entitled to decline the application.

1st DIVISION.

B.

THE estates of Edward Mather Bell were sequestrated by the Sheriff of Lanarkshire on 9th May 1884, and Robert Sharp was appointed trustee. At the date of the sequestration Bell held 248 shares, representing £12,400 of capital in the Coatbridge Tinplate Company, Limited, of which he had been manager.

The company having declined to comply with the application of the trustee to enter his name in the register of shareholders of the company as holder of the bankrupt's shares, the trustee presented a petition to the Court for rectification of the register to that effect in terms of the 35th section of the Companies Act, 1862 (25 and 26 Vict. cap. 89).

The company lodged answers in which they stated that at the date of Bell's death on 24th May 1886 he was indebted to them in the sum of £7038, 2s. 9d.; that the value of the shares held by him had decreased to £4216; and that they had under their articles of association a lien over the shares for the debts due by the bankrupt,* and that this security

* The articles bore:—Art. 11.—“The company shall always have a first and permanent lien on the shares of each member, for all the debts, liabilities, and engagements to the company of such member, solely or jointly with any other person, and the company may refuse to register the transfer of any shares by any member who may then be indebted, or under any liability to the company, whether solely or jointly with any other person on any account whatever, and the company may, at any time, call upon such of the shareholders who may be indebted to the company, to pay such debts and engagements, and interest and expenses thereof, within one month from the date of the notice thereof, and, should they fail to pay the same at the time and place fixed upon in the said notice, the company may at any time thereafter absolutely sell and dispose of the shares of any member who may refuse or neglect to pay such debts, liabilities, and engagements, and whether such member be the sole or a joint holder of such shares, and apply the proceeds of such sale, so far as the same will extend, in discharge, or satisfaction of all debts, liabilities, or engagements from such member of the company, and upon such sale the company shall, without any further or other consent from the holder or holders of such shares, transfer the same, in the books of the company, to the purchaser thereof.”

Art. 20.—“Any person becoming interested in a share in consequence of the death or bankruptcy of any shareholder, or by any lawful means other than by transfer, in accordance with these presents, may, upon producing such evidence

had been admitted by the trustees.* They therefore submitted that the petition should be refused. It further appeared that the company had, on 29th February 1884, intimated to Bell that, failing payment of his debt to them, they would sell his shares. No. 53.

Dec. 17, 1886.
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Argued for the petitioner;—At the date of the sequestration the bankrupt was the registered owner of the shares, and the 20th article of the company's articles of association provided for a bankrupt's trustee being put on the register. It was said that the 11th article entitled the company to refuse to register. But this was a transmission,—it was not a transfer. And so far as that article gave a power to the company to refuse to register, because of the debt due by the bankrupt to the company, it was answered by the decision of the English Courts in the case of the *Bentham Mills Spinning Company*.¹ In that case the articles of association were in the form given in table A to the Companies Act, 1862. It was said that here the company possessed a right of a higher kind, and it might be that the terms of the 11th article gave the company an equitable charge upon the share of any member; but they certainly did not give them a right of property. The circumstances of the case of *Harrison*² were so different from the present as to make it of no authority.

As to the trustee's deliverance, dated 22d September 1884, to which reference had been made, it had been held that a trustee ought not to pronounce a deliverance until he was about to declare a dividend, and, further, that it was open to him to reconsider it.³

The respondents argued;—Article 11 of the company's articles of association gave the company a distinct lien over the shares, and subsequent articles should be read in the light of that article and with a view to preserving the lien. The more reasonable view of the 20th article (which was equivalent to article 14 of table A) was that it contained a general direction, subject to the provisions of article 11. The object of article 11 was to make the company's lien effective, and the company were entitled, in the circumstances of the present case, to refuse to put the petitioner's name upon the register.⁴ There was no provision in the articles or elsewhere for putting a name on the register under reservation of their lien, and the petitioner's remedy was to pay the debt, when he could at once

as the board think sufficient, either be registered himself as the holder of the share, or elect to have some person nominated by him, and approved by the board, registered as such holder, and if he shall elect to have such nominee registered, he shall grant to his nominee a transfer of the share, and until such transfer be registered he shall not be freed from any liability in respect of the share."

* In a claim lodged by the respondents upon Bell's sequestrated estate for payment of the debt of £7038, 2s. 9d., the trustee issued this deliverance on 22d September 1884:—"The trustee admits this claim to rank to the extent of £1038, 2s. 9d.; *quoad ultra* rejects the claim, in respect that the claimants hold a security over a part of the estate of the bankrupt, which they have valued at the sum of £6000."

¹ *In re Bentham Mills Spinning Company*, 1879, L. R., 11 Chanc. Div. 900.

² *Ex parte Harrison in re Cannock & Rugeley Colliery Company*, April 9, 1814, L. R., 26 Chanc. Div. 522, revd. Feb. 11, 1885, L. R., 28 Chanc. Div. 363.

³ *Monkhouse v. Mackinnon*, Jan. 28, 1881, 8 R. 454.

⁴ Buckley on the Companies Acts, p. 412; The Companies Act, 1862, table A, Cause 10; *Ex parte Harrison, supra*, L. R., 26 Chanc. Div. 522, revd. 28 Chanc. Div. 363; *Burns v. Laurie's Trustees*, July 7, 1840, 2 D. 1348, 12 Scot. Jur. 622.

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be put on the register. There was an English case of *Lewis*¹ which illustrated the effect of a proper lien as against a mere set-off. The result of the contention on the other side would be to defeat the provisions of the 65th section of the Bankruptcy Act, 1856. The creditor holding a security had an active right, and might realise it in order to pay his own debt.² If the petitioner was right, the creditor's rights would be defeated. This was the view which had been taken by the trustee himself in his deliverance in September 1884, and it was only lately that he had adopted a different course.

At advising,—

LORD PRESIDENT.—This is an application by the trustee on the estate of a certain Mr Edward Mather Bell, a shareholder in the respondent company to the extent of 248 shares, representing a nominal value of about £12,000 of capital, and Mr Sharp, the petitioner, applies to be put upon the register in place of the bankrupt, as owner of the shares in question. The ground upon which he makes this application is the 20th article of the articles of association, which provides that “any person becoming interested in a share in consequence of the death or bankruptcy of any shareholder, or by any lawful means other than by transfer, in accordance with these presents, may, upon producing such evidence as the board think sufficient, either be registered himself as the holder of the shares, or elect to have some person nominated by him, and approved by the board, registered as such holder.” The petitioner produces his confirmation as trustee, and desires to have the shares transferred to his name in the books of the company. But the company state in answer that Mr Mather Bell's indebtedness to them in a sum of money exceeds the value of his shares. The amount of his debt is about £7000, and the present value of the shares he holds was stated, in the trustee's deliverance (dated 22d September 1884) upon the respondents' claim on the bankrupt's sequestered estate, to be £6000. The company maintain that under the 11th article of the articles of association they are entitled to a lien for the debt due to them, and to sell the shares for the purpose of realising their value and satisfying their claim.

Three things are provided for in the 11th article. First, it is provided that the company are to have a preferential permanent lien for debts due. In the second place, in the case of a transfer, the company is to be entitled to refuse to register a transfer by any member who may then happen to be in debt to the company until the debt is paid. In the third place, there is provision for working out the lien by notice and sale.

The parties here appear to have been originally at one, because I see that a claim was made by the respondents on the bankrupt estate for £7038, 2s. 9d., and that they declared that they held no security therefor except their right of lien, which they valued at £6000 and deducted, and on considering the claim the trustee made this declaration,—“The trustee admits this claim to rank to the extent of £1038, 2s. 9d.; *quoad ultra* rejects the claim, in respect that the claimants hold a security over a part of the estate of the bankrupt, which they have valued at the sum of £6000.” If the parties had settled upon that footing there would have been no further difficulty, and the lien would have received full effect. But the trustee seems to have taken new advice or to have conceived

¹ *In re General Exchange Bank, Lewis' case*, May 1871, L. R., 6 Chanc. App. 818.

² *Henderson's Trustee v. Auld and Guild*, July 6, 1872, 10 Macph. 946.

a different idea, and he presents this petition and requires the company to register him as a shareholder. It appears to me that if the lien claimed by the company is effectual, he can have no right to require registration, for the simple reason that registration would do him no good. He contends that not being a transferee of shares, and the shares being transmissible by reason of bankruptcy, he is not within the rules which entitle the company to reject a transferee. But independently of the first mode of giving effect to the lien which is provided by the articles of association to which I have referred, there is another method of giving effect to it, viz., by giving notice to the bankrupt himself and then selling the shares. And I see that such notice was given by the company upon 29th February 1884, before the date of the bankruptcy, and they are clearly entitled to follow up that notice. So that they have put themselves into the position defined in the 11th article, assuming that they have this lien, and, accordingly, the only point is whether the lien is good or not.

I must say that I have not seen any reason for refusing effect to the lien. The right is one which is quite in conformity with the law prior to the passing of the Joint Stock Companies Acts. We are familiar with this in connection with the law dealing with the management of banks. There is one well-known case—*Hotchkiss (Keir's Trustee) v. The Royal Bank*, 1797, M. 2673, which was affirmed upon appeal, 3 Paton, 618. In that case Bertram, Gardner, & Company became bankrupt, deeply indebted to the Royal Bank of Scotland. The bye-law of 1728 really created such a lien as we are dealing with here, and it was maintained by the trustee for the creditors of Bertram, Gardner, & Company that the bye-law was *ultra vires* of the bank, and it is very important to observe how that contention was met. The answer was that the right of retention was good at common law independently of the bye-law, and this was the ground upon which the Court decided the case. It was observed that the bye-law was merely corroborative of the common law.

No less than three cases were decided at the same time, and all upon the same ground. It was thus established that by the common law of Scotland there is a right of retention on the part of a company, where shares stand in the name of a shareholder, in satisfaction of debts due by the shareholder to the company.

The same thing occurred in connection with another bank,—*Burns (Manager of Central Bank) v. Lawrie's Trustees*, July 7, 1840, 2 D. 1348,—where the doctrine laid down in the case of *Hotchkiss* was dealt with as a fixed rule of law. Lord Moncreiff, the Lord Ordinary in that case, stated the law thus,—“The first question is whether the Central Bank have a right to retain the shares of stock standing in the name of Peter Rae, in satisfaction of debts due to them by Rae? . . . The Lord Ordinary thinks that there is no doubt or difficulty in the first question. The fund *in medio* consists of certain shares of the stock of the Central Banking Company. By the constitution of that company, in the special clauses quoted or referred to, it was an intrinsic quality or condition of the right of every holder of such stock that the bank should be entitled to retain it for payment of whatever debts he might in any way contract to the bank. The stock here in question had stood from the commencement of the establishment in the name of Peter Rae; and before the bank had any notice of any other party having a claim thereupon, which was in June 1838, all the debts had been contracted for which the bank now claim retention. In the simple statement this must appear a very clear case.” The application of these authorities is very

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apparent, and even without them the creation of this lien would be a perfectly lawful stipulation in the constitution of the company. It is therefore clear that the company have this lien, and that they are entitled to retain the shares, because an incorporated society such as the present is on the same footing as a private trading company.

It is inconsistent with this right of lien that the shares should be transferred to the name of the trustee, and therefore the trustee's demand is quite untenable. He seems to desire to have himself placed on the register so as to try the question of his position. He can have no other conceivable object except to defeat the company's right of lien. But I am of opinion that the company's lien is good, and that they are entitled to retain the shares that they may realise them in satisfaction of the debt which is due to them, and I am therefore for refusing the petition.

LORD MURK.—The company have declined to register the trustee, on account of the lien they have over the shares; and I have no doubt that this lien is good against the bankrupt, both at common law and under the articles of association. My individual opinion is so decided upon this point, that, as at present advised, I do not see how the trustee could maintain the position of his being in right to those shares, except upon the footing that he is to hold them subject to the same lien as the bankrupt himself. I do not therefore see that this company would here be prejudiced by registering the trustee.

But the circumstances of the case are peculiar, because the trustee makes no secret of his intention to dispute the company's lien. His object, moreover, is to endeavour to strengthen his position in this respect by forcing the company to put his name upon the register; and I agree with your Lordship that in these circumstances the company have a right to refuse to register the petitioner, particularly looking to the decision in the case of *Hotchkiss* to which you have referred.

LORD SHAND.—The bankrupt, who is now represented by his trustee, was indebted to the respondents' company in a sum of about £7000, and the value of the shares which he held in the company is stated by the petitioner to be about £4000 only. The respondents, on the other hand, state the value of the shares to be about £6000. It is plain that there is a debt due by the bankrupt exceeding the value of the shares, and the only purpose which the trustee can have in asking that the shares shall be transferred to his name is that he may get rid of the lien which the company holds over the shares. I am of opinion that in the circumstances the trustee is not entitled to have the shares entered in his name with a view to his effecting any such purpose.

There is in the articles of association of the company this provision,—“The company shall always have a first and permanent lien on the shares of each member, for all the debts, liabilities, and engagements to the company of such member, solely or jointly, with any other person.” The company are desirous of exercising this lien, and the trustee seeks to defeat it by getting his name placed upon the register. I think the company has a legitimate interest, title, and right to decline to put his name on the register even by way of transmission by virtue of his act and warrant of confirmation. Suppose that article 11 had stopped at the point to which I have now read, I cannot imagine that there would be any room for the argument of the trustee. The lien is declared by

that article, and, the trustee's purpose being to defeat it, surely the company would be entitled to defend their right and to decline to register the transfer. The only justification for the argument he advances is contained in the words which follow,—“and the company may refuse to register the transfer of any shares by any member who may then be indebted, or under any liability to the company, whether solely or jointly with any other person on any account whatever.” It is said that this necessarily limits the remedy of the company vindicating their lien. It certainly provides a remedy in one class of cases, but if there be another in which the entry of a new and substituted name might defeat the lien to the prejudice of the company, I do not think the company are precluded from refusing to make the registration asked.

We were referred to a case which has been decided in England, and I rather believe that it is in reliance upon that case that the trustee has taken up his present position—(*Bentham Mills Spinning Co.*, L. R., 11 Chanc. Div. 900). It was held in that case that a company cannot refuse to register a trustee in bankruptcy of a shareholder on the ground that the shareholder is indebted to the company. If we assume that the decision of the Court of appeal is right, I am still of opinion that it is clearly distinguishable from the present. The case was decided on the terms of the 10th rule of table A of the schedule to the Companies Act, 1862. The 10th rule of table A provides that “the company may decline to register any transfer of shares made by a member who is indebted to them.” That rule professes at the outset to deal with transfers only, and it was held, whether rightly or wrongly, that the fact of a member's indebtedness to the company would not entitle the company to decline to register a transfer to his trustee in bankruptcy. But the present case is very different. There is here a clear provision expressed in the articles of association in entirely different terms from those used in the *Bentham Mills Spinning Co.* case—viz., to the effect that the company shall have a lien over the shares of any member for payment of any debt he may owe to the company. What follows is merely executorial, and I do not think that the words which follow the clause giving the right to refuse to register a transfer are to be read as at all limiting the right which the company has to decline to enter a new and substituted name on the register where there is reasonable ground to think there may be prejudice to the company's right of lien.

LORD ADAM.—I do not think the petitioner here disputes the validity of the company's lien. His object is to have himself placed upon the register of shareholders, because he thinks that the debts of the bankrupt would not be his debts. But I am of opinion that this is a ground on which he is not entitled to succeed, and I concur with your Lordships that the petition must be refused.

THE COURT refused the petition.

FODD, SIMPSON, & MARWICK, W.S.—J. & A. HASTIE, S.S.C.—Agents.

THOMAS KERR (Mary Halliday's Executor), Pursuer. No. 54.
JOHN HALLIDAY AND JAMES HALLIDAY (William Halliday's Executors),
Defenders (Appellants).—J. C. Lorimer—Boyd.

Sheriff—Jurisdiction—Executor—Whether subject to jurisdiction of Sheriff
Court in which confirmation granted.—Held that the fact that confirmation of
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an estate has been taken out in the Sheriff Court of the deceased's domicile does not of itself subject the executors to the jurisdiction of that Court, and that an action will not lie against them if none of them is resident within that jurisdiction.

THOMAS KERR (Mary Halliday's executor), sued John Halliday, and James Halliday, executors-dative *qua* next of kin of the late William Halliday, in the Sheriff Court of Dumfriesshire, for payment of £200, a sum alleged to have been due by William to Mary at the date of his death.

The defenders pleaded;—(1) The defenders not being subject to, or under the jurisdiction of, this Sheriff Court, the action falls to be dismissed, with costs.

It appeared that the deceased William Halliday had resided at Ulzieside, in the parish of Sanquhar, Dumfriesshire, and that the defenders had applied for and obtained confirmation in the Sheriff Court of that county. Neither of them resided within the sheriffdom, one being domiciled in Glasgow, and the other in Ayrshire. The greater part of the executry estate had been removed from Dumfriesshire, and was now deposited in the British Linen Company Bank in Glasgow.

The Sheriff-substitute (Hope), on 13th September 1886, *inter alia*, repelled the plea above stated.*

* "NOTE.—The first plea is one of 'no jurisdiction,' and it is founded on the fact that neither of the defenders lives within the sheriffdom. The point thus raised seems to be a new one, as far as I can see. This may arise either from the fact that jurisdiction in such a case has not usually been disputed, or because no action has been brought against executors similarly situated. The case most analogous to the present is that of *Black v. Duncan* (18th December 1827, 6 S. 261), the rubric of which is as follows:—'Trustees of a party deceased who was proprietor of an heritable property, in which he had carried on a manufacture, may be sued before the Sheriff of the county where the deceased had lived, where the property lay, and where the managing trustee resided, although the majority of their number personally dwelt in another county, they being cited by letters of supplement.' The distinctions between that case and the present are, (1) The defenders were trustees and not executors; (2) The trust-estate comprised heritable property; and (3) One of the trustees was resident within the sheriffdom. Taking these differences—for convenience—in their reverse order, I may remark that I fail to see that the presence of one trustee can affect the question, if the majority live out of the jurisdiction. I do not see that the trustees as a body are separable in their fiduciary capacity, or that jurisdiction over an estate should vary if the trustees choose to change their residence. However that may be, I think that the case of executors is different. If this were not a case in which executors are sued I would have some difficulty in respect of the fact that the estate is admittedly moveable. In the case of *Cameron v. Chapman* (9th March 1838, 16 S. 907), Lord Glenlee remarked,—'Moveables have no *situs*,' and therefore on the ground of *ratione rei sitae* alone I think there would be no jurisdiction.

"As regards the distinction between trustees and executors, it is all in favour of the pursuer's contention. The executors have, I consider, subjected themselves to the jurisdiction of this Court in matters pertaining to the executry estate. They have applied for and received from this Court the office they hold, and they have obtained confirmation and have recorded in the books of the sheriffdom an inventory of the estate. I do not see to what tribunal they are more amenable.

"Mr Wilson, after noticing the case of *Black v. Duncan*, remarks,—'In the same way it is thought that executors would be liable to the jurisdiction of a sheriffdom where the deceased lived, where the executors were confirmed and

On 21st October 1886, the Sheriff (Macpherson) on appeal adhered, holding that there was jurisdiction in a question regarding the amount of the deceased's estate, and further that the Sheriff Court of Dumfriesshire was *forum conveniens*. He also held that by taking out confirmation the defenders had prorogated jurisdiction. No. 54.

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The defenders appealed to the Court of Session, and argued;—The Court of Session was the only competent tribunal here, where both executors and the principal portion of the estate were out of the sheriffdom.¹ That the jurisdiction must be in the sheriffdom where the administration was taken out was said to be the true construction of the decision in *Preston's case*.² That construction had been canvassed in the House of Lords in *Orr Ewing's case*.³ The form of the testament-dative granted by the Sheriff was not important, because as soon as the confirmation was complete the Sheriff had nothing further to do with the matter.

No appearance was made for the respondent.

LORD PRESIDENT.—I am disposed to sustain this appeal and to hold that the Sheriff has no jurisdiction. If the executors who were confirmed had been foreigners, it is plain that they could not have been sued except in the Supreme Court, which is *commune forum*. Where one executor resides in the sheriffdom, and is engaged in the active administration of the funds of the estate, it might be different, and I am very much disposed to agree with Lord Fraser in the view which he took in the case which has been cited to us (*Guthrie's Sheriff Court Cases*, 241). It is no doubt true that confirmation was obtained in the Sheriff Court of Dumfries, but that was because the deceased was domiciled within the sheriffdom, but the executors have no connection with that sheriffdom, and they went there merely for the purpose of obtaining possession of the executry estate. They got possession of it on the footing that they should duly account for it, but they can only be called to account for it where they may be

where the estate was being wound up, though the majority of them should actually be resident without the sheriffdom.'

"I go further than this, and would say—'though they be all resident without the sheriffdom.'

"I think that support for this view can be obtained by a consideration of the terms of the bond of caution, which cautioners for executors have to sign, and which must have been signed by the cautioners for the defenders. The form, after stating that the cautioner binds and obliges himself that the sum contained in the testament 'shall be made free and forthcoming to all parties having interest therein as law will,' contains the following clause,—'And I subject myself, my heirs and successors, to the jurisdiction of the Sheriff of Dumfries and Galloway in this particular.'

"I never heard of a cautioner being subjected to greater liability than the principal; and, if an executor is not subject to the jurisdiction of the Court which appointed him, I cannot see why his cautioner should be required to subject himself to it."

¹ *Watt v. Richmond's Executors*, decided by Lord Fraser when Sheriff of Renfrewshire, *Guthrie's Sheriff Court Cases*, 241; *M'Morine v. Cowie*, Jan. 16, 1845, 7 D. 270, 17 Scot. Jur. 135; *Ferguson v. Douglas, Heron, & Co.*, 1796, H. of L., 3 Paton's Appa. 503 (Lord Chancellor Loughborough, p. 510); *Black v. Duncan*, Dec. 18, 1827, 6 S. 261; *Magistrates of Wick v. Forbes*, Dec. 11, 1849, 12 D. 299, 22 Scot. Jur. 71.

² *Preston v. Melville*, March 29, 1841, 8 Cl. & F. 1, 2 Rob. App. 88 (Lord Chancellor Cottenham, p. 12).

³ *Orr Ewing's Trustees v. Orr Ewing*, July 24, 1885, 13 R. (H. of L.), Lord Blackburn, p. 18.

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competently cited. There is nothing in the fact that the Sheriff of Dumfriesshire granted confirmation to confer jurisdiction upon him in such an action as the present. The executors have carried the estate outside the sheriffdom, and in that state of circumstances I do not see on what ground the pursuer can establish the jurisdiction. If, as Lord Adam has remarked, the mere fact of confirmation gave jurisdiction against executors exclusively in the Court which granted the confirmation, I could understand the argument for the pursuer, but as an executor may be sued anywhere, where he himself is, and an action may be brought against him in any Court to which he is himself subject, it is quite plain that there cannot be exclusive jurisdiction in the Court from which the confirmation proceeded. And if there is not exclusive jurisdiction, I do not see how the fact of confirmation can confer any jurisdiction unless the executor is otherwise subject to it. I think the defenders' first plea in law must be sustained.

LORD MURE.—I am of the same opinion. At first I had some hesitation in coming to a different conclusion from the Sheriff, from the apprehension that a contrary decision on the question of jurisdiction might render it necessary in all such cases for parties to be at the expense of coming to the Court of Session as the *commune forum*. But this may I think be obviated wherever there is one executor, and there are many such cases, subject to the jurisdiction of a Sheriff Court. I further agree with what has been said by your Lordship, to the effect that there is no exclusive jurisdiction in the Sheriff Court which granted confirmation.

LORD SHAND.—The decision of this point seems to me to depend upon the answer to the question whether the taking out of confirmation implies (for there is nothing express to which we can look) that thereby jurisdiction arises entitling creditors or beneficiaries to call the executors to account in the Sheriff Court in which the confirmation was granted. I agree in thinking that this question must be answered in the negative.

Suppose that one of the executors here had lived in Glasgow, can it be said that he is not to be sued there, but that the action must be brought in another part of the country with which he has no connection? I should be sorry if the result of our decision were that in future it would be necessary to bring the action to the Court of Session. But that is not a necessary result. All that we decide is that where an executor has no residence in the jurisdiction in which he is sued, and no tie there except that he has obtained confirmation of the estate of a deceased, the action will not lie. If the pursuer had resorted to the domicile of the executor who had taken the leading part in connection with the administration of the executry estate, and had sued both executors there, I should have had no doubt of the jurisdiction. But that is not the case here, and I agree with your Lordship that the defender's first plea must be sustained.

LORD ADAM concurred.

THE COURT accordingly recalled the interlocutors of the Sheriff and Sheriff-substitute, sustained the first plea in law for the defenders, and dismissed the action.

THOMAS HART, L.A., Agent.

ALEXANDER M. ROSS, Pursuer.—*C. S. Dickson—G. W. Burnet.*
 WILLIAM LETHAM M'KITTRICK, Defender.—*Asher—Kennedy.*

No. 55.

Dec. 17, 1886.

Reparation—Slander—Process—Jury trial.—A person charged with having contravened the Weights and Measures Act, 1878, by having in his possession or using measures which were not of any Board of Trade standard, and were false or unjust, was convicted of the offence except in so far as it was charged that his measures were false or unjust. He afterwards brought an action of damages against the printer and publisher of a newspaper for slander contained in an article commenting on the case, which, upon the face of it, assumed that there had been a conviction upon both charges. There was no issue of justification, and the defender in his defences offered a retraction and apology, and a nominal sum of damages, and in the witness-box admitted that the article charged the pursuer with dishonest conduct. The presiding Judge (Lord McLaren) told the jury that it was for them to consider whether the article was false and calumnious, and no exception was taken to his charge.

The jury having returned a verdict for the defender, the Court granted a new trial upon the ground that the verdict was contrary to evidence—*disa.* Lord McLaren, who held that it being the province of the jury and not of the Court to determine whether the article was or was not a defamatory libel, their verdict affirming that it did not exceed the limits of fair criticism ought not to be interfered with.

ALEXANDER M'KENZIE ROSS, refreshment contractor in the International Exhibition Buildings at Edinburgh, was charged with a contravention of the Weights and Measures Act, 1878, "in so far as, on the 8th May, . . . he used, or had in possession for use, for trade, twenty-eight measures of capacity which were not of the denomination of some Board of Trade standard, and were false or unjust." The complaint was tried in the Edinburgh Burgh Court on 19th May 1886 before Baillie Turnbull, and the accused was "convicted of the offence charged, except in so far as it is charged in the complaint that his measures in question were false or unjust." On appeal to the High Court of Justiciary, the conviction was set aside (June 8, 1886, 13 R. Just. Ca. 73).

In the *National Guardian* newspaper of 26th May 1886 there appeared an article regarding the proceedings in the Burgh Court, headed "Illegal Measures."*

* The article was:—"There never was a time in the history of the world, so far as we know, when false weights and measures were not in existence. . . . Seeing that the use of a false measure violates one of the ten commandments, it follows, naturally enough, that a portion of the moral law is thereby broken. Nothing is more certain than that an infraction of the plain injunction, 'Thou shalt not steal,' must then ensue. It is not possible to regard the position in any other light.

"It is unfortunate, therefore, that the International Exhibition in Edinburgh should have been marred, at the very opening, by the unseemly discovery that visitors were being supplied with liquor in measures that were unjust or false in respect of their capacity. . . . The case against Mr Alexander M'Kenzie Ross, the purveyor, was not very creditable to him, and it also, indirectly at least, reflects most awkwardly on the directors. Either Mr Ross had illegal measures in his possession or he had not. In the latter case the charge against him must have naturally collapsed. Unfortunately for him, however, and also for those officially responsible for the just management of the Exhibition, the offence was clearly proved, and Mr Ross was fined £2, with the alternative of going three days to prison. The illegal measures, as is customary in such cases, were ruthlessly confiscated, so that visitors will know in the future that they are being supplied with the quantity of liquor for which they pay. The attempt to prove that this had been the case already was not very happy. The mere circumstance that the false measures were there, unstamped, in constant use, and purporting to be what they really were not, was quite sufficient to secure a conviction.

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An action of damages for slander was afterwards brought by Ross against William Letham M'Kittrick, the printer and publisher of the *National Guardian*, on the ground that the statements and representations made in the article were false and calumnious, and were maliciously made and published.

The defender explained in answer that the article in question was based upon the reports of the proceedings at the trial, and that it did not exceed the limits of fair and legitimate comment. He further offered a retraction and apology, and also to pay the pursuer a sum by way of nominal damages. He also inserted in a prominent position in the issue of his journal dated 9th June an explanation and apology.

The following was the issue for the trial of the cause :—"Whether the article is of and concerning the pursuer ? and Whether the article falsely and calumniously represents the pursuer as having been guilty of dishonest conduct in his business of purveyor to the said International Exhibition, to the loss, injury, and damage of the pursuer ?" There was no counter issue.

The case was tried before Lord M'Laren on 18th November 1886, when the jury returned this verdict :—"The jury unanimously find that the article is of and concerning the pursuer, but find that it does not impute dishonest conduct to the pursuer to his loss, injury, and damage." The verdict was entered for the defender.

On 15th December following the pursuer moved the First Division for a rule, upon the ground that the verdict was contrary to evidence. He maintained that the article in question represented that he had been convicted of an offence of which he had been really acquitted. There was no reasonable doubt that it was intended to charge him with dishonourable conduct. The defender himself had admitted in the witness-box in cross-examination that the article "charged dishonesty, *i.e.*, in connection with the charge of using unjust measures." It was therefore a strong thing for a jury to affirm that there was no such charge, for the verdict could mean nothing else, although it was no doubt the fact that no special damage had been proved.

A rule having been granted, the defender shewed cause. Lord M'Laren's charge to the jury was admittedly correct, otherwise the pursuers ought to have excepted to it. There had been a conviction under the Weights

"Mr Johnstone, who addressed the Court on the question at issue, said that he made no reflection at all upon Mr Ross from a moral point of view. This was very kind and generous of Mr Johnstone, who undoubtedly placed the transaction in as mild and civil a fashion as he could decently assume, but it is by no means clear that he was strictly accurate. If Mr Ross was not guilty of an offence against the moral law, as laid down in the authorised authorities on that delicate subject, then why should he have been dragged into Court and fined £2 with the alternative of imprisonment ? It was distinctly proved that Mr Ross had ordered forty measures to hold about one-third of a gill, and as one tradesman refused to do the work we are entitled to assume that some dubiety already existed in certain quarters concerning the propriety of making the measures at all. It was also proved that the measures had been made by another tradesman, failing the one who had refused the order, and that they had been delivered to Mr Ross and used in the Exhibition. The measures, moreover, must have been recognised as inaccurate by the servants of Mr Ross, for when the two officials from the Weights and Measures Department were engaged in their mission in one part of the building, the waiters were removing the measures from another. It is certainly to be deplored that the opening of the Exhibition, so grand an event in the history of Edinburgh and of Scotland, should have been disfigured by such an unfortunate occurrence, but in all probability it was better that the discovery should have been early in order to give the public the full benefit of a more equitable traffic."

and Measures Act, 1878, and the article in question was founded upon a report of the trial of the case which had appeared in the *Scotsman*, and was a fair criticism of that report. Between the date of that report and the appearance of the article there had been an interval of six days, during which the report had remained uncontradicted. The damages which were asked were by way of reparation only, for there was no ground for *solatium*, an apology and explanation having been published in the issue succeeding that in which the article complained of appeared. The question, therefore, came to be, whether, although no special damage was proved, the jury ought not to have awarded nominal damages. Upon that question the case of *Craig v. Hunter*¹ was in point. The Court held there that to sustain an action of damages for alleged verbal injury there must be an *animus injuriandi*, and they reversed the interlocutor of the Lord Ordinary finding damages due. The present case was not one in which the Court would readily grant a new trial.

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Replied for the pursuer;—The verdict was not only against the weight of evidence, there was actually no evidence to support it. The defender himself admitted that the article was capable of no other interpretation than that put upon it by the pursuer. The only question, therefore, left for the jury to consider was that of the amount of damage. The apology and retraction might be relevantly taken into consideration in regard to the matter of the amount of damage, but not as affecting the nature of the verdict for or against the pursuer. A verdict for the pursuer with nominal damages would have cleared his character,—which the verdict returned did not. It was important to observe that the summons in the present case was dated 3d June, the apology was dated the 9th June. There was a similarity, therefore, between this case and that of *Faulks v. Park*,² where a retraction made just before the case went to trial was held insufficient. The case of *Craig v. Hunter*¹ was quite inconsistent with the later view of the law that language which was found to be calumnious was presumably malicious.

At advising,—

LORD MURK.—A motion for a new trial has been made in this case on the ground that the verdict is contrary to evidence; and the question for consideration is, whether it has been shewn that there is in the proof adduced evidence which ought necessarily to have led the jury to come to a different conclusion from that at which they arrived. The main question sent to trial was, whether the article complained of “falsely and calumniously represented the pursuer as having been guilty of dishonest conduct in his business of purveyor, &c., to the loss, injury, and damage of the pursuer,” and the jury have found that it did not. Having regard, however, to the admission made by the defender when under cross-examination, to the effect that the article in question “charged dishonesty, i.e., in connection with the charge of using unjust measures,” and to the terms of the article itself, I am constrained to come to the conclusion that the verdict finding for the defender was contrary to evidence, being contrary to the defender’s own express admission that the pursuer was charged with being guilty of dishonest conduct.

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An action of damages for slander was afterwards brought by Ross against William Letham M'Kittrick, the printer and publisher of the *National Guardian*, on the ground that the statements and representations made in the article were false and calumnious, and were maliciously made and published.

The defender explained in answer that the article in question was based upon the reports of the proceedings at the trial, and that it did not exceed the limits of fair and legitimate comment. He further offered a retraction and apology, and also to pay the pursuer a sum by way of nominal damages. He also inserted in a prominent position in the issue of his journal dated 9th June an explanation and apology.

The following was the issue for the trial of the cause:—"Whether the article is of and concerning the pursuer? and Whether the article falsely and calumniously represents the pursuer as having been guilty of dishonest conduct in his business of purveyor to the said International Exhibition, to the loss, injury, and damage of the pursuer?" There was no counter issue.

The case was tried before Lord M'Laren on 18th November 1886, when the jury returned this verdict:—"The jury unanimously find that the article is of and concerning the pursuer, but find that it does not impute dishonest conduct to the pursuer to his loss, injury, and damage." The verdict was entered for the defender.

On 15th December following the pursuer moved the First Division for a rule, upon the ground that the verdict was contrary to evidence. He maintained that the article in question represented that he had been convicted of an offence of which he had been really acquitted. There was no reasonable doubt that it was intended to charge him with dishonourable conduct. The defender himself had admitted in the witness-box in cross-examination that the article "charged dishonesty, i.e., in connection with the charge of using unjust measures." It was therefore a strong thing for a jury to affirm that there was no such charge, for the verdict could mean nothing else, although it was no doubt the fact that no special damage had been proved.

A rule having been granted, the defender shewed cause. Lord M'Laren's charge to the jury was admittedly correct, otherwise the pursuers ought to have excepted to it. There had been a conviction under the Weights

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charge must, as I conceive, be held to be false; and the proper verdict for the jury in such circumstance to return was a verdict for the pursuer, with such damages, nominal or real, as they thought applicable to the case.

I have been averse to granting a new trial here, having in view the fact that an apology has been made by the defender. But it appears that this was not done until after the case had come into Court. I put it to the defender's counsel whether they knew of any instance where in such a case an apology of the description here made had been held to justify a verdict of the kind, but they were unable to name one. I cannot therefore see my way to come to any other result than that the rule must be made absolute, and a new trial granted.

LORD SHAND.—I concur with Lord Mure in thinking that in the circumstances it is inevitable that a new trial should be granted. It is important in considering the question to have in view the precise point of time at which the article complained of appeared. The pursuer was charged by the Procurator-fiscal of the Burgh Court of Edinburgh with what may be fairly called two distinct offences—at least the charge dealt with two different matters—the having in his possession measures which were not standard measures was one matter, and the second was that he had used measures which were “false and unjust.” The magistrate convicted him of having measures which were not standard measures, but declined to convict him of having acted falsely and dishonestly in the use of these measures, so that the result of the conviction was that the magistrate refused to affix any moral stigma upon him. It was in that state of matters that the article appeared, and the pursuer complains of it as having been false and calumnious, and as representing him as having been guilty of dishonest conduct in connection with his business in the International Exhibition. In other words, the pursuer complains that the article charged him with conduct which subjected him to a very serious moral stigma, viz, with dishonesty. That being so, the question for the jury, in the first place, was whether this article did go beyond a fair comment on the conviction; and it appears to me to be quite clear that it did so, for there was a distinct charge of dishonesty contained in it, and indeed the defender in the witness-box admitted that it bore that construction. The article cannot be read without this being at once apparent, and this is not surprising, for the writer of the article was under the erroneous impression that the conviction had found that false and unjust measures had been used. The article, indeed, in substance, stated that this was the fact. In these circumstances I am not surprised that counsel for the defender was unable to resist an admission that the article was false and calumnious. That being so, the result must be that the pursuer was entitled to a verdict. Apologies and expressions of regret may go to reduce damages. But if a legal wrong is committed by a false and calumnious charge being made, then a verdict for the pursuer must be returned, the jury being masters of the amount of damages to be awarded.

The verdict was worded in very peculiar terms, for instead of a simple finding for the defender, it repeated the words of the issue. That seems to indicate that the jury held that the charge was false and calumnious, but would not find that the result was loss, injury, and damage to the pursuer. But if such a charge was made, then, in the absence of an issue of *veritas*, it follows there must be damages given. I think the pursuer is entitled to a verdict which will clear his character, and that the present verdict cannot stand.

As already noticed, it has been suggested that the article may be sustained as being a fair comment upon the proceedings at the trial. But I think there are fatal objections to such a view. If there had been a conviction upon both charges, then there would have been room for strong comment, and it would have been very desirable that there should be strong comment. But the conviction was, as I have said, limited to the charge that the accused had the measures in question in his possession, while the article proceeded, indeed asserted, that the conviction had in point of fact gone farther, and commented on the conviction, taking that view of it. In such a case it is impossible successfully to represent that the article only contains fair comment.

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LORD ADAM.—It appears to me that the verdict for the defender necessarily affirms that the defender has not represented that the pursuer was guilty of dishonest conduct. I quite think that the question whether the article was calumnious or not was properly left to the jury. But I do not think that a jury is more infallible in a libel case than in any other, and if juries go wrong, as they do occasionally, I do not see any reason why in these, as in any other cases, they should not be corrected. In this case I have no doubt that the jury has gone wrong. The admission of the defender himself that the article does accuse the pursuer of dishonesty is enough to shew that the verdict is a wrong one—and the accusation did not merely refer to the keeping illegal measures, it also extended to the using of false and unjust measures. No doubt the article was a comment on the trial, but the writer was under a mistake in imagining that there had been a conviction upon the charge of using the false measures. It may have been a mere mistake, but that is not a sufficient excuse. The pursuer is entitled to have a verdict which will clear his character. That means that there must be a verdict for the pursuer, which is the only verdict consistent with the evidence in the case. That being my view, I see no other course but to send the case to be tried anew.

LORD M'LAREN.—As I believe I stand alone in the opinion which I have formed regarding this motion, I think it necessary that I should state my views in some detail. The question is one of considerable importance, and, so far as I know, there is no precedent since the institution of jury trials in Scotland for interfering with the verdict of a jury in a case of libel where the question is between a verdict for the defender and a verdict for the pursuer with nominal damages. I should have been satisfied if the verdict had been for the pursuer, accompanied with nominal damages, in accordance with the view which has been expressed by my colleagues who have already spoken. But I am also satisfied with the verdict which has been returned. There is a distinction, no doubt, between the two forms of verdict, but I think it is a distinction without a difference. I cannot see, either as regards the matter of real injury or as regards the vindication of the pursuer's character in the eyes of the public, that it is of the slightest consequence whether he receives a verdict with a farthing damages or whether a verdict is recorded against him.

I am, however, of opinion that the verdict returned was not against the weight of the evidence, but was one which the jury were entitled to give—having regard to the evidence which was before them. It must be observed that the pursuer was undoubtedly convicted before the Burgh Police Court of Edinburgh of a contravention of the Weights and Measures Act, the charges being, first, that

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he had used unjust measures, and, secondly, that he had in his possession measures which were not the legal and correct standard measures. The conviction was upon the latter charge only. Accordingly, there was a substantial acquittal upon the charge of using unjust measures. Nevertheless there was a conviction under the statute, and a punishment of a fine inflicted, so as clearly to constitute the offence a criminal one. The conviction was thereafter set aside in the High Court of Justiciary, where the Judges were divided in opinion, but that fact is of no importance so far as regards the question of the justice of the criticism of a case previously tried before a competent Court. What the defender professed to do in the article in question was to criticise the conduct of the pursuer as disclosed in a case which had been heard in Court, and in which he had been convicted of a criminal offence.

The next point in the order of events is that it has not been shewn, at least to my satisfaction, that the article in question contains any misstatements of the case. It is not a full report—it is rather of the nature of a leading article. But in the course of it the circumstances are fairly brought out, and also the different views which might be taken of these—both those for and those against the pursuer. There was an omission in the article: It was not stated that the pursuer had been absolved from the charge of using unjust measures, but neither was it stated that he had been convicted of that charge. In considering the import of the article, I think the pursuer is entitled to have it read just as if it had contained the words which are used in the innuendo, because the defender admitted in the witness-box that the article was meant to characterise the conduct of the pursuer as dishonest. Upon this I would remark that it was not a general accusation of dishonesty, which would have been a more serious matter. The issue puts it in this way:—"Whether the said article falsely and calumniously represents the pursuer as having been guilty of dishonest conduct in his business of purveyor to the said International Exhibition, to the loss, injury, and damage of the pursuer,"—and I think the article is to be considered as if it had said in so many words that the pursuer had been guilty of dishonesty in the conduct of his business as purveyor to the Exhibition. There were two questions which the jury had to consider,—First, What was the meaning of the article? and second, Was it, or was it not, a fair comment upon the conduct of the pursuer as disclosed by the trial? Upon the first question there was no doubt, because the meaning attributed to the article by the pursuer was admitted by the defender. But, as I have said, the jury had further to consider whether the imputation of dishonesty was or was not within the bounds of fair criticism. It was argued to the jury that if the innuendo put upon the article was proved to their satisfaction damages must follow. I expressly told the jury that this was not the case, and that it was for them to say whether the article was, or was not, calumnious, and I do not understand that any of your Lordships take a different view. And I take it that by their verdict the jury in effect found that the article did not exceed the bounds of fair criticism, and that it was not calumnious.

The question whether words are defamatory is a question not so much of fact as of opinion. It is a matter which the practice of this country—I may almost say the constitution of this country—leaves entirely to the discretion of the jury, and I do not know how I can arrive at the conclusion that the verdict of the jury was against the weight of evidence where the facts have been fairly laid before them. Without going so far as to say whether I should have agreed with

the jury or not, I think that the language of the article complained of was such that a jury might hold that it did not go beyond the bounds of fair criticism. No. 55.

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But, further, I think that the judgment which your Lordships are to pronounce really amounts to this, that it attributes to the Judges the function which is generally exercised by juries, of considering and determining whether the words used are libellous or not. I think this is just what the Judges in England in the last century tried to do in the prosecution in which Lord Erskine was counsel, and in which he successfully asserted the right of the jury to give a general verdict, and to determine whether the words used were, or were not, defamatory. In consequence of that case an Act of Parliament was passed which is known as Fox's Libel Act (32 Geo. IV. cap. 60). That Act is, I think, a clear indication of what the Legislature thought was the proper function of juries in actions of libel. It provides that, in all cases of libel, the jury "may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the Court or Judge before whom such indictment or information shall be tried to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." The statute applies to criminal prosecutions, and therefore I do not quote it as a direct authority. But I do not conceive that the functions of a jury are materially different in criminal and civil cases depending on the same facts.

It seems to me that if the Court takes the course of sending this case to a new trial it is in effect assuming that upon proof of the words used, and upon proof of the sense attributed to them, the jury must, in accordance with the direction of the Judge, find a verdict for the pursuer, which is the very thing the statute says they are not to do. I should be strongly opposed to making a precedent which would take from juries the discretion which I think they have, upon the whole, fairly exercised of distinguishing between cases in which damage has been suffered and cases, such as this, where no substantial injury has been done, and where the whole matter has arisen out of a mistake, for which an apology was offered.

LORD PRESIDENT.—The publication of the alleged libel in this case was admitted, and it was also not matter of dispute that the article applied to the pursuer, and, therefore, the only question remaining for the consideration of the jury was, whether the article falsely and calumniously represented the pursuer as having been guilty of dishonest conduct in the business of purveyor at the International Exhibition, to his loss, injury, and damage.

What is the meaning of a verdict for the defender upon such an issue? It can mean nothing but this, that the article did not falsely and calumniously represent the pursuer as having been guilty of such dishonest conduct. Lord McLaren seems to think that the difference between this and a verdict for the pursuer, with nominal damages, is immaterial; or, in other words, that it is a distinction without a difference. I cannot assent to that. To say that a man has been calumniated, and to say that he has not been calumniated, appears to me to constitute a substantial distinction with a very great difference. A verdict for the defender means in a case of libel either that there has been no attack upon the pursuer's character at all, or that he has come into

No. 56. On 11th December 1886 the pursuers moved for decree in terms of the joint minute.

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Railway Co.

The defenders appeared, and stated that they wished to be certain that they got a valid discharge, and that some of the children being pupils and others minors, and no curator having been appointed to them, there was some doubt whether they could grant a valid discharge, or whether their mother could do so. As regarded the pupils, probably under sec. 2 of the Guardianship of Infants Act, 1886 (49 and 50 Vict. chap. 27), the mother of the pupils, being "the guardian of the infant," could grant a valid discharge for them just as the father might have done had he been alive. The question as to whether minors could validly discharge such a debt as this did not appear ever to have been expressly settled.¹

At advising,—

LORD PRESIDENT.—In this case there was an issue in which the children of the late John Jack claimed damages to the extent of £2100, or £300 to each of them, they being seven in number. The case did not go to trial, but was settled by a joint minute, in which the pursuers accepted a tender, which had previously been made, of a payment of £350 in all, or alternatively of a payment of £50 to each child. The case now comes here on a motion by the pursuers for decree.

Of the seven children five are in pupillarity, and two have attained minority, and the question comes to be, how are the defenders to obtain a valid discharge? As regards the five pupil children, I think all difficulty is at an end, for by the recent statute the mother is entitled to act as tutor or guardian to her children, and she has apparently just as good a right to grant a discharge as the father would have had had he been alive.

But as regards the minor children, the question is of greater difficulty. No curator has been appointed to them, and therefore it is doubted by the defenders whether they can grant a good discharge. That is a point which we have not yet had occasion to consider in reference to the question under consideration. Three cases have been laid before us. The first is *Pratt v. Knox*, June 28, 1855, 17 D. 1006. There the Court refused to grant decree against the defenders for payment to the *curator ad litem* for behoof of minor children, or to appoint him *curator bonis* without a formal application in the usual way. That case obviously does not apply here. The next case was that of *Anderson v. Kidd*.² There a widow and her children were the pursuers of the action, and the Court refused to grant decree until a *factor loco tutoris* was appointed, because the mother declined to hold the sum awarded by the jury in trust for herself and the children subject to the orders of the Court. There only remains the case of *Anderson v. Muirhead*, June 4, 1884, 11 R. 870. That was a case of minors, but there there was no demand for decree in the children's own names, and therefore the point we have here did not arise. The minors considered that they ought to have a guardian, and therefore the Court refused to proceed until a curator was appointed.

In the present case the minors ask for decree in their own name. As

¹ In *Sharp v. Pathhead Spinning Co.*, Jan. 30, 1885, 12 R. 574, the Second Division appointed a trustee to hold a fund of this kind for a minor, and in *Collins, &c. v. Eglinton Iron Co.*, Feb. 2, 1882, 9 R. 500, the same Division *de plano* appointed a *factor loco tutoris* to pupils.

² Not reported, but see Lord President's opinion in *Anderson v. Muirhead*, June 4, 1884, 11 R. 870.

to the general rule applicable to the case, there is perhaps no place where it is better stated than by Mr Erskine in his Institutes (i. 7, 33), where he says,—“Every deed of a minor who has no curators is as effectual as if he had curators, and had acted with their consent.” That statement is subject to some qualification, and Professor More states as accurately as anyone the result of the cases, where he says (Lectures, i. p. 110),—“Where minors have no curators they may act by themselves, and payments made to them by their debtors will be valid and effectual. But the Court of Session will not in every instance compel a debtor to pay to a minor who has no curators, at least without his giving security to keep the debtor indemnified, thus indirectly compelling the minor, where this appears to be necessary for his own protection, to have curators appointed to him.” Now, the case in which the qualification alluded to was given effect to is that cited in Lord Fraser’s book on Parent and Child, pp. 337-338, viz., *Kirkman v. Pym*, 1782, M. 8977, and it affords a good illustration of the sort of qualification with which the general doctrine of Erskine is to be received. Pym was there indebted to Kirkman in “a large sum of money secured by a heritable bond upon some houses in Edinburgh.” On the death of Kirkman, his son succeeded, but no curators were appointed to him, and he chose none himself. While in minority he claimed payment of this “large sum of money secured by heritable bond.” It was observed on the Bench,—“This question, which relates to the payment of a principal sum or *sors*, is to be distinguished from all cases in which the interest only of money or the rents of subjects are claimed,—those ordinary acts of administration which might be necessary for a minor’s support.” “The Lords were of opinion that as the debtor could not even by making full money be secure against future challenge unless the money were to be afterwards profitably employed for the minor’s behoof, so the Court ought not to interpose their authority in order to compel him to do an act which would subject him to that hazard.” Now, the distinction taken there is between large capital sums which fall to be invested and income, and it is a very important distinction, but it is in applying this doctrine that the only difficulty lies. It appears to me that this sum, which each minor proposes to discharge, cannot be described as a large sum which falls to be invested, or as anything equivalent to it. It is simply a sum which the law has given to the children to repair the loss they have sustained through the death of their father, and that loss is just the liability he would have been under to maintain and educate them, and if the sum which comes in place of that is this £50 a-piece, that seems to me to be intended to satisfy the immediate purposes of maintenance and education, and to fall within the rule and not under the exception, and therefore I think the minors can grant a valid discharge to the defenders.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

A minute was lodged sisting the mother as tutor to the pupil pursuers, and

THE COURT thereafter pronounced this interlocutor:—“Decern against the defenders (first) for payment to” the minor pursuers “of the sum of £50 sterling each, with interest thereon from 27th July 1886 till paid, and (second) for payment to the said Mrs Mary Gray Wilson or Jack, as tutor foresaid, of the sum of £250, with interest thereon from said date till paid.”

DOVE & LOCKHART, S.S.C.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

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No. 57. UNITED HORSE SHOE AND NAIL COMPANY, LIMITED, Pursuers (Reclaimers).

—*Guthrie Smith—Shaw.*Dec. 17, 1886.
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Stewart & Co.JOHN STEWART & COMPANY, Defenders (Respondents).—*Asher—Ure.**Patent—Damages—Infringement of subsidiary part of patented mechanism.—*

Where articles are manufactured by means of pirated machinery, it is relevant for the patentees to aver as grounds of damage that they have suffered from loss of market, and obtained smaller prices for the patented goods, owing to the competition of the infringers.

In an action of damages brought by a company engaged in the manufacture of horse-shoe nails against another company engaged in the same manufacture for damages caused by the defenders' infringement of patents belonging to the pursuers for improvements in the mechanism used in the manufacture, the defenders admitted that certain boxes of nails, manufactured and sold by them, had been made by means of machines which, in a previous action, had been held to be in certain minute particulars infringements of the pursuers' patents; but they proved that the pirated portions of the mechanism were not essential to the manufacture of the nails, and that without using these portions they could have made the nails as well, and almost, if not quite, as cheaply, as with them. *Held* that inasmuch as infringement of patented right was admitted, it must be assumed that the pirated mechanism was of some utility, although it was proved to be but small, and that the amount of damages fell to be assessed on the footing that the infringer must pay merely for the benefit which he had taken from the use of the improvements pirated. Damages assessed at £50.

1st Division.
Lord Kinnear.
B.

IN May 1885 the United Horse Shoe and Nail Company, Limited, raised an action of damages against John Stewart & Company, iron merchants, Glasgow, concluding for payment of £10,000 in respect of infringement of certain patent rights.

The pursuers founded on a judgment of Lord Kinnear, Ordinary, which was acquiesced in and had become final, pronounced on 20th March 1885, in a process of suspension and interdict at their instance against the defenders, in which he interdicted the defenders from infringing letters-patent No. 2432, granted in 1872, and No. 4078, granted in 1878. Of these patents, No. 4078 related to machinery for the process of punching in the manufacture of horse shoe nails, No. 2432 was an "interceptor," which was a part of the finishing machine, and was not actually used in the manufacture of the nails, but merely came into use in case of an obstruction arising in the supply of nails to the machine.

The pursuers in the action of damages averred that such nails as they sold could be made only by the use of the patented mechanism, and that, consequently, the infringement enabled the defenders to compete with them in the market, when otherwise the pursuers would have had the field to themselves. They averred further that by underselling the pursuers, the defenders had brought down prices, and had seriously injured the pursuers' trade connection and business profits.

The defenders admitted that certain boxes of nails manufactured and sold by them had been made by means of machinery which, in the interdict process, had been held to be in certain particulars an infringement of the pursuers' patents, but denied that nails such as they produced could only be made by using the mechanism covered by the patent, or that they had undersold the pursuers or injured their business. They further founded on the opinion delivered by Lord Kinnear, in the suspension and interdict, averring in accordance therewith (1) that in that action the pursuers founded on five separate letters-patent, and failed entirely on three of them, (2) that the letters-patent No. 4078 now founded on concluded with six claims, but that interdict had been granted only in respect of an infringement of the sixth, and that the least

important claim, which related only to an unimportant part of the mechanism used; and (3) that the letters-patent No. 2432 now founded on concluded with two claims, but that interdict had been granted only in respect of infringement of the second, and that the less important claim, which protected only a subsidiary part of the mechanism used.

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The pursuers pleaded;—(1) The defenders having infringed the said two letters-patent No. 2432 of 1872, and No. 4078 of 1878, as aforesaid, and having thereby caused serious loss, injury, and damage to the pursuers, they are liable in reparation therefor to the pursuers.

The defenders pleaded, *inter alia*;—(3) The pursuers having suffered no damage in consequence of the defenders' actings, absolvitor should be pronounced, with expenses.

Issues were adjusted for the trial of the case before the Lord Ordinary and a jury, but a reclaiming note and a notice of motion to vary the issues having been presented to the Inner-House by the defenders, at the discussion both parties agreed that the proof should proceed before the Lord Ordinary. On the motion of the defenders an assessor was named to hear the case along with the Lord Ordinary in terms of the Patents Act, 1883, but before the proof it was intimated that the parties were agreed to dispense with the assistance of the assessor.

Thereafter the minute of admissions quoted *infra* was adjusted.*

After hearing evidence, the import of which is fully given in Lord Adam's opinion, the Lord Ordinary (Kinnear) pronounced this interlocutor on 11th March 1886:—"Having considered the cause, productions, and whole proceedings, decerns against the defenders for the sum of £530 sterling: Finds the pursuers entitled to expenses."†

* In this minute it was stated that "the defenders, with the view of limiting the proof in this action, but merely for the purposes of this action, admitted and hereby admit that all the horse-shoe nails imported by the defenders from Sweden prior to 20th March 1885, consisting of 6215 boxes of 25lbs each, and all the horse-shoe nails sold by them prior to 20th March 1885, consisting of 5752 boxes of 25lbs each (of which 1390 boxes were made entirely without the use of the interceptor forming part of the subject of the letters-patent No. 2432 after mentioned) were made by machines not differing from the machines belonging to Messrs Kollen" (manufacturers of the nails in question abroad), " . . . and in contravention of claim 2 of the letters-patent No. 2432 of 1872, and claim 6 of No. 4078 of 1878, in respect of which interdict was granted; and that of said 5752 boxes, 2481 boxes were made and sold prior to the 23d May 1884, 200 of which were made without the use of the interceptor, the remaining boxes being made between that date and the 20th March 1885, of which 1459 boxes were made without the use of the said interceptor. The pursuers, on the other hand, only for the purposes of this action, do not maintain that said nails were made by mechanism constructed in contravention of claim 1 of No. 2432, nor of the claims of No. 4078 other than the 6th."

† "OPINION.—I think it is clear, from the evidence which has now been adduced, that from the date of the agreements with the United Horse Nail Company, the pursuers were in right of the patents which were subsequently formally assigned to them by the assignation founded upon. They were bound by the agreement to take over the pending contracts and liabilities of the former company as from its date; and the evidence shews that they did in fact take over the business on the 28th of June, or at all events in the beginning of July 1883; and I think it follows that any infringement of the patent right after the 28th June, or the beginning of July, was an injury to the pursuers, for which they are entitled to compensation.

"Now, that leaves only one question,—the question of the amount of damages,—and I do not think it is in general necessary or desirable to give

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The pursuers reclaimed, but at the opening of the discussion in the Inner-House the defenders' counsel intimated in answer to the Court that

reasons in detail for fixing damages; because, although the elements which ought to be taken into account may be capable of more or less exact definition, still in most cases the estimate of the particular sum which the pursuer may be entitled to as compensation must be made upon somewhat vague and conjectural considerations. It is really a jury question. But there are one or two points in this case as to which I think it is due to the parties that I should say how far I take them into consideration.

"In the first place, the defenders say, and I think rightly, that the pursuers can only recover compensation for the actual loss which they have sustained; and, on the other hand, it is said with equal justice that every sale of a patented article is an injury to the patentee or to the assignees of the patent; and *prima facie*, therefore, it would appear to me that the true measure of damage should be the amount of profit which the assignees of the patent would have made if they had themselves carried through those sales, because the loss which they have sustained is simply the loss of profit upon sales, which it may be presumed they would have made, were it not for the wrongful intervention of the defenders. But then it is said—and there is force in the consideration—that it is rather an assumption than a matter of certain inference to say that if the infringers had not interfered, the sales made by them must necessarily have been made by the pursuers; because there are other considerations which go to the effecting of sales, such as connection in trade, and energy and skill in the conduct of business, and therefore it does not necessarily follow that the pursuers would have made every sale which the defenders succeeded in making, if the defenders had not interfered at all. There is another consideration which the defenders have urged, and perhaps a more formidable one, because they say that the patents have only been infringed in so far as they apply to two separate parts of the process of the manufacture of shoe nails, and that those two parts are in themselves of subordinate importance; and therefore they say that they have derived no material advantage from the infringement, because the real merit of the nails they have sold is not attributable to the patented mechanism, or to any process or mechanism that is not open to the public. And therefore they say that since no considerable portion of the profit they have made upon the sales in question can be traced to their use of the patented machinery, the pursuers are entitled only to nominal damages, if they are entitled to damages at all. Now, as to the matter of fact upon which that argument was founded, I think that if I were to proceed merely upon the evidence which had been adduced in this case, and which was not adduced in the former action, as to the value and utility of the particular part of the punching machine which is covered by the claim which the defenders are said to have infringed, there might have been considerable force in the defenders' argument. But then the argument goes too far; because the purpose of the device in question is to save waste, and the evidence, according to their view of it, is that, so far from saving waste, it really involves greater waste than the former process of manufacture; or, in other words, that the supposed invention is perfectly worthless, and therefore that the patent is void from inutility. But it is an admission in the case that the patent No. 4078 has been infringed by the defenders in the particular respect set forth in their minute. Now, that means that there is a good patent, which necessarily means that there is a patent for a useful and meritorious invention, which the defenders have infringed, and that is the admission upon which I am asked to proceed, in considering the question of damages, and therefore I cannot assume anything contrary to that, but must, on the contrary, assume that the particular piece of mechanism which is covered by this part of the patent is a useful and meritorious part of the invention—that the value of the patent is what the patentee alleges—that it saves waste, and therefore saves cost of manufacture. I should not, however, have thought the matter of very much importance, in so far as the argument rests upon this patent alone, if the pursuers had been in a position to say that all the sales of which they complain involved an infringe-

they proposed to take advantage of the pursuers' reclaiming note, and to ask the Court to find nominal damages only due by the defenders. No. 57.

ment of the other patent, No. 2432; because, in order to the production of the manufactured articles which form the subject of this complaint, it is necessary to use not only the machine which is covered by the patent No. 4078, the punching machine, but also the finishing machine, which is covered by No. 2432, and, according to the opinion of the late Professor Fleeming Jenkin, and according to the evidence in the former case, the finishing machine is certainly an exceedingly ingenious and useful invention. It is covered by three separate patents—the pursuers, at least, maintained it was covered by three separate patents,—but of these there is only one that I was able in the former action to sustain as valid; but still the mechanism covered by that single patent, No. 2432, is undoubtedly very ingenious and useful; and, therefore, if every nail that has been sold by the defenders involved in its production an infringement of that patent, I should not have thought it very material to consider, for the purposes of this question, whether it involved the infringement also of any part of patent No. 4078.

“But then the admission that the defenders, by importing and selling the nails in question, have infringed the patent for the finishing machine, is qualified by the counter admission that the infringement of that machine arises only with reference to the sale of a certain portion of the cases of nails imported and sold by the defenders. I think something like 1800 odds out of 5000 odds cases of nails have been produced, according to the admission, without infringing that patent. As to the question of law that was suggested as arising upon that admission, all I think it necessary to say is, that it is a misapprehension to suppose that it was decided in the former case that there could be no infringement of the patent without taking the interceptor as well as the moveable gate, which is patented as in combination with the interceptor. That was not decided. It was a question that did not arise, and was not necessary to be considered, because there was no question in the former case that the defenders had imitated the interceptor, nor that they had imitated the combination if I was right in the view I took of the evidence as to the similarity of their machine to the pursuers' machine. Therefore it is a misapprehension to suppose that there was any decision as to the possibility of infringing No. 2432 without taking both the moveable gate, which is a material part of that invention, and the interceptor, which is also a material part of it. Of course, I say nothing for the purpose of deciding it now, because for the purposes of this action the parties are agreed as to what is to be taken as the condition of the infringement,—the admitted fact as to the infringement is that the defenders are to be held as having infringed No. 2432 by the importation and sale of those cases of shoe nails, but of those cases alone which were produced by the use of the interceptor.

“Now, that being the state of facts upon which this argument for reducing the damages to nominal damages is founded, the question is whether the defenders are well founded in maintaining that, by reason of the infringement being applicable only to those portions of the patented machine which I have described, the pursuers are precluded from saying that the loss which they have sustained by the infringement is the loss of the profit they would have made upon the sale of the nails if they had sold them themselves. And there certainly is a great deal of authority for saying that, where only a part of a complex machine is protected by a patent, the infringer cannot be made liable for the aggregate profit derived from the entire machine, as if that were the profit he had made by the use of the patent. But then the cases cited by the Solicitor-General, in which that consideration was thought to be material, were not actions of damages for infringement. They were suits in equity for ascertaining the profits obtained by the infringers, charging them as trustees for the patentee, and in such case it would be exceedingly material to shew that a part of the profit for which they were asked to account was really attributable to processes which were not covered by the patent at all. For the only question in these cases is what advantage the infringer has derived from the use of the patent over and above what he

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Argued for the pursuers ;—The defenders' admission of infringement of the two letters-patent, against infringement of which they were admit-

would have got from the use of processes open to the public, and this is very clearly explained in the American case of *Moury v. Whitney*, quoted by the Solicitor-General. The question as to the patentee's loss does not enter into the consideration at all, because, as the law was stated in the House of Lords in *Betts v. De Vitre*, the basis of the claim for profits is that the patentee condones the infringement and does not complain of it, but seeks to recover the whole profit made by the infringer as if it had been made as trustee for him. But this is an action of damages for infringement, and the question is, not what profit the infringer has made, but what loss the patentee has sustained ; and what the pursuer complains of is that he having a sale for articles of common use, which was of great value to him, by the use of his patented machine, the defenders have infringed his patent right by interfering with his business, and depriving him of the sales which he alone would have made if the defenders had not pirated his machine. Now, if the pursuers have lost the profit they would have made upon these sales by reason of the defenders' infringement, it does not appear to me to be of very much importance whether you can trace the profit which they would have made, or how much you can trace to the use of a particular portion of their machine. What they have lost is the sale. The great value of all machines of that kind consists not merely in their producing a superior article, but in their producing that article at a cost which enables the patentees to put it upon the market so as to command large sales, and that is what they lose by an infringement which enables others to compete with them.

"Therefore it appears to me to be a fair enough ground for estimating their damages to take the whole profits which they would have made upon the sales actually made by the defenders, if the defenders had not interfered so as to prevent the pursuers effecting those sales themselves. That would mean the difference between the cost of manufacture and the prices at which they were selling at the time to their own agent. No doubt there are the considerations to which I have adverted which ought to be taken into account. I cannot hold it as absolutely certain that they would have made the whole of these sales. That is a consideration, however, which I think is not capable of being estimated very exactly in money, and before determining as to the weight which is to be given to it there is another point to be taken into view—a ground upon which the pursuers maintain that the profit upon their sales—I mean the profit upon the defenders' sales at the actual rate at which the pursuers are selling for the time—is by no means sufficient to compensate them for the loss which they have actually sustained, because they say that they have been compelled by the wrongful competition of the defenders to lower their prices to their own agent in Scotland, and, therefore, that to give them full compensation the profits of which they have been deprived by the defenders are not to be estimated at the rates at which they were selling at the dates when the actual infringement took place, but at the higher rate at which they were enabled to sell before the defenders began to compete with them, or before the competition of the defenders had brought down their prices so considerably as they say it in fact succeeded in doing ; and, for the same reason, they say it follows that they must also have the difference between the prices which they actually earned on their own sales to their agent in Scotland and the rates they would have earned if there had been no competition. Now, I think this additional claim would not be unreasonable if the grounds in fact upon which it rests could be satisfactorily established, for, if they have the sole right of manufacturing and selling horse-shoe nails produced by their machine, they might well be entitled to damages for interference with their business over and above loss and profit on the actual sales of nails imported by the defenders. But then I think they have failed to prove damage on this account—at least to such an extent as would enable me to make any satisfactory estimate of the amount which they have lost in this way ; because, though it is true there has been a considerable fall in prices since the beginning of 1883, when the defenders first began to sell nails made by the

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tedly interdicted, afforded conclusive proof of the fact that they had adopted a valuable improvement, otherwise they would not have used it. Without using it they could not successfully have competed against the pursuers in the market,* and the latter were therefore entitled to damages upon the footing that the defenders' presence in the market was due entirely to the piracy. If that were so, damages to a much larger extent than had been awarded by the Lord Ordinary were due. The true measure of damages was the amount of profit which the holders of the patent would have made had they themselves carried through the sales, for it must be presumed that had the defenders not made these sales the pursuers would have done so, there being no other nails of anything like the same quality in the market. Further, the effect of there being two nails of the same quality in the market was to drive down the prices, and, therefore, in estimating the amount of damages due the sales should be calculated as if they had taken place when the nails were at the higher price at which they were when the pursuers were alone in the market, and not at the lower price which they fetched when competition had been brought to bear.

Argued for the defenders ;—The evidence shewed that the nails sold by them could have been produced equally well without using the patent

machines which have been found to infringe the pursuers' patents, I do not think it is proved that the competition of the defenders was the sole cause of that fall. There is evidence that, however excellent the pursuers' nails may be, there were other nails in the market with which they had to compete, and, independently of competition, there are other causes for the fluctuation of prices which do not appear to me to be excluded by the evidence. Therefore I am not able to give any precise pecuniary value to this element of loss which the pursuers allege. The result is that there are considerations tending, on the one hand, to increase, and, on the other, to diminish, the compensation to which the pursuers would be entitled if their loss of the profits which they might have earned upon the sale of the same number of cases of nails as the defenders have sold, in violation of their patent, were to be taken as the true measure of damage. But they are neither of them capable of any precise pecuniary estimation, and I think the fair result is that these considerations on either side, which cannot be estimated with precision, should be allowed to neutralise one another, and therefore that the measure of damage should be the difference between the cost of manufacture and the profit which they would have obtained upon the sale to their own agent in Scotland of as many cases of nails as are admitted to have been sold by the defenders in violation of the patents, taking the rates which they obtained at the time when the infringement actually took place.

"Now, the evidence as to that is that, if the whole 5752 boxes were in question, the amount of damages would be £611, but the pursuers were not in right of the patents until the end of June 1883, and I think about 700 of the 5752 boxes were imported by the defenders prior to the end of June 1883, and therefore I think the sum of £611 brought out in the pursuers' evidence must suffer deduction to the extent of 700 boxes. The result of that is that I think a fair compensation to the pursuers will be £530. I do not know that that is the exact amount, but it is within a few pounds of the profit which, I think, they might have obtained if the defenders had not interfered. It is right to add, though I daresay I have said it already, with reference to the argument which the defenders urged upon the extent of the infringement of the pursuers' patent, that, in my opinion, the defenders have infringed, and have admitted upon their admissions a very substantial infringement of, a really valuable patent, and therefore the suggestion that this is a case for mere nominal damages is entirely without foundation."

[The defenders having only tendered £251, the pursuers were found entitled to expenses.]

* For details of the inventions and such a statement of the evidence as is necessary, see Lord Adam's opinion, *infra*, 274.

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No. 4078, which had nothing to do with any method of making nails, but was designed only to save waste in the punching.* No doubt the defenders had acquiesced in the judgment in the interdict case, and here had admitted infringement. That inferred that the patent infringed was valid, and therefore useful, but the question how great the utility was one for the Court to decide. The proof here went to shew that the utility was very small, and therefore the admission ought to be taken as meaning that the utility was only great enough to render the patent valid. As regarded the second letter-patent, No. 2432, which related to a piece of mechanism called an interceptor, the same argument applied. It was proved by the pursuers' own manager† that the interceptor was injurious to the machine, and had been for some years discarded, so that the fact that the nails could be made without that piece of mechanism was not open to doubt. That had in fact been done. Upon the authority of American decisions it was plain that damages for infringement of a small and unimportant part of a complicated machine must not be assessed upon the same principle as where the whole machine had been taken.¹ On the evidence it was shewn that it was not the defenders' competition which had lowered prices, and that the pursuers had taken the lead in under-selling.

At advising,—

LORD ADAM.—This is an action brought by the pursuers for damages in respect of the infringements of two patents belonging to them. These are, first, claim 6 of letters-patent No. 4078, and claim 2 of letters-patent No. 2432, both being used in the manufacture of horse-shoe nails, the first in connection with the punching-machine and the second in connection with the finishing-machine.

The Lord Ordinary has found the pursuers entitled to a sum of £530 as the damage sustained by them in respect of the infringement by the defenders of these two patents.

He has arrived at that result in this way—The number of cases of nails sold by the defenders between the end of June 1883, when the pursuers acquired right to the patents, and the 20th March 1885, when the sale of the nails by the defenders was stopped by interdict, was 5052, and the sum of £530 is the amount of profit (that is, the difference between the cost of manufacture and the prices at which the nails were selling at the time) which the pursuers would have realised on the footing that they would have sold all these nails themselves. There are, however, two other elements which the Lord Ordinary has taken into consideration; the one is that he thinks it is not certain that the pursuers would themselves have made the whole of those sales, a consideration which goes to diminish the amount of the damages, and the other is that the competition of the defenders may to some extent have lowered the selling price of the nails in the market, and so have diminished the pursuers' profits.

"The result is," he adds, "that there are considerations tending on the one hand to increase and on the other to diminish the compensation to which the pursuers would be entitled if their loss of the profit which they might have

* See Lord Adam's opinion, p. 275.

† See Lord Shand's opinion, p. 281.

¹ *Authorities cited.*—Curtis on Patents, pp. 55-9; Jones v. Morehead, 1863, 1 Wallace (U. S. Reps.) 155; Mowry v. Whitney, 1871, 14 Wallace (U. S. Reps.) 620; Suffolk Company v. Hayden, 1865, 3 Wallace (U. S. Reps.) 315; Yale Lock Company v. Sargent, 1885, 117 U. S. Reports, 536; Watson v. Holliday, 1882, L. R., 20 Chanc. Div. 780.

earned upon the sale of the same number of cases of nails as the defenders have sold in violation of their patent were to be taken as the true measure of damage. But they are neither of them capable of any precise pecuniary compensation, and I think the fair result is, that these considerations on either side, which cannot be estimated with precision, should be allowed to neutralise one another," and so he arrives at the result of giving as damages to the pursuers the profits which would have been realised by them had they themselves sold the whole of the nails sold by the defenders.

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I am not satisfied that the basis on which the Lord Ordinary has thus rested his award of damages is sound.

I see nothing in the proof to shew, or to make it probable, that the pursuers would have made all these sales. There is nothing in the proof to shew that purchasers generally would have this particular nail, and none other. There is keen competition in the nail trade, and no doubt these sales were in large part due to the exertions of the defenders' agents. I do not think therefore that it is either proved, or that it would be at all in accordance with the fact to presume, that the pursuers, but for the intervention of the defenders, would have effected the whole or any large part of these sales. If the pursuers had had a monopoly of horse-shoe nails, and if none could have been manufactured or sold except by the use of their patents, probably the assumption made by the Lord Ordinary would be correct enough, but I do not think it is so where, as in this case, there are many competing nails in the market, all apparently equally sought after. Neither am I satisfied that even in that case the whole profits of the manufacture would furnish the true measure of the damages to be awarded. I cannot help thinking that the Lord Ordinary has been misled by the supposed analogy of the case in which a patentee, as he is entitled to do, claims, not damages in the proper sense, but the profits made by the infringer by the use of the patent infringed, in which case the profits made by the infringer on the sales is the measure of the patentee's claim.

The pursuers, however, maintain that by the use of the parts of the punching and finishing machines which the defenders have infringed the defenders have been enabled to compete with them so as not only to force down the selling price of the nails in the market, and thus diminish their profits, but also to reduce the amount of sales of the nails which they would otherwise have effected.

It appears to me that these are perfectly relevant grounds of damage, and, if established in fact, would entitle the pursuers to corresponding damages. But the defenders reply that it was not because of their use of the infringed patents that they were enabled to manufacture and sell the nails in question, which they say could and would have been manufactured and sold by them as freely and cheaply if they had not used these patents, and they further say that it was not the competition of their nails which brought down the price in the market, upon which they say their nails had no appreciable effect, but the competition of other nails, and if such be the state of the fact it would appear that the pursuers' claim for damages must fail.

As I have said, the infringed patents are claim No. 6 of patent No. 4078, and claim No. 2 of patent No. 2434.

With reference to patent No. 4078, the defenders maintained that they had, by inadvertence, failed in a previous case between them and the pursuers to contest the validity of this patent, and they have led evidence in this case to

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shew that the patent was of no utility, and therefore invalid. But I agree with the Lord Ordinary that for the purposes of this case the defenders are bound by the admission contained in their minute, which necessarily means that the particular piece of mechanism which is covered by this part of the patent is a useful and meritorious invention in respect that it saves waste, and therefore cost of manufacture.

But that does not preclude inquiry into the degree of usefulness of the patent, and the amount of waste saved by its use, facts which, having regard to the pleas of parties, it is necessary to ascertain in this case.

Claim No. 6 of No. 4078 is described in the letters-patent as "an improvement in the art or method of making animal shoe nails, which consists in punching from a rolled ribbed plate blanks of different widths, those cut from one edge of the plate being wider at or near their heads than those cut from the other edge of the plate, the object being to economise waste heretofore common and necessary when cutting blanks of equal width."

The punching machine is, I understand, a complicated and ingenious piece of machinery which the defenders were entitled to use. The invention patented consisted of the use in the punching machine of a matrix and die constructed so as to punch out blanks of different widths, but the patent in no way affected or interfered with the defenders' right to use the punching machinery with matrices and dies adapted to punch out blanks of the same size. The process patented was in no way required for the manufacture of the nail—the only question is, whether by its use the nail can be manufactured more economically, and if so, to what extent.

The pursuers have examined one mechanical engineer, Mr Beck, who is of opinion that the saving of waste by the use of the patent would amount to from 10 to 15 per cent; while the defenders have examined two engineers, Messrs Cruickshank and Morton, who are equally positive that the use of the patent would result in an increase of waste.

The difference between them may, I think, be accounted for to a considerable extent by the fact that the defenders' witnesses assume, and perhaps rightly, that the patent is used exactly as described in the letters-patent, in which case I think they are right in saying that its use would result in increased waste, while the pursuers' witnesses, in order to prove that there is less waste, have to assume that not only a wider but also a longer blank is punched out. It may be that if this be done a saving may result, but it is to be remarked that there is nothing said in the letters-patent about the one blank being longer than the other.

Seeing that these machines have been in use by both pursuers and defenders for a considerable time, one would have expected that the question might have been brought to the test of actual experiment.

Mr Gibbs, the pursuers' manager, tells us from experiment that the waste has been reduced since the improvements in 1878 from 33 per cent to 16 per cent, but this experiment is of no value in the present question, because these improvements included others calculated to save waste besides the one in question.

Mr Cruickshank says that he ascertained by experiment that the total waste when punching nails of equal size was 7 per cent. If this be true, it shews that it was only on this small margin of 7 per cent that saving could be effected by the use of the patent. Mr Kollen, however, did make the experiment, and he tells us that—"I made an experiment to ascertain the amount of waste in

punching blanks from the plate last summer. I took two blanks of equal width at the head, and of the same length, and the percentage of waste I got was 3·458. I made another experiment with another size of nail, and I got a little less waste, viz., 2·951 per cent. Then I made another experiment with the same size, the nails being of equal width at the head, but of different length, and I found that with the size which had before given 3·458 per cent of waste, I now got 5·647, and with the size which had before given 2·951 of waste, I now get 6·596 per cent. Then I made a third experiment with blanks of different width at the head and of different lengths, and I got 6·392 per cent of waste. I find from experience that there is more waste in punching blanks with broad heads at one side of the plate, and with narrower heads at the other. I find there is least waste when blanks are punched of equal width and equal length from opposite sides of the plate."

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If this evidence can be relied on, it would appear that there was no saving, but a loss, by the use of the patent, and Mr Kollen is not cross-examined at all as to this. Mr Kollen, however, continued to use the patent until he was interdicted, from which it may be inferred that he derived some advantage from it.

On the whole matter, I have come to the conclusion that if the patent is used exactly as described in the letters-patent, no saving is effected, but the reverse, and that in any view the saving is so immaterial that I have no doubt the defenders without its use would still have manufactured their nails, and competed with the pursuers just as they are doing now.

With reference to the infringement of claim No. 2 of patent No. 2434, this patent is for a piece of machinery called an interceptor, and is a part of the finishing machine. It will be observed that the interceptor has nothing to do with the fabrication of the nail. Mr Gibbs, the pursuers' manager in Sweden, says,—“When the machine is working properly, the interceptor has nothing whatever to do; it is an apparatus which comes into use only in case of obstruction or choking in the tunnel, so as to intercept the supply of blanks coming down. We have never used,” he says, “the interceptor described in the second claim in Sweden,” and a little further on he says, “We have entirely done away with the gate described in the specification as arranged to be opened by forward pressure. We have never used that in Europe at all. We found in America that it was not successful, and we have never used it in Sweden. It would not be an advantage in making nails, and we consequently did not adopt it.”

Mr Morton says there are innumerable means of counteracting a block without the use of an interceptor. One method, and one that is in use, is to drive the finishing-machine by means of a friction pulley, which will only stand a certain strain, and in the event of that strain being exceeded the pulley slips, and the whole machine comes to a stand. By adopting that method, nails can be as cheaply made as by the use of the interceptor, and Mr Kollen says, “Since March 1885, I have not used the interceptor in my nail-making machines. For sizes 11 and 12 we have not used it since the autumn of 1883. The interceptor on the machine we were working for these sizes at that time was broken, and we never repaired it. Instead of the interceptor to stop the supply of nails when a choke takes place, we use a friction pulley to drive the machine, and whenever a choke occurs, the resistance being greater than the pulley is able to overcome, the machine stops. I gave up its use,” he says, “altogether in January or February 1885. I did not find it an advantage when I used it.” And it is

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It appears to me, in the face of this evidence, it is impossible to say that this patent was of much, if any, use in the process of manufacture.

With reference to the question whether the competition of the defenders' nails brought down the selling price of the pursuers' nails in the market, I am of opinion that they did not do so to any appreciable extent.

I think it is clearly proved that many nails of different kinds and descriptions keenly compete in the horse-shoe trade, and that it was the competition of these nails that brought and kept down the price, and that the price was not affected by any competition of the pursuers' and defenders' nails *inter se*.

I do not propose to analyse the evidence in detail, but I would refer to the evidence of Mr Seeley, the pursuers' manager. He says,—“There was a change in the price of our nails before 1883. The discount we gave was at first 30 per cent and then 35 per cent, and in the end of 1881, or beginning of 1882, I increased the price-list and changed the discount. I did so because before that we had been selling at a price that we could not live at. Prices for ordinary iron have fallen very much recently, but there has been no fluctuation recently in the price of the material and plate we use for years. I attribute the high rate of discount which we still maintain to competition alone. That applies to the period from March to September 1885 as well as before.”

Now, this is a very significant statement, because Mr Seeley says that the pursuers brought down their prices in 1881, but the defenders did not begin to sell till 1883, and he further says that he attributes the present high rate of discount, which is, in other words, the low rate of price, to competition alone, but the defenders ceased to use the infringed patents in March 1885, and the price not having risen since, the inference would seem to be that the market price was not affected by the defenders' use of the patents.

I would also refer to the evidence of Mr Goodall, Mr Lamb, and Mr Andrew Goodall, where an account will be found of a dozen or so in number of nails which were competing in the market, and their evidence is confirmed by that of some purchasers and sellers of nails. On the whole matter I have no difficulty in coming to the conclusion that the competition of the defenders' nails had no appreciable effect on the market price at which nails were selling.

If this be so, and if I am right in thinking that the defenders could and would have equally competed with the pursuers if they had not used the patents, then the conclusion at which I am compelled to arrive is, that the pursuers have failed to prove that they have suffered any loss from the defenders' use of their patents, and therefore are not entitled to recover any substantial damages. But nevertheless the defenders have committed an illegal act in infringing the pursuers' patent, and in that view they would be liable in a nominal sum of damages.

There is, however, another view of the case which was not pressed before us, but which leads to a somewhat different result.

A patentee whose patent has been infringed may elect either to claim damages or the profits made by the infringer by the use of his patent. Now, although I do not think that the patentees in this case have proved that they have suffered loss by the acts of the infringers so as to entitle them to damages, still it does not follow that the infringers may not have made some profit by the use of the patents which the patentees are entitled to claim.

We are, as I have said, bound by the admission of the defenders in this case to assume that both patents were useful and meritorious inventions, and seeing that the defenders continued to use them, I think we may fairly presume that they found some profit in doing so.

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I do not think, however, that the pursuers are entitled to claim the whole profits made by the defenders in the manufacture of the nails, but only such portion thereof as is fairly attributable to the use of those parts of the machinery covered by the patents.

We were not referred to any case in this country where the question has occurred, but we were referred to a case decided in the Supreme Court of the United States—that of *Mowry v. Whitney*, in December 1871, in 14 Wallace's Reports, 620.

This was an action brought for the infringement of a patent for an improvement in the process of manufacturing cast-iron railroad wheels.

The improvement consisted in a process of slow-cooling the wheels in connection with the employment of artificial heat to retard the progress of cooling.

The Court below found that the defendant had infringed the patent, and found him liable in damages, these being assessed at the entire profits made by him by the manufacture and sale of all wheels sold by him in the manufacture of which the patented process had been used.

The Superior Court reversed this latter finding, and decided that an infringer is not liable to the extent of his entire profits in the manufacture, and that in such a case the question to be determined was, what advantage did the infringer derive from using the invention over what he had in using other processes then open to the public, and which would have enabled him to obtain an equally beneficial result. The fruits of that advantage it was held were his profits, and that advantage is the measure of profits to be accounted for. I agree with that case. The whole profit is not made by the use of the patents infringed, but by the use of the whole machinery employed. It is the saving only in the cost of manufacture which is effected by the use of the infringed patents which is the profit made by their use, and it is this saving, it appears to me, which ought on such an assumption to be given to the patentee.

The case we have to deal with is one in which the article produced is the result of a variety of successive processes, and of the use of a variety of complicated and ingenious machinery, all parts of which the defenders were free to use except only the two in question, which I think have been proved to be subsidiary and unimportant parts. The saving effected by their use must have been small. What proportion it bears to the whole profit realised we have no means of judging with precision, but I think that if we award £50—which is about one-tenth of the whole profits—to the pursuers on that account we shall be doing justice.

LORD MURE.—I concur in the result at which Lord Adam has arrived. The only question before us in this reclaiming note is the question of damages. There has been a decision on the question of infringement, and the proof proceeded in terms of a written admission of the parties. The ground upon which damages were claimed was somewhat different, I think, from what we usually find in these cases. In general when damages are claimed, the claim is measured by the profits the infringer has made by the use of the patent; but in this case, in article 5 of the condescendence, which is the only one that makes specific mention of the grounds upon which the damages are assessed, the patentees com-

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plain of the interference with their business by the influx of nails made abroad and thrown into the market by the defenders while they were infringing the patent; and the Lord Ordinary has adopted that view, and has allowed (as he explains in his note) the pursuers the profits which they would have made upon the sales actually made by the defenders if the defenders had not interfered so as to prevent the pursuers effecting these sales themselves. That is the ground upon which he estimates the damage, which is a somewhat different mode from that usually adopted, and having applied his mind to the consideration of the case in that view, he brings out the sum mentioned in his interlocutor as the sum which he thinks is due. I have looked at the evidence, and I concur with Lord Adam that it is not sufficient to instruct that any such loss has been sustained through the operation of the infringers. And while I think Lord Adam has taken a sound view of that matter, I further agree with him that there must necessarily, when there is infringement of this sort, be a certain amount of damage sustained by the patentee, and although the sum is far short of the sum claimed, I think with Lord Adam that £50 may fairly represent any inconvenience and loss they may have sustained. I concur in the decision Lord Adam has come to.

LORD SHAND.—This case undoubtedly presents points of novelty and of considerable importance for the decision of the Court. The question which is raised and which has been discussed before us is one of fact only, and that is as to the amount of damage the pursuers are entitled to claim in respect of the infringement of their patents which was established by the decision of the Lord Ordinary, and is admitted in the joint minute of admissions. The claim as presented to us was, as Lord Adam has observed, not a claim for profit made by the defenders, but a claim for damage done to the pursuers by the actings of the defenders. It was presented under two heads. In the first place, it was said that the defenders, by bringing the nails into the market in large quantities in competition with the pursuers, and selling large quantities of nails, had really been selling nails which the pursuers would have sold, and the pursuers claim on that ground that they have been damaged by those sales, and that the measure of the damage is the profit the defenders made. The second head of damage was that the defenders having put the nails, as they did, into the market, they thereby competed with the pursuers and brought down the pursuers' prices by a process of underselling from time to time, and that thereby a much larger sum than even the Lord Ordinary has allowed was sustained as damage.

Now, the Lord Ordinary in dealing with those claims has fixed the amount exactly on the same principle and brought out the same amount as if the defenders had infringed the pursuers' patents in all respects. It is clear upon a perusal of his Lordship's judgment that he would have arrived at exactly the same result as he has done in regard to the amount of damage, and no higher result, if it had been found by the Lord Ordinary that in every respect the pursuers' patents had been infringed; and his Lordship therefore has proceeded on this view, that the defenders could not have put nails the same in material and form on the market if they had been interdicted from the use of the patent in terms of the Lord Ordinary's previous judgment. But the great peculiarity of the case, to which I think the Lord Ordinary has not sufficiently adverted, is this, that the defenders were not found guilty of infringing these patents in all their heads, or infringing them generally. The Lord Ordinary's judgment

in its terms no doubt was a general interdict against infringing these patents, but by reference to the opinion which his Lordship then gave it is quite clear that he held that the main parts of the subject of these patents were not infringed, and that only in two particulars—what I may call the fringes of the patents of the pursuers—was there any infringement at all. Certainly the infringement that was found under that former action had reference, as the Lord Ordinary says, I think, in this case, to merely subordinate points in the patents. That, I think, is made very clear by a short reference to the patents themselves. In the first place, the patent No. 4078 contains no less than six heads, and it is impossible to read those different heads of the patent without seeing that the substance of the patent is contained in the first five, none of which the Lord Ordinary found had been infringed. The first is for a machine generally “to punch blanks from a rolled, flanged, or ribbed plate, combined with feeding mechanism which intermittently grasps and feeds forward the said flanged plate, and then releases the plate and moves back along over it, again grasping the strip and again feeding it forward to the punches after each operation of the punches”; second, in a machine “for the manufacture of blanks for animal shoe-nails, a series of punches and dies to shape the blanks, an intermittently operating feed of the class herein described, and mechanism to straighten the long, rolled, flanged strip supported in coil form in advance of the feeding mechanism”; third, “the combination with intermittently reciprocating and grasping feeding mechanism of an adjustable stop to control the backward reciprocation of the feeding devices, and a stop to determine the forward reciprocation of the said feeding devices”; fourth, “the combination with the carriage which supports the feeding devices of an operating arm provided with friction rollers, one of which is moveably supported upon the said arm, the two rollers rotating in contact to operate substantially as described”; and fifth, “the combination with a nail-plate grasping lever or jaw held up by a spring, of a striker connected with the punch-slide to open and release the grasp of the said jaw upon the nail-plate preparatory to the backward movement of the said feeding devices.” Now, there, I think, one finds quite clearly the main features of what I may call the substance of the invention. The sixth head relates simply to a matter in which it is claimed that some saving can be effected in the use of the general subject of the invention. It says—“That improvement in the art or method of making animal shoe-nails which consists in punching from a rolled ribbed plate blanks of different widths, those cut from one edge of the plate being wider at or near their heads than those cut from the other edge of the plate, the object being to economise waste heretofore common and necessary when cutting blanks of equal widths.” In short, the point of head six is, taking the patent generally as for the machine as it is now described, that it will make some saving in the operations to be carried out in the use of the machine. Now, it was that sixth head only that the Lord Ordinary found was infringed. And, again, in regard to the other patent, the only infringement there found to have taken place was on head 2 of the claim, which was in these terms:—“In combination with the gate the hook or interceptor *r* operating substantially as shewn and described.” Then, again, in the minute of admissions we have it made quite clear that that must be the view on which this question of damages arises, because whereas on the one hand the defenders admit that while the nails which they put on the market were manufactured subject to the infringement of head six of the first patent and the

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second head of the second patent, the pursuers, on the other hand, have admitted—only for the purposes of this action, but still admitted—that they do not maintain that the said nails were made by mechanism in contravention of claim one of No. 2432, nor of any of the claims of No. 4078 except the sixth.

Now, upon that state of the rights of the parties as settled by the Lord Ordinary's judgment, followed by the interdict, the pursuers present the case in this shape: They say the defenders never could have manufactured their nails at all, standing an interdict of that kind, and upon the footing that the rights of the parties had been so declared; that if they had proceeded to manufacture without taking the benefit of these two minor parts of those patents they would have lost all their profit, and the nails would never have been in the market. If that be established in this case, then the pursuers' view of their claim of damage is right. The defenders, on the other hand, however, have said, "Suppose we had been interdicted then, as we are interdicted now, from using these two subordinate minor parts of these patents, we could have put our nails on the market all the same; and if so, the view which you present in your claim of damages must be unsound, because the view on which your claim is presented is, that we could not have put our nails on the market." Now, looking at the position of the two parties, we have defenders before us who have been guilty of infringement, and I am free to confess that *prima facie* one would be disposed to hold infringers liable in damages, and that if they mean to say that they could and would have manufactured nails all the same, and would have been quite as much in competition in the market as they were, notwithstanding that they had been found guilty of the infringement of those two patents, there is a heavy *onus* upon them to instruct that that was the case. But having given the best consideration I could to the argument (which was very full) and to the evidence, I am of opinion with my brother Lord Adam that the defenders have made out their point—that the result of the evidence is, that they have shewn that a mere interdict against contravening what I have called the fringes of these patents would not have prevented their being in the market with the nails just as they were, and if so, the case presented for the pursuers in that view undoubtedly fails. In the first place, we have the fact that the defenders have gone on to manufacture their nails; they stopped for a short time after the interdict, I suppose to take counsel and make arrangements, but since that they have gone on manufacturing their nails, and they are as fully and freely in the market as ever, and it is not said that the nails so manufactured do contravene those minor parts of the patents. Then, in the second place, although undoubtedly it has been found that these patents in the two heads to which I have been referring were useful, and such as would base a claim for a patent, the question is, what amount of utility was there in them, and although I find on the one hand that there is a good deal of loose evidence on the part of the pursuers as to the percentage of saving that they could make by the use of the particular method patented under the sixth head of the main patent, on the other hand I think, when their men of skill and their own manager came to be subjected to cross-examination, their evidence produced the effect on my mind that really the amount of saving was very little. And when I look to that, and the large body of counter evidence, the result is to impress me with the conviction that the saving is trifling, if there be a saving at all. Then, again, in regard to the use of the interceptor, it appears to me that the evidence of the pursuers really demonstrates that the interceptor, as put in the claim in the second patent, although

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found by the Lord Ordinary and Professor Fleeming Jenkin to be an ingenious contrivance, so that we must take it to be of some benefit because of the decision in the former case, must be taken to be a very trifling benefit, because Mr Gibbs, the pursuers' own manager, says in regard to that matter,—“As I have said, the middle tunnel was discarded because, when the door opened, the supply of blanks not being checked, they continued to come down, and, instead of passing between the bottom rolls, came out and fell into the nipper-frame, and disarranged it, and caused serious trouble and delay. We found it was not advisable to have that door open, because it allowed the blanks to fall out and do damage to the machine. We made a new form of tunnel slightly different, and we also made a slightly different form of interceptor.” And then he goes on to say that they have entirely done away with the gate; that it would not be an advantage to use that mechanism, and consequently they did not adopt it. Now, if that be so of this interceptor as patented in combination with the gate, for the patent so bears—“In combination with the gate the hook or interceptor *r* operating substantially as shewn and described,”—it appears to me that again there is a failure to shew that the adoption and use of this part of the patent could be of any material advantage to the defenders. Now, what is the result? The question I put to myself upon this jury question of damages is this, Does it appear that if this interdict had been granted as at the date when this process was brought into Court, or at a much earlier date, the defenders would have been precluded from making nails and putting them upon the market? My opinion upon that question is that they would not. I think the defenders would have been the pursuers' competitors, and so I think it would be most unjust to the defenders that we should hold that the pursuers must reap the profit of all the nails which the defenders sold.

Now, that disposes of the first branch of the pursuers' claim, for which the Lord Ordinary has allowed upwards of £500, and upon the view I have stated, and concurring in the opinion Lord Adam has delivered, I am of opinion that judgment cannot be sustained.

The second head is,—“You were in the market as competitors, and you constantly kept bringing down prices, and the result is we have lost a great deal of money which we would have had by selling our nails at much higher prices.” Now, if what I have said be sound—and it is the judgment I have formed upon the evidence—it results that the competition would have existed all the same, and if the competition had existed all the same, then the defenders, as competitors, were entitled to reduce the market price if they thought fit, and so there is no damage done upon that head. But there is, further, a fatal objection to that contention, which is this, that I do not think it has been proved in this case at all that the competition of the defenders was really the cause of bringing down the price of these nails. It appears that before the defenders came into the field at all the prices of these nails were tumbling down steadily and considerably—coming down time after time in the market; and that they came down after the defenders came into the market is not, in my opinion, to be placed to their doing so. The pursuers themselves seem to have led in reducing the prices, and I think they did so, not because of the defenders' competition, but because there was a very large competition with a great many other nails, particulars of which are given by the witnesses, and so I am of opinion with the Lord Ordinary and Lord Adam that in this part of the case the pursuers also fail.

Lord Adam has proposed that we should, nevertheless, allow a sum of £50 to

No. 57. the pursuers as damages or compensation, and I quite concur with his Lordship that this may be done. The ground upon which I do so is this, that in any view there has been an infringement of these patents. I do not think that, as the case was presented, the pursuers have made out damage which they could recover in either of the views they put, but taking this case as one in which they might have said—although they have not so said,—“Well, at all events, we must have the profit made by your using these two parts of our patent,” I think we must take it that, although the profit that would be made must be of very trifling amount, there must be some profit made, because the former case sustained the patents upon the footing that there must be some profit made. But, looking to the evidence as a whole, I cannot see, assuming that these were beneficial parts of the patent which the defenders used, that it has been made out that a profit beyond the sum of £50 at the utmost could have been made by infringement of these heads of the patent, and, taking it at that, I have only to say that I concur entirely in his Lordship's views, and have only ventured to add what I have done because of the novelty and importance of the question raised.

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LORD PRESIDENT.—I entirely concur in the opinion of Lord Adam. The result will be to reduce the damages found by the Lord Ordinary from £530 to £50.

THE COURT pronounced this interlocutor :—“Recall said interlocutor : Decern against the defenders for £50 ; and, in respect of tender of £251, find the defenders entitled to expenses since the date of said tender, and remit,” &c.

GILL & PRINGLE, W.S.—MACONOGHIE & HARE, W.S.—Agents.

No. 58. **COLL MACKINTOSH, Complainer (Reclaiming).—Asher—Strachan.**
LORD LOVAT, Respondent.—D.-F. Mackintosh—C. J. Guthrie.
Lease—Subject—Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. c. 62), secs. 28, 35, and 42.—Held that the Agricultural Holdings (Scotland) Act, 1883, did not apply to the case of a hotel and 30 acres of land let together as one subject.

Dec. 18, 1886.
Mackintosh v.
Lord Lovat.

1ST DIVISION. **LORD M'LAREN.** **M.** ON 23d March 1878 an agreement was entered into between Lord Lovat and Coll Mackintosh, residing at Fort-Augustus, “for a lease of the hotel and lands there, as now possessed by him, and also for the new hotel, built adjoining to the old hotel by his Lordship.” The lease was for seven years from Whitsunday 1878, and the rent £160. The lands included in the lease extended to about 33 acres, a small portion of which, about 4 acres, were shortly after the commencement of the lease resumed by the landlord, a deduction of £8 per annum being allowed from the rent.

Mackintosh remained in possession of the subjects of lease until its expiration, after which it was continued by tacit relocation. On 24th December 1885, Lord Lovat presented a petition in the Sheriff Court of Inverness-shire for Mackintosh's removal as at Whitsunday following, and in April following the latter was charged, upon an extract decree of the Sheriff of Inverness-shire, so to remove.

Mackintosh then brought a suspension of the charge in the Court of Session, urging that the Sheriff's interlocutor was erroneous and unfounded,

as no notice of removal had been given, as required by the 28th section of the Agricultural Holdings (Scotland) Act, *i.e.*, not less than one year "before the termination of the lease."*

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The respondent pleaded, *inter alia*, that "the complainer not being a tenant of a holding within the meaning of the Agricultural Holdings Act, was not entitled to the notice therein prescribed."

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The Lord Ordinary (McLaren), on 3d November 1886, repelled the reasons of suspension.†

The complainer reclaimed.

LORD PRESIDENT.—The subject of the original lease between Lord Lovat and the reclaimer (which is dated 23d March 1878, and was for a period of seven years from Whitsunday 1878) is "the hotel and lands there," *i.e.*, at Fort Augustus, "as now possessed by him, and also the new hotel, built adjoining to the old hotel by his Lordship." The question is whether that is a subject to which the Agricultural Holdings (Scotland) Act, 1883, applies. The 28th section, subsec. (a), of the Act, provides that in such a case as the present notice of intention to bring the tenancy to an end must be given not less than one year, nor more than two years before the termination of the lease. The subject in question was held on tacit relocation, the lease having expired in 1885, but the provisions of the above quoted subsection apply if the subject is one to which the statute applies.

It appears to me that the 35th section of the Act makes it clear to what subjects the Act applies and to what it does not. The form of expression used in the section is a little awkward,—“Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral.” The same meaning might be

* The Agricultural Holdings (Scotland) Act, 1883, sec. 28, enacts,—“Notwithstanding the expiration of the stipulated endurance of any lease, the tenancy shall not come to an end, unless written notice has been given by either party to the other of his intention to bring the tenancy to an end—(a) In the cases of leases for three years and upwards, not less than one year, nor more than two years before the termination of the lease; (b) In the case of leases from year to year, or for any other period less than three years, not less than six months before the termination of the lease. Failing such notice by either party, the lease shall be held to be renewed by tacit relocation for another year, and thereafter from year to year.”

The 35th section enacts,—“Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden, or to any holding let to the tenant during his continuance in any office, appointment, or employment of the landlord.”

The 42d section, *inter alia*, enacts,—“Holding” means “any piece of land held by a tenant.”

† **OPINION.**— The subject let to the suspender is a hotel and land, and the subject cannot be described as being either ‘wholly agricultural,’ ‘wholly pastoral,’ or ‘in part agricultural, and as to the residue pastoral.’ Nor is it a market garden. The subject is therefore not a holding falling under any of the descriptions contemplated by the Act. I understand that the suspender relies entirely upon the words of section 42. But it is clear (so far as any enactment can be clear) that the more comprehensive definition of a holding contained in section 42 is controlled by the words of exclusion contained in section 35. The form of the proposition in section 35 is that of a universal negative, subject to certain exceptions. The suspender must be able to place his holding under one of the excepted categories, otherwise he takes no benefit from the statute.”

No. 58. differently expressed in this way,—“This Act shall apply only to a holding which is wholly agricultural or wholly pastoral.” The meaning would be exactly the same, and it makes it abundantly clear that the intention was that the Act should apply to agricultural and pastoral subjects, and not to anything of the nature of urban or house property. The subject here is a hotel with one or two fields consisting of 33 acres—five of which were rough pasture—adjoining. Shortly after the commencement of the lease, the landlord resumed possession of a small portion of these. Is it possible, in these circumstances, to say that the subject is wholly agricultural or wholly pastoral?

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The argument under the 42d section of the Act affords no aid to the reclaimer, because all that is there expressed is that “holding” means any piece of land held by a “tenant.” It seems to me that the interpretation here given stands as much in need of interpretation as the interpreted. If a holding means only a piece of land held by a tenant, then the 35th section provides, that no piece of land held by a tenant shall be subject to the Act unless it is wholly agricultural or wholly pastoral. I entirely agree with the Lord Ordinary.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT adhered.

WILLIAM OFFICER, S.S.C.—JOHN C. BRODIE & SONS, W.S.—Agents.

No. 59. JAMES ANDERSON AND OTHERS (Buchanan's Testamentary Trustees),
First Parties.—*Sol.-Gen. Robertson—C. N. Johnston.*
Dec. 18, 1886. PROVOST AND MAGISTRATES OF KILMARNOCK AND OTHERS (Trustees of the
Buchanan's Buchanan Bequest), Second Parties.—*Sol.-Gen. Robertson—*
Trustees v. *C. N. Johnston.*
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REV. WILLIAM DUNNETT AND ANOTHER, Third Parties.—
Sol.-Gen. Robertson—C. N. Johnston.
REV. EMANUEL MORGAN, Fourth Party.—
Sol.-Gen. Robertson—C. N. Johnston.
REV. JAMES MACGEOCH AND OTHERS, Fifth Parties.—
D.-F. Mackintosh—H. Johnston.
REV. GEORGE GARDINER, Sixth Party.—*D.-F. Mackintosh—H. Johnston.*

Church—Quoad sacra—Trust—Construction.—An estate was left to the Provost and Magistrates of Kilmarnock, “the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of the parish of Riccarton, all for the time being, and their successors in office,” to hold the same, and to apply the income to certain purposes, paying the balance of the income “equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith.”

Held (1) that the ministers of three *quoad sacra* parishes, the churches of which were situated within the burgh, were trustees both to hold the general fund and to receive and expend the balance of income; but (2) that the minister of a *quoad sacra* parish erected out of portions of Kilmarnock, of Riccarton, and of Galston parishes was neither a trustee of the general fund nor of the balance, his church being situated outside the burgh of Kilmarnock.

2d Division.
M.

BY mutual trust-disposition and settlement dated 8th July 1861, Misses Margaret, Jane, and Elizabeth Buchanan, three sisters residing at Bellfield, in the parish of Riccarton and county of Ayr, *inter alia* directed their trustees in the seventh place, as soon as they conveniently could

after the death of the last survivor of the trustees, to dispose, convey, and deliver over to "The Provost and Magistrates and Town-Council for the time being of Kilmarnock, and their successors in office; the clergy-men of the Established Church of Scotland in Kilmarnock for the time being, and their successors in the ministry; and the clergyman of the parish of Riccarton for the time being, and his successors in office—all in trust," the lands and estate of Bellfield belonging to the trustees, to be held by these trustees in trust for the ends, uses, and purposes therein mentioned.

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On 11th May 1871, Miss Elizabeth Buchanan, the survivor of the three sisters, in exercise of a reserved power of revocation and alteration, executed a codicil to the trust-disposition and settlement, by which she, in the third place, on the narrative that it was her will and desire that the estate of Bellfield should be devoted in all time coming to certain uses and purposes therein set forth, and that the trust in connection therewith should be called "The Buchanan Bequest," ordained and appointed her trustees to hold that estate for the period of ten years from and after the first term of Whitsunday or Martinmas occurring six months after her death, and on the lapse of the said period of ten years to dispose, assign, and make over the estate, and all accumulation of rents which might then be in their hands, "to and in favour of the Provost and Magistrates of Kilmarnock, the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of the parish of Riccarton, all for the time being, and their successors in office," and to the trustees themselves during their lives, all as trustees to hold the same in all time coming, and apply the income thereof in the execution of the several purposes of the "Buchanan Bequest" mentioned in the codicil.

The sixth and last purpose mentioned in the codicil was in these terms:—"(*Sixth*) For payment of the balance or residue of the said revenue or income equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith."

Miss Buchanan died on 23d April 1875, and accordingly the ten years mentioned in her codicil expired at Martinmas 1885.

At the date of Miss Buchanan's death there were in Kilmarnock the *Laigh Kirk*—which was the original parish church and a collegiate charge—and three *quoad sacra* parishes—the *High Kirk*, *St Marnock's*, and *St Andrew's*, which were erected respectively in 1811, 1862, and 1868. All these churches and parishes were within the burgh of Kilmarnock, and also within the original parish of Kilmarnock, with the exception of the parish of *St Marnock*, which to the extent of more than one-half was outside the burgh, though entirely within the original parish. The church of *St Marnock's* was within the burgh.

There was also the *quoad sacra* parish of *Hurlford*, which was erected in March 1875, the church being opened in May 1875—a month after Miss Buchanan's death. This parish was erected out of parts of the parishes of *Riccarton*, *Kilmarnock*, and *Galston*, to the extent of populations respectively of 3849, 657, and 193. The church was within a portion of the parish which had been disjoined from Kilmarnock, but it was not within the boundaries of the burgh.

In these circumstances, questions having arisen as to who were entitled to be trustees of the Buchanan Bequest, and also who were entitled to administer the residue of the income of the fund under the sixth purpose of the codicil, a special case was presented, to which the parties were (1) the Buchanan testamentary trustees; (2) the Provost and Magistrates of Kilmarnock, the ministers of all the parishes except *Hurlford*, and the

No. 59. testamentary trustees—these being the persons to whom the testamentary trustees proposed to convey the subjects of the Buchanan Bequest; (3) the ministers of the Laigh Kirk; (4) the minister of Riccarton; (5) the ministers of the High Kirk, of St Andrew's Kirk, and of St Marnock's Kirk; and (6) the minister of Hurlford.

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The questions of law were:—“(1) Is the minister of the church and parish of Hurlford *quoad sacra* one of the ministers of the Established Churches of Scotland in Kilmarnock in the sense of the said trust-disposition and settlement and codicil, and as such a trustee of ‘The Buchanan Bequest’? (2) Are the ministers of the parishes of the High Kirk *quoad sacra*, Kilmarnock, St Marnock's *quoad sacra*, Kilmarnock, St Andrew's *quoad sacra*, Kilmarnock, and Hurlford *quoad sacra*, or any and which of them, entitled, along with the collegiate ministers of the Laigh Kirk, Kilmarnock, to receive and expend the one-half of the balance or residue of the income of the Buchanan Bequest falling to the parish of Kilmarnock? (3) Is the minister of the parish of Hurlford *quoad sacra* entitled, along with the minister of the parish of Riccarton, to receive and expend the one-half of the said balance or residue falling to the parish of Riccarton? (4) In the event of the second and third queries, or either of them, being answered in the affirmative, is the fund to be administered jointly within the respective parishes by those found entitled to receive and expend it; and if not, upon what principle does it fall to be apportioned?”

The sixth party maintained an affirmative answer to the first question. With reference to the second and third questions, the fifth and sixth parties contended that, as regarded the half of the residue falling to the parish of Kilmarnock, the ministers of the *quoad sacra* parishes of the High Kirk, St Marnock's, St Andrew's, and Hurlford were entitled, along with the collegiate ministers of the Laigh Kirk, to receive and expend that half, either jointly or in proportion to the population, or to the area of their respective parishes, so far as within the original parish of Kilmarnock; and the sixth party further contended that, as regarded the one-half of the residue falling to the parish of Riccarton, the minister of the *quoad sacra* parish of Hurlford was entitled similarly to receive and expend that half along with the minister of the parish of Riccarton.¹ The third and fourth parties maintained that the residue fell to be paid to and expended by them and their successors in office in equal shares. On the fourth question, the fifth and sixth parties preferred that it should be held that each minister should be found entitled to receive and distribute an aliquot share of the residue—the remaining parties, that each half should be distributed by the ministers as a distributing board.

At advising,—

LORD RUTHERFURD CLARK.—We have here before us a special case, which has been presented for the purpose of determining certain questions which have arisen as to the construction of a charitable trust established by the will of the late Miss Elizabeth Buchanan.

The questions are two in number,—first, who are the trustees to hold; second, who are the trustees to distribute. The fund is to be divided into two portions. One half of it is to be expended on charitable purposes within the parish of Kilmarnock; the other half in the parish of Riccarton.

¹ *Authority*.—Hutton v. Harper, March 9, 1876, 3 R. (H. L.) 9, L. R., 1 App. Cas. 464.

By the clause which establishes the trust for holding the fund the truster directs her trustees to pay the trust funds to the Provost and Magistrates of Kilmarnock, the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of Riccarton.

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The question which has arisen under this clause is, who are in the sense of the deed the ministers of the Established Churches in Kilmarnock? Putting aside the *quoad sacra* parish of Hurlford, which I shall deal with afterwards, it appears that in the town of Kilmarnock there is the original parish church, which is called the Laigh Kirk, and several *quoad sacra* churches which have been created from time to time. The question is, whether the expression "ministers of the Established Churches in Kilmarnock" includes not only the ministers of the Laigh Kirk, but also the ministers of the *quoad sacra* churches, and in my opinion it includes the whole. It is plain that the latter are ministers of Established Churches in Kilmarnock, and it is as plain that according to the very expression of the deed more than one minister in Kilmarnock was to be a trustee. I am very clear therefore that the *quoad sacra* ministers are trustees as well as the minister of the Laigh Kirk. It is impossible otherwise to satisfy the words of the trust-deed.

There is no question about the parish of Riccarton. With respect therefore to the constitution of the trust for holding the fund, I am of opinion that the trustees include the ministers I have mentioned.

With respect to the trust for distribution we have a different phrase. The clause is thus expressed,—“for payment of the balance or residue of the said revenue or income equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes, in charitable and benevolent purposes connected therewith.”

If we had not anything else but these words, there might be considerable difficulty in extending the trustees beyond, first, the minister of the parish of Kilmarnock, that is to say, the minister of the Laigh Kirk, and secondly, the minister of the parish of Riccarton. But I think it would not be consistent with the purposes of the trust, and the intention of the truster, to take these words according to their strict meaning. It appears to me that she must be held to have meant that the trustees for holding were also to be the trustees for distributing, and that the trustees for distributing, so far as regarded the parish of Kilmarnock, were not to be confined to the minister of the Laigh Kirk. With respect to Riccarton, the trustee for distributing is of course the minister of Riccarton.

I have yet to deal with the minister of Hurlford.

The position of Hurlford is peculiar. That parish has been formed partly out of Kilmarnock, partly out of Riccarton, and partly out of Galston; but I do not think that the minister can be held to be a minister of an Established church in Kilmarnock. His church, although in the parish of Kilmarnock, is not in the town of Kilmarnock. I think that the words “Established Churches in Kilmarnock” refer to churches in the town of Kilmarnock, and do not extend to the whole parish.

I propose that the questions should be answered according to the opinion I have just expressed.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

LORD CRAIGHILL was absent.

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THE COURT pronounced this interlocutor :—"The Lords having heard counsel for the parties on the special case, are of opinion (1) with reference to the first of the questions therein stated, that the minister of the church and parish of Hurlford *quoad sacra* is not one of the ministers of the Established Churches of Scotland in Kilmarnock in the sense of the trust-disposition and deed of settlement and codicil mentioned in the special case, and is not a trustee of 'The Buchanan Bequest'; (2) with reference to the second question, that the ministers of the parishes of the High Kirk *quoad sacra*, Kilmarnock, St Marnock's *quoad sacra*, Kilmarnock, and St Andrew's *quoad sacra*, Kilmarnock, are for the time being entitled, along with the collegiate ministers of the Laigh Kirk, Kilmarnock, to receive and expend the one-half of the balance or residue of the income of the Buchanan bequest falling to the parish of Kilmarnock, and that the minister of the parish of Hurlford *quoad sacra* is not so entitled; (3) with reference to the third question, that the minister of the parish of Hurlford *quoad sacra* is not entitled along with the minister of the parish of Riccarton to receive and expend the one-half of the said balance or residue falling to the parish of Riccarton; (4) with reference to the fourth question, that to the extent of one half the fund is to be administered for the time being by the ministers of the Laigh Kirk, Kilmarnock, of the High Kirk *quoad sacra*, Kilmarnock, St Marnock's *quoad sacra*, Kilmarnock, and St Andrew's *quoad sacra*, Kilmarnock, jointly, and that to the extent of the other half the fund is to be administered by the minister of the parish of Riccarton: Find and declare accordingly: Find the whole parties to the case entitled to expenses out of the trust-funds: Remit," &c.

GIBSON & STRATHERN, W.S.—GEORGE J. WOOD, W.S.—Agents.

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WILLIAM LESLIE AND OTHERS, Pursuers (Appellants).—*H. Smith—M'Kechin.*
 THOMAS WALKER AND OTHERS, Defenders (Respondents).—*Sol.-Gen. Robertson—D. Dundas.*

Reparation—Fishing—Trawler—Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22), sched. art. xix.—The Sea Fisheries Act, 1883, sched. art. xix., provides that, "where trawl fishermen are in sight of drift-net or long-line fishermen, they shall take all necessary steps in order to avoid doing injury to the latter. Where damage is caused, the responsibility shall be on the trawlers, unless they can prove that they were under the stress of compulsory circumstances, or that the loss sustained did not result from their fault."

Long-line fishermen were engaged for about an hour in setting their lines between three and four on a clear afternoon. During this time they saw a steam trawler engaged in fishing two miles off. The fishermen, without warning the trawler, went ashore, leaving their lines through the night marked only by a buoy and flag at each end of the line, a distance of $3\frac{1}{2}$ miles. During the night the trawler carried away the lines. In an action of damages by the fishermen against the trawler, the pursuers averred, but failed to prove, a general custom of long-line fishermen to leave their lines all night unattended. The Court being of opinion, on the evidence, that the trawler had kept a proper look-out, and had not seen either the fishermen setting their lines or the buoys they had set, held that the defenders had proved that the loss sustained did not result from their fault, and therefore assoilzied them.

In July 1885 William, John, and James Leslie, fishermen, Stronsay, Orkney, and owners of the fishing-boat "Ebenezer," brought an action in the Sheriff Court at Aberdeen against Thomas Walker and others, owners of the steam-trawler "St Clement" of Aberdeen, for £122, being (1) £10 as the value of ten long fishing-lines, which, as the pursuers averred, had been destroyed by the "St Clement" on the night of the 20th-21st May 1885, when trawling in the North Sound between the islands of Sanda and Papa Westray; and (2) £112 as the estimated value of a fortnight's fishing said to have been lost in consequence of the loss of the lines.

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L.

The case stated by the pursuers was that, on the afternoon of the 20th May, they had set on a bank about $1\frac{1}{2}$ miles from the shore ten long lines, each of 300 fathoms, making, when joined together, a continuous line of 6000 yards, with hooks baited; that the lines were properly buoyed, the buoys being easily observable on the surface of the water; that, when engaged in setting their lines, they saw the "St Clement" fishing about 2 miles off, and that those on board her saw, or could easily have seen, them setting their lines; that, after setting their lines, they returned to Pierowall Harbour, Westray, for the night; that it was a well-known custom, which the defenders knew or ought to have known, for long-line fishermen to leave their lines all night at that place, which was a well-known fishing ground for long-line fishermen; and that, in these circumstances, the defenders were liable in damages to the pursuers, both at common law, in respect that they ought to have refrained from approaching the fishing ground when they knew, or ought to have known, that the pursuers' lines were set there, and also under the Sea Fisheries Act, 1883, particularly art. 19 of the schedule annexed thereto.*

The defenders on record and before the Sheriffs did not admit that the pursuers had set their lines as they alleged, or, if they had, that the "St Clement" had had anything to do with their destruction, but at the hearing on the appeal the defenders conceded that the lines had been lost, and that the trawling operations of the "St Clement" were the cause of the loss. The defenders maintained that they were nevertheless not liable in damages, in respect (1) that their crew had kept a proper look-out, and had never seen either the pursuers setting the lines or the buoys of the lines when set; and (2) that the pursuers had themselves been guilty of negligence in leaving the lines unattended all night, instead of staying by them in their boat, which would have had to shew a light.†

A proof was allowed. The evidence, in so far as bearing on the points ultimately in dispute, was to the following effect:—The lines as set had two buoys, one at each end of the 6000 yards. On each buoy was a flagstaff 10 feet high with a black flag, which would shew about 7 feet above the surface of the water. The afternoon was clear, but the night was somewhat hazy, according to some of the witnesses. Such a buoy and flag would probably have been visible about a quarter of a mile off during the night. The pursuers had never shot long lines in the North Sound before, nor had they ever before seen a steam trawler there. It did not occur to them that there was any risk of the lines being carried away by

* The Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22), schedule, art. xix., provides,—“When trawl fishermen are in sight of drift-net or long-line fishermen they shall take all necessary steps in order to avoid doing injury to the latter. Where damage is caused, the responsibility shall lie on the trawlers, unless they can prove that they were under stress of compulsory circumstances, or that the loss sustained did not result from their fault.”

† The Order in Council, dated 17th September 1885, sec. 10, subsec. c, provides,—“A vessel employed in line-fishing with her lines out shall carry the same lights as a vessel when engaged in fishing with drift-nets.”

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the trawler. During the whole time they were setting the lines (about an hour) they saw her steaming backwards and forwards about two miles off, and they assumed that she saw what they were doing. It was customary in the North Sound (where the tide did not run strongly) to leave long lines out all night unattended, but there was no evidence that a similar practice prevailed anywhere else, except that one of the defenders, Thomas Walker, in cross-examination spoke to its being done in the Bay of Aberdeen. The sea was rough on the night of the 20th May, and it would have been dangerous for the pursuers to stay by their lines. Those on board the trawler deponed that they had kept a good look-out during the whole time they were in the North Sound; that they had seen no fishing boat setting lines, nor any buoys except one that they had fixed as a guide for their own operations; and that they had found no fishing hooks or lines caught in the trawl, when they raised it, which they did every two hours. The master of the trawler admitted that he had taken no pains to ascertain the practice of long-line fishermen in the North Sound, and stated that, before the present occurrence, he was not aware that they were in the habit of leaving their lines out all night unattended. Several independent witnesses both on shore and on other boats observed both the "Ebenezer" and the trawler, and inferred what each was doing. One of these witnesses was of opinion that those on board the trawler could easily have seen the "Ebenezer" setting her lines if they had looked; and further deponed, that he had remarked to one of his crew at the time, that he "expected the trawler would take away some of the 'Ebenezer's' lines before daylight." On the morning of the 21st, the "Ebenezer" went alongside the trawler, and the pursuers demanded compensation from the trawler. This her master refused. He and his crew deponed that the pursuers first asked for £2 and then for £1, and the pursuers stated that they had asked for compensation for the loss of their lines.

On 29th April 1886, the Sheriff-substitute (Brown) pronounced an interlocutor (after other findings in fact) finding "(4) That when the pursuers were engaged in setting their lines as aforesaid, the defenders' trawler the 'St Clement' was in the North Sound, at a distance at which the operations of the pursuers might have been observed had a look-out been kept; (5) That during the night of the 20th of May and the morning of the 21st May, the said trawler belonging to the defenders passed over the pursuers' lines, and carried them away or destroyed them; (6) That the officers and crew of the said trawler failed to keep a proper look-out while engaged in trawling operations as aforesaid, and failed otherwise to take all necessary steps in order to avoid doing injury to the pursuers' lines, in terms of article 19 of the first schedule appended to the Sea Fisheries Act, 1883: With reference to the foregoing findings, finds the defenders liable to the pursuers in damages; assesses these at £20, with expenses."*

* "NOTE.— . . . The statute was evidently designed to give a special protection to the weaker party; and I am disposed to think that the provision in the schedule imposes an absolute obligation on trawlers when long-line fishermen are in sight, or with proper care may be observed. But, notwithstanding the rules laid down by the Sea Fisheries Act, it seems to me that the main issue in the case must still primarily be controlled by the provisions of the common law. In this view, the defenders contend that there is a duty laid on long-line fishermen, after they have set their lines, to remain by them in their boats during the night, in which case the situation of the lines would be marked by the lights which the boats are bound to carry. It is not said that there is any provision in an Act of Parliament or any statutory regulation that a boat shall remain beside its lines during the night, but it is argued that that is a principle of the common law, and in corroboration of that the defenders appeal

On appeal the Sheriff (Guthrie Smith) recalled this interlocutor, and found "that on the night of the 20th May 1885 the pursuers' fishing-lines were damaged, as alleged, by the trawler 'St Clement,' but that the defenders have proved that the loss sustained did not result from their fault: Therefore assoilizes the defenders from the conclusions of the action," with expenses.*

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to the regulations for preventing collisions at sea, annexed to the Order in Council, dated at Balmoral on 17th September 1885, and particularly to section 10 thereof, subsection c.—(*supra*, p. 289). Now, certainly, that is a very distinct provision as to what lights are to be exhibited, assuming fishing-boats and vessels to be in the same category, when they remain beside their lines; but considering what the primary object of the regulations is, viz., to prevent collisions at sea, it strikes me as a somewhat strained principle of construction to extract from them a law to regulate the conduct of fishermen in prosecuting their rights as such. It is proved in this case that the lines were set in the usual way, and it is quite a common practice to leave them out all night without a watch; and I have judged in several cases in this Court where damages have been claimed and awarded under the same conditions. I quite appreciate the strength of the argument that if fishermen are to be permitted to occupy such a large portion of the highway of the sea as is implied in setting their lines in a continuous line, and are not to be held bound to mark their situation by a light, and trawlers are to be found responsible for destroying them, that practically means the prescription of trawlers from certain localities in the exercise of an admittedly common right. It would, however, be as manifest a hardship to poor fishermen following their calling in remote districts of the country, and knowing little of modes of fishing beyond their own primitive experience, to have their property destroyed when pursuing their vocation as they have been accustomed to do, and in a way that the law, so far as I can see, has never declared illegal. Both trawlers and fishermen are engaged in exercise of their common right to take white fish from the sea, but it is notorious that, in pursuance of these rights, a conflict of interests may arise, and therefore it is necessary that each party should inform himself as to the conditions under which the other practises his vocation. I think it is proved that there is a practice, not only in the North Sound, but in other places, such as the Bay of Aberdeen, of fishermen leaving out their lines all night; and it seems to me that if a trawler betakes himself to such a limited area for fishing as the North Sound, with that knowledge, a special duty of inquiry and vigilance is laid upon him both by common and statute law to see that no damage is done. But that is precisely, I think, what the defenders' trawler did not do, for I believe the master of the trawler strikes the true keynote of the case, notwithstanding his protestations as to the instructions to keep a good look-out, by his admission that it never occurred to him to look out for fishermen's lines; and if that was the frame of mind of the captain, that of his crew may readily be inferred. On these grounds, I feel myself obliged to award damages. . . ."

* "NOTE.—I think that the Sheriff-substitute has rightly held that the damage in this case was done by the trawler. The master admits that she was the only trawler in the North Sound of Orkney on the night of the 20th May, and two perfectly neutral witnesses saw her crossing and recrossing about 10 o'clock at night over the part of the bay where the lines were set. It follows that, under article 19 of the convention, which by the Sea Fisheries Act of 1883 has the force of statute, the responsibility lies on the trawler, 'unless she can prove that the loss sustained did not result from her fault.'

"The pursuers commenced to set their lines about three in the afternoon, and about four o'clock left them for the night, their custom being to return next morning and lift them. During the night they admit that they were wholly unattended and unprotected, and were only marked at either end by a skin and cork buoy, surmounted by a flagstaff, rising perhaps 7 feet above the water. The lines were 6000 yards, or nearly 3½ miles, in length. It is admitted that the weather was hazy, not so much so in the afternoon, but towards evening the

No. 60. The pursuers appealed.

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Walker, &c.

As already stated, the defenders admitted that the pursuers had set their lines as alleged, and that the loss had been caused by the "St Clement."

Argued for the pursuers ;—(1) The defenders had failed to prove that they were not in fault. Either they saw the pursuers' boat, and, doing so, must have known that the pursuers were long-line fishermen setting their lines; or they did not see the pursuers, in which case they could have kept no efficient look-out, for it was now conceded that the pursuers did set their lines. They were near enough to enable people accustomed to fishing (which the trawler's crew must be assumed to be) to know that. In the words of the Lord Justice-Clerk in *Combe v. Renton*, "they were manifestly to the observation of any skilled eye engaged in the occupation of fishing."¹ The pursuers were certainly long-line fishermen setting their lines "in sight" of the defenders, whether the defenders actually observed them or not, if they ought to have observed them. The Act, art. 19, therefore applied, and imposed the duty on the defenders of looking out for the lines which the defenders ought to have known would probably be left unattended. That was the custom of the district, at least, and was common elsewhere, and made the defenders liable at

haze became very dense, and after dark the two terminal buoys were of no use in indicating the lines.

"It appears that it has always been the custom for the people of the islands to fish in this way; and until they were invaded by trawlers, the traffic in these seas was too insignificant to occasion any considerable risk. It is otherwise, however, now; and I have no scruple or hesitation in holding that the local custom must conform to the requirements of the general law. The sea is a public highway, open to all; and if a fisherman leaves his lines all night to take care of themselves, it is at his own risk. Had the pursuers remained by their lines, they would have been bound to exhibit the lights prescribed by vessels engaged in fishing; and any failure to do so would have disentitled them to recover. Much more when there was neither boat nor light, nor anything visible to warn off passing vessels; and if, in the darkness, another boat chanced to run through their lines, she cannot be said to be to blame, unless she knew that they were there.

"The question in the case thus comes to be, Did the defenders know? On this point the burden of proof shifts to the pursuers as soon as the defenders have proved negligence in leaving the lines unguarded. I do not think that, on the evidence, this burden has been discharged. When the pursuers began to set their lines the trawler was observed away to the south, about half-way between them and the island of Sanday, which, according to the chart, would be about 3 miles. It is inferred that, at that distance, they might have seen the boat and also what she was doing, if a proper look-out had been kept. But the master states that he was on deck all the time, and he is confirmed by his crew in saying that no boat was seen, and they had no reason to suppose that a line had been stretched right across the mouth of the bay. Moreover, the argument cuts both ways. If the trawler was to blame in not taking a more active interest in the operations of the fishermen, it was no less the duty of the pursuers to have made certain that she did see them. It would have been an easy thing to have hailed her, and warned her to keep clear of the lines, especially if one of their own witnesses is right in saying, 'I expected the trawler would take away some of the "Ebenezer's" lines before morning.' Thus, in the most favourable view which can be taken of the pursuers' case, there was negligence on both sides; and I have no doubt that art. 19 of the convention, under which the case falls to be determined, must be read in accordance with the rule of the common law on the subject, namely, that to enable a fisherman to recover, the accident must be attributable entirely to the fault of the trawler; and if there was want of care on both sides, he cannot maintain his action."

¹ *Combe v. Renton*, June 5, 1886, 13 R. (Just. Ca.) 67, at p. 70.

common law, although it was true that the evidence was meagre on the general custom, the only other locality with reference to which the custom was proved being the Bay of Aberdeen. That being so, (2) No fault could be imputed to the pursuers. Their duty was to set the lines, to buoy them and flag them. They might then go away. They did not require to give verbal warning to trawlers near enough to see what they were doing.

Argued for the defenders ;—The evidence here was that the defenders kept a proper look-out, and they did not in fact see the pursuers, at least they did not see what they were doing. Nor were they in a position to infer what the pursuers were doing. The distance was too great, and there was nothing in the motions of the pursuers' boat to make it reasonably plain that they were setting lines. The pursuers, who knew what they themselves were doing, and who saw the trawler, ought to have given warning, and were in fault for not giving warning. If, then, the defenders neither saw, nor were bound to see, the pursuers setting their lines, they were out of the Act, which applied only to "fishermen" in sight. That could not be construed to mean a buoy without a light. When the pursuers' boat went away the application of the Act ceased. After that there was only the common law, and nothing like a general custom of long-line fishermen to leave their lines out unattended had been proved. Assuming that this was a well-known long-line fishing ground, the defenders were bound (under the Act) if they saw lights. If they saw no lights they were entitled to assume that the ground was unoccupied. The pursuers, therefore, had lost their lines through their own fault, and could not recover.

At advising,—

Lord Young.—The only questions in this case are questions of fact. There are two questions raised—the first being, whether the fishing lines of the pursuers were destroyed by the defenders ; and the second, if they were so destroyed, whether the defenders have proved that the destruction was attributable to no fault on their part. The Sheriffs are both of opinion that the pursuers' fishing lines were destroyed by the defenders, but they differ in opinion on the other question. The Sheriff-substitute is of opinion that the defenders did not take due care to avoid the pursuers' lines, and therefore he finds them liable in damages. The Sheriff finds that the defenders have proved that the loss did not result from fault on their part, and reverses the Sheriff-substitute's decision. For my own part I think it doubtful—although, as the defenders do not now dispute the fact, I require to say no more—whether the pursuers' lines were destroyed by the defenders' trawling gear at all. I think it doubtful if it is proved that the pursuers' lines were ever set as they allege. It is curious that not a trace of the lines said to have been destroyed was ever discovered. None was found on the trawling gear, according to the evidence of those on board the trawler, and the fishermen who first examined the place where the lines were said to have been set say that they saw not a trace of them. They then went to the trawler, and I think all on board her concur as to the complaint that they made, and as to what they said—that they first claimed £2 by way of damages, and afterwards came down to £1. I see no reason for discrediting these witnesses, and that being so it is certainly remarkable that the pursuers of an action in which £120 is sought as damages should have started with asking first 40s. and then 20s., and not a trace of their lines for the loss of which they ask these sums as compensation to be

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found anywhere. They bring their action for £120 and get only £20 from the Sheriff-substitute. I do not think that these circumstances are favourable to them. I am content, however, to put my judgment as the Sheriff has put it, and find not only that it is not proved that the trawler was in fault, but affirmatively that the import of the evidence proves that the men on board used all due care not to commit any fault. I think therefore that the judgment of the Sheriff should be affirmed, except that I am not sure that I should affirm the first finding in fact in his interlocutor. I should prefer to find that it is not proved that the pursuers' lines were destroyed by the defenders, and that it is proved that the defenders used all due care and caution, and were not in fault.

LORD CRAIGHILL.—In my opinion the interlocutor of the Sheriff-principal is in accordance with the evidence, and in accordance with the law applicable to this case, and I am entirely satisfied with the reasons which he gives for it. With reference to the question whether the lines were set, and if set were destroyed by the trawler, I do not express an opinion. The case was presented to us on the assumption that the lines had been set, and had been destroyed by the trawler.

LORD RUTHERFURD CLARK.—I am rather inclined to arrive at the opposite conclusion. I think that it is sufficiently proved that the lines were set in the sight of the trawler, that she did not use due care to avoid going over the ground where they were laid, and that she destroyed them. That is my impression of the result of the evidence.

LORD JUSTICE-CLERK.—I confess I participate to some extent in the doubts expressed by Lord Rutherford Clark, and I should hardly be prepared to affirm that the lines were not set, or that they were not destroyed by the trawler. But these matters are not in question now. We are asked to find that it is proved that the trawler did not take sufficient care to avoid destroying those fishermen's lines. There is a conflict of evidence on that point, but I am hardly prepared to affirm that the precautions taken on board the trawler were insufficient. I am further moved by the fact that the fishermen might have taken the precaution, which they did not take, of informing the trawler that they had set lines. Then again, they left the lines as soon as they had set them, and went on shore, no doubt they say for a very good reason, on account of the threatening state of the weather, but they did leave their lines without anyone to warn passing vessels off, and the marks which they put up were insufficient to warn the trawler from going over the ground. In these circumstances, I am disposed to agree in the result at which the Sheriff has arrived.

THE COURT pronounced this interlocutor:—"Find that on the night of the 20th May 1885 the pursuers' fishing lines were damaged as alleged by the trawler 'St Clement,' but that the defenders have proved that the loss sustained did not result from their fault: Therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against," with expenses.

THOMAS CARMICHAEL, S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

THOMAS M'CAIG (Maitland's Judicial Factor), Pursuer and Nominal Raiser. No. 61.

ELPHINSTONE VANS AGNEW MAITLAND, Claimant (Reclaimant).—

Sol.-Gen. Robertson—Rankine.

Jan. 5, 1887.

MRS MATILDA FRANCES HARRIET BUCHANAN OR MAITLAND (Maitland's
Executor), Real Raiser and Claimant (Respondent).—*Murray—*

M'Caig v.
Maitland.

G. R. Gillespie.

Res judicata—Identity of parties.—A plea of *res judicata* sustained against a claimant in a multiplepinding claiming upon a title upon the future and contingent possession of which another person had founded unsuccessfully in a previous process with reference to the same fund.

A lady left the residue of her estate, burdened with certain annuities, to the heir in possession of the family estates. In a multiplepinding brought soon after her death A, the heir then in possession, claimed the residue as vested in him at the testator's death. B, a remoter heir, claimed to have the residue retained till the death of the last annuitant, pleading that vesting was postponed till that event. The Court found that A was entitled to the whole residue after payment of the annuities, and sustained his claim for payment thereof so far as not necessary to be retained by the trustees to meet the annuities. In a multiplepinding brought on the death of the last annuitant to distribute the fund retained competing claims were lodged by A's executor and C the heir then in possession of the family estates. Plea of *res judicata* sustained against C.

In 1861 Alexander Smith, W.S., sole surviving executor of Miss Mary^{2D} Division.
Turner Maitland, raised a multiplepinding to determine the right of suc- Lord M'Laren.
cession to "the whole moveable and personal estate and effects" of that I.
lady. She had left a number of testamentary writings, the precise terms of which are quoted in the report of that case at 2 Macph. 417, the questions raised for determination there being, first, had she died testate or intestate? and second, was her estate, supposing these testamentary writings were valid, vested *a morte testatoris*, or was vesting postponed?

The gist of the provisions, which gave rise to these questions, was as follows—viz., Miss Maitland nominated her nephew, Patrick, to be her heir, and desired that everything not specifically bequeathed otherwise should go to him, as the head of the house of Maitland of Freugh and Balgreggan. She also left a number of annuities, and she then provided,—"I think you will find the spirit of all the same—that eventually the Capital of what I possess should go to the support of my Father's House, tho' I dispose of the interest to many lives. So far does that spirit go, that should any circumstances occur to cause the sale of the Estates of Freugh & Balgreggan, I desire the Capital to be divided (after all the life annuities fall) as the Law directs amongst the descendants of my Father, but as long as they remain, the Capital to revert to the possessor first to my Nephew, Pat^k. Maitland of Freugh and his children; failing them, to my Nephew, John Maitland."

Patrick predeceased his aunt, leaving a son, John, who was in possession of Freugh in 1861; and two younger sons. The next heir of line to the estates was Patrick's brother, Colonel John Maitland.

John of Freugh claimed "present payment to the claimant of the residue of the testatrix's executry estate, under burden of the annuities charged thereon. Or, alternatively and in the event of the claimant being unsuccessful in the first alternative of this second claim, retention by the pursuer, as executor aforesaid, of the capital of said residue until the death of the last surviving annuitant, to be then paid to the claimant if said family estates shall remain unsold; or, in the event of said estates

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having been sold, to be divided among the descendants of the testatrix's father according to the legal rules of distribution."

He pleaded;—According to the sound construction of said writings it was also the meaning and intention of the testatrix that the whole residue of her executry estate, but "deeply burdened" with annuities, should at her death be made over to her nephew Patrick Maitland, whom failing, to his heir-at-law, if in possession of the family estates.

Colonel John Maitland, his uncle, besides claiming on the footing of intestacy, claimed,—“3. The claimant, John Maitland, failing all the children of his brother, the said Patrick Maitland, claims that at the death of the last surviving annuitant he shall be ranked and preferred to the fund *in medio*, as it shall exist at that time, if the estates of Freugh and Balgreggan shall then remain unsold.”

He pleaded;—3. On a sound construction of the will of the testatrix, the claimant, John Maitland, failing children of his brother, Patrick Maitland, will be entitled, at the death of the last surviving annuitant, other than himself, to be ranked and preferred to the fund *in medio*, as it shall then exist, if the estates of Freugh and Balgreggan shall at that time remain unsold, and he should now be contingently ranked accordingly, as craved in his claim.

On 10th February 1863 the Lord Ordinary (Ormidale) pronounced this interlocutor:—“Finds that, according to the sound legal construction of the said testamentary writings, the claimant John Maitland, as the heir-at-law of the late Patrick Maitland of Freugh, and, as such, now in possession as proprietor of the estates of Freugh and Balgreggan, is entitled to the residue remaining of the testatrix Miss Maitland's means and estate, after payment of all the specific legacies and annuities left by her . . . Sustains the claim for John Maitland of Freugh, for immediate payment of the residue of the testatrix's executry estate, so far as not necessary to be retained by the raiser, Mr Smith, as executor of Miss Maitland, to meet the annuities still remaining charged against it; reserving to the said John Maitland, and all others whom it may concern, his or their claims on the remaining portion of said residue, which, in the meantime, is to be retained by the pursuer, as Miss Maitland's executor: Repels the claims for all the parties so far as not now sustained, subject always to said reservation, and decerns.”

On a reclaiming note the First Division, on 15th January 1864, adhered to this interlocutor (reported 2 Macph. 417, 36 Scot. Jur. 204).

John of Freugh having died shortly afterwards, the whole residue of the estate was paid over to his mother, Mrs Matilda Frances Harriet Maitland, who had been confirmed executor-dative to him, under reservation of a sum of £7000 retained to meet the outstanding annuities.

John was succeeded in Freugh by his younger brother William; he died unmarried in January 1881, leaving a disposition by which he conveyed his whole personal estate and the liferent of Freugh to his mother, and the fee of Freugh to his uncle, Colonel John Maitland.

Colonel John Maitland died in March 1881, leaving a conveyance of his estates in favour of his three daughters, who subsequently conveyed Freugh to their brother Elphinstone Vans Agnew Maitland. He also made up a separate title by serving himself heir to his father.

In 1886, the whole residue being then available for division, Mrs Maitland raised a new action of multiplepounding in name of Mr Thomas M'Caig, who had been appointed judicial factor on the fund on Mr Smith's death, for distribution of the estate.

She claimed the whole fund, founding on the judgment in the former action. Elphinstone Vans Agnew Maitland also claimed the whole fund,

pleading that the residue did not vest till the time of distribution, and that he was entitled to the residue in terms of the settlement as the head of the house in possession of the estate of Freugh at the date of vesting.

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The Lord Ordinary (M'Laren), on 13th July 1886, ranked and preferred the claimant Mrs Maitland to the whole fund. The question chiefly debated before his Lordship and in the Inner-House upon a reclaiming note was whether Lord Ormidale in the former action had disposed of the whole fund, or only of so much of it as was then available for payment. In the course of the argument in the Inner-House doubts were expressed upon the bench whether Elphinstone Maitland and his father, Colonel John, were so identified one with the other that the former was open to the plea of *res judicata* in respect of the judgment pronounced against the latter.

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It was argued for Elphinstone that there was no person in existence at the date of the former action who held the character which he now held, and even if Colonel John Maitland had assumed that character, the present claimant did not take through him, and, indeed, could not, for the Colonel had never held the character on which the present claimant founded.

Argued for Mrs Maitland;—There did not require to be identity of persons to found a *res judicata*, but merely identity of legal title. A judgment against one heir of entail bound the whole series in matters affecting the entailed estate,¹ and a judgment against one member of the public bound all in a question of public right.² [LORD RUTHERFURD CLARK.—But take the case of a claim lodged by trustees in a multiple-poining that they are entitled to retain the fund to await certain contingencies, is a judgment against them *res judicata* against all claimants to the fund, who might put forward the same pleas as they have put forward?] Yes. That was a case very much like the present, and although no authority could be cited for it, the principle of *res judicata* demanded that, when a question had been fought out between parties having a title and interest to fight it, either *de facto* or, as here, *ex concessis*, the judgment between them should be regarded as putting an end to that question between parties who had no new title and no new arguments to advance. Here Elphinstone Maitland could say nothing that might not have been said by Colonel Maitland.

In reply, the Solicitor-General, for Elphinstone Maitland, confined his argument to the question whether Lord Ormidale had disposed of the whole fund or not. In answer to the Court he stated that he was prepared to concede the other point.

LORD JUSTICE-CLERK.—I think it is impossible that this party, who simply represents the position which Colonel John Maitland held in the former process, should be again allowed to raise the question of John Maitland's right to the whole residue which, I think, was finally and conclusively determined.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THE COURT adhered.

J. & A. FORMAN & THOMSON, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

¹ Earl of Leven v. Cartwright, June 12, 1861, 23 D. 1088, 33 Scot. Jur. 521.

² Cf. Jenkins v. Robertson and Others, April 5, 1867, 5 Macph. (H. of L.) 27, 39 Scot. Jur. 384.

No. 62.

ALEXANDER MACLEOD AND ANOTHER, Pursuers (Respondents).—

*D.-F. Mackintosh—T. R. Clark.*JAMES M. DAVIDSON AND OTHERS, Defendants (Appellants).—*Scott*—*Rhind.*

Jan. 6, 1887.
 Macleod, &c. v.
 Davidson, &c.

Process—Expenses—Citation Amendment (Scotland) Act, 1882 (45 and 46 Vict. cap. 77)—Service by officer of Court.—In taxing an account of expenses the cost of service by an officer of Court in ordinary form will be allowed where the party cited does not reside in a postal delivery district, and where it is improbable that a letter of citation will reach him.

2D DIVISION.
 Sheriff of In-
 verness, Elgin,
 and Nairn.
 1.

(SEQUEL to *Macleod, &c. v. Davidson, &c.*, Nov. 17, 1886, *supra*, p. 92.)

In taxing the pursuers' account of expenses the Auditor disallowed a sum of £31, 14s. 6d. charged under date 27th November 1884. This sum represented the cost incurred in serving on the defenders the petition and the deliverance thereon granting interim interdict. The service was made by a Sheriff-officer sent from Inverness, all the Sheriff-officers in Skye having resigned their offices. In place of this sum the Auditor allowed £1, 18s. 10d., being the amount of fees of service by registered letter in terms of the Citation Amendment (Scotland) Act, 1882 (45 and 46 Vict. cap. 77). The pursuers lodged objections to the Auditor's report.

It was admitted that the defenders did not reside within a postal delivery district.

Argued for the pursuers;—There was no delivery from the post-office at Staffin by letter-carriers, so that a registered letter could not have been tendered to the defenders. There was no probability that they would call for these letters of service at the post-office. There were a large number of defenders, and if one of them even had failed to call for his letter the case could not proceed. The Act only intended to introduce the machinery of the post-office so far as suitable for the purpose, but where, as here, it would have been quite unsuitable, the Act did not apply. The pursuers really had only one way open to them, namely, to serve by an officer in person, as notoriously the state of feeling in Skye at present in regard to proprietary rights was such that the defenders would have taken care not to call for letters which they knew to contain citations. But even if citation by post were possible, it would undoubtedly have been very uncertain, and the pursuers were entitled to take the only way likely to be effectual.

Argued for the defenders;—Section 4 (subsection 5) of the Act provided for such a case as this, where there was no delivery by the post-office. If not called for within twenty-four hours, the letter is to be returned. The pursuers were bound in the first instance to have tried service by post before incurring such expense in service by officer, and there was no pressing hurry in the case, as the trespass complained of had happened months before the action was raised. Section 6 provided that only fees for service by post should be allowed on taxation unless it were not expedient in the interests of justice that such service should be made.

LORD JUSTICE-CLERK.—The question here is whether the successful party is to be allowed the expense of serving the summons of interdict by means of a Sheriff-officer, who went and served the writs personally, or whether he is only entitled to the expense of serving the writs through the post in terms of the recent statute.

But it is averred, and it is admitted, that the post-office in this district does

not deliver letters. If persons call for them they receive them, and if these letters had been called for they would have been received. But the probability is that they would not have been called for, and therefore it is probable that that would not have been an effectual method of serving this important writ. There are provisions, no doubt, in the Act of Parliament for the event of notices not reaching the party to whom they are addressed. These are natural and proper provisions in cases to which the statute properly applies, but not in cases where it is an admitted fact that the mode indicated by the statute is not a certain or safe mode of transmission, and that the probability is that the writs would not have reached the parties. I am therefore for sustaining these objections.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THE COURT sustained the objections.

SKENE, EDWARDS, & BILTON, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

THE PROPERTY INVESTMENT COMPANY OF SCOTLAND, LIMITED, Pursuers
(Respondents).—*Gloag—G. W. Burnet.* No. 62.
ALEXANDER DUNCAN, Defender (Reclaimer).—*Scott—Jameson.*

Jan. 6, 1887.
Macleod, &c. v.
Davidson, &c.

ALEXANDER DUNCAN, Petitioner.—*Scott—Jameson.*

THE PROPERTY INVESTMENT COMPANY OF SCOTLAND, LIMITED, Respondents.
—*Gloag—G. W. Burnet.*

Company—Transfer of shares—Companies Act, 1862 (25 and 26 Vict. c. 89), sec. 35—Unnecessary delay in registering transfer—Rectification of register.—A shareholder transferred fifty shares in a company, the stock in which was then unsaleable, to his wife, whose sole separate estate consisted of an alimentary annuity of £150 a-year. The transfer was intimated to the company in December 1883. The transfer was not considered at the first meeting of directors, which took place in January, but at the next meeting, which took place in April, the directors, in the exercise of a power given to them by the articles of association, declined, without cause assigned, to register the transfer, and the rejection was communicated to the holder.

In an action for payment of subsequent calls against the original shareholder, the defender maintained that in consequence of the unnecessary delay of the directors in dealing with the transfer he was no longer liable for calls. The defender also presented a petition for rectification of the register. *Held* (1) that there had been “unnecessary delay,” in the sense of the 35th section of the Companies Act, 1862, in the directors not disposing of the transfer at their first meeting, but that this did not of itself entitle the defender to have the transfer registered; and (2) that although the defender might have been entitled to have the register rectified if he could have shewn that he had been prejudiced through the delay of the directors in dealing with the transfer, he had failed to instruct such prejudice, the shares having been unsaleable during the whole time. The Court therefore gave decree for the calls, and refused the petition.

ALEXANDER DUNCAN, S.S.C., held fifty shares of £10 each—on which £1 had been paid—in the Property Investment Company of Scotland, Limited. In consequence of a heavy fall in the value of these shares he determined to get rid of them, and instructed his broker, Mr Denholm, to this effect. No other purchaser having been found, they were, on 22d December 1883, sold to his wife, Mrs Duncan, at sixpence per share, and on the same day Mr Denholm sent the transfer to the company's secretary for registration, and asked him to forward the certificate with as little delay as possible, at the same time enclosing the registration fee.

1st Division.
Lord Fraser.
B.

No. 63.

Jan. 6, 1887.
Property In-
vestment Co.
of Scotland,
Limited, v.
Duncan.

The first meeting of the directors of the company took place in January 1884, but the transfer was not taken into consideration until the next meeting on 9th April thereafter, when it was declined by the directors, under the power conferred by the 32d article of association.* Intimation to this effect was made on 14th April by the secretary to Mr Denholm, and the certificate, transfer, and registration fee were returned. This was notified to Mr Duncan by Mr Denholm.

In March 1886 an action was brought by the company against Mr Duncan concluding for payment of calls made since the date of the transfer.

The defender stated that he had sold the shares as above narrated to his wife, who had separate estate not subject to the defender's debts or deeds, and that there had been "unnecessary delay" within the meaning of the 35th section of the Companies Act, 1862,† on the part of the company in not dealing with the matter between December 1883 and April 1884. "The pursuers grossly neglected their said duty, and by such neglect the defender was precluded from redispensing of said shares, and otherwise sustained loss."

The defender pleaded;—The pursuers not having dealt with the defender's transfer at their first ordinary business meeting, or at least without any unnecessary delay, the defender is not liable for payment of said calls.

A proof was led in which the facts narrated above were proved, and from which it further appeared that in January 1884, when Mr Duncan's transfer was sent to the bank, the company's shares were not saleable,—they had remained unsaleable ever since,—and were removed from the Stock Exchange list shortly afterwards. The neglect of the directors to consider Mr Duncan's transfer at the first meeting after intimation of it was stated by their secretary to have been an omission on the part of the clerk.

It appeared that Mrs Duncan was in right of an alimentary annuity of £150 a-year. This income ceased with her death, which took place before this action was brought.

The Lord Ordinary (Fraser), on 7th July 1886, gave decree in terms of the conclusions of the summons.‡

* "The board shall have power to decline registering any transfer in favour of any person whom they may consider it against the interest of the company to admit as a shareholder, and that without any cause expressed or assigned."

† The 35th section of the Companies Act, 1862, enacts,—“If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, . . . as respects companies registered in Scotland may by summary petition to the Court of Session, . . . apply for an order of the Court that the register may be rectified, and the Court may either refuse such application . . . or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application, or petition, and any damages the party aggrieved may have sustained,” &c.

‡ “OPINION.— . . . The defence in the present action is that the case must be dealt with on the footing that the transfer was duly registered. The pursuers have assigned no reason for not registering the transfer, except that they consider it for the interest of their company not to make the registration, and they found upon the 32d section of their articles of association. And the 29th section provides that ‘the instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register-book in respect thereof.’ Now, it is no

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The defender reclaimed.

On 19th August following he presented a petition, under the 35th section of the Companies Act, 1862, for rectification of the register, and answers were thereafter lodged by the company. The averments made therein were similar to those founded on in the action, and the proof was held by the parties as applicable to both processes.

When the case came on for hearing in the Inner-House, the reclainer and petitioner argued;—Admitting the power of the company to decline to register the transfer, there was undue delay on their part from December to April to take it into consideration.¹ The declinature to entertain

objection to the action of the directors of the pursuers' company that they have assigned no reason for their declinature to register the transfer, for they have by their articles of association power to do so.—(See *In re Gresham Life Assurance Society, ex parte Penney*, 20th December 1872, L. R., 8 Chanc. App. 446.)

“But it is further said that the pursuers are barred from pleading that the transfer was not registered in favour of the transferee, and this by reason of their delay in disposing of the matter. The directors had no stated days of meeting; they only met when there was business to attend to. After the transfer was sent in there was a meeting of the directors in January 1884, at which consideration might have been had of the transfer, but the matter was overlooked, and, as Mr Couper, the secretary, states, this was in consequence of the neglect of the clerk in not putting it among the agenda for that day. The next meeting of the directors took place on the 9th of April, when the resolution was come to not to register the transfer. Now, it is maintained by the defender that there was here such unnecessary delay as to entitle the defender to escape liability for the calls. The 35th section of the Companies Act, 1862, does provide a remedy against unnecessary delay in the registration of transfers. It provides that the person aggrieved may, by summary petition to the Court of Session, apply for an order of the Court that the register may be rectified. This course was not adopted by the defender, who allowed his name to remain upon the register for a whole year without any intimation being given by him to the company that he considered the refusal to register the transfer as a grievance. There have been many decisions in England holding that unnecessary delay will entitle a party to have his name removed from the register.—(See *In re Joint Stock Discount Company (Fyfe's case)*, 9th July 1869, L. R., 4 Chanc. App. 768; *In re Joint Stock Discount Company (Nation's case)*, 10th December 1866, L. R., 3 Eq. 77; *In re Stranton Iron and Steel Company*, 26th July 1873, L. R., 16 Eq. 559; *In re Hercules Insurance Company (Lowe's case)*, 27th January 1870, L. R., 9 Eq. 589.) But these cases do not go the length of justifying the broad statement made by Mr Buckley in his Treatise on the Companies Acts, at p. 117, where he says,—‘A transfer, to which no objection is or can be made on the part of the company, ought to be confirmed by the directors at the first meeting at which, in the ordinary course of business, it can be confirmed, and thereupon registered. If not so confirmed at the first meeting at which, in the ordinary course of business, it can be done, there is “unnecessary delay” within the meaning of the section.’ This is by far too general and comprehensive, and does not take into account the special circumstances that may exist, such as, in this case, long acquiescence by the defender in his name being retained upon the register after he had got distinct notice that registration of the transfer was refused. His remedy was then by petition to the Court, which he did not adopt, and the redress he now seeks of resisting payment of calls while he is upon the register as a shareholder is not the remedy which the statute gives him. This may be added, that no special damage was sustained by the defender in consequence of the delay in dealing with the transfer. The shares were unsaleable in January equally as in April 1884, and the depression in the property market makes them unsaleable still.”

¹ Authorities quoted in the Lord Ordinary's note; also *In re Joint Stock Discount Company (Hill's case)*, reported in the foot-note to *Fyfe's case*, 1869, L. R., 4 Chanc. App. 769.

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the transfer ought to have been intimated after the January meeting of the directors.¹ The excuse that this neglect was owing to the mistake of a clerk could not be listened to. [LORD SHAND cited the case *In re Joint Stock Discount Company* (Shipman's case), Jan. 20, 1868, L. R., 5 Eq. 219, and asked if the company had not a good cause for refusal, the transferee being a married lady with nothing beyond an alimentary income of £150, and who had since died.] The transfer was perfectly *bona fide*, and the shares had been paid for by the lady. There was no delay to take action on the part of the reclamer such as barred him from maintaining his right to have the transfer registered. He was entitled to assume that this had been, or ought to have been, done by the company when it was originally sent them.

The respondents were not called on.

LORD PRESIDENT.—The action in which Lord Fraser's interlocutor was pronounced is at the instance of the Property Investment Company, Limited, against Mr Duncan, for payment of two calls, of £1 per share, upon his holding in the company. The interlocutor is dated 7th July 1886. Subsequently the defender presented a petition, under the 35th section of the Companies Act of 1862, to have the register of shareholders rectified by the deletion of his name. The argument we have heard applies to both processes, and the defence in the action and the statements in the petition are founded upon the same grounds, and may be disposed of together, and at once.

I am of opinion that the Lord Ordinary's interlocutor is right, and accordingly that the petition must be refused. The transfer by Mr Duncan to his wife was dated in December 1883, and was presented to the directors of the company shortly afterwards, but it was not disposed of until the meeting of the directors in April following, and it is said that this constituted an unnecessary delay on the part of the directors in disposing of it, and I am very clearly of opinion that there was unnecessary delay. Undoubtedly the transfer ought to have been disposed of, at all events, at the first meeting of the directors after it was presented.

But what is the consequence of such unnecessary delay under the 35th section of the Companies Act of 1862? Nothing but this, so far as I can see, that it gives the party presenting the transfer a right to present a petition to this Court to have the register rectified if he can shew good ground for this. But unnecessary delay does not in itself constitute a ground for rectification of the register. The reasons which the directors of a company may have for refusing to register a transfer are many, and if in reply by the company to a petition for rectification founded on unnecessary delay the latter come into Court and aver, apart altogether from the particular terms of the articles of association, that the transfer is due to fraud or has been brought about by dishonest means or some such cause, it would afford a very good answer. The mere occurrence of unnecessary delay will certainly not be a good ground for an order by the Court upon the directors to register a transfer executed by a member, and the company must always be entitled to shew that although there has been unnecessary delay sufficient to justify an application to the Court, there are good reasons for not having the transfer registered.

The reason assigned here is, that the directors were of opinion that it was not for the benefit of the company that the transfer should be registered, and that, according to the articles of association, was, I think, a perfectly good reason for

¹ Buckley on the Companies Acts, 117.

refusing to register it. The clause is expressed in this form,—“The board shall have power to decline registering any transfer in favour of any person whom they may consider it against the interest of the company to admit as a shareholder, and that without any cause expressed or assigned.”

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It is not necessary for the Court to inquire why the directors considered it was not in the interest of the company to register the transfer, for I do not think they were bound to assign any cause. But we can form a pretty shrewd guess. The transfer is by a husband in favour of his wife, and the directors were either not aware, or at anyrate were not satisfied, that the transferee, being a married woman, had separate estate. Or if it be the case that the trust-deed which we have seen was exhibited to them, they were well justified in saying that it was so doubtful whether she had separate estate or not that they would not register it. They had a good reason for declining, and whether they had a good reason or not they had a sufficient title and right to decline.

But I am bound to make this qualification. I think that if the petitioner can shew that he was prejudiced by the unnecessary delay which occurred, that might be a very good reason for insisting upon a rectification of the register. If the petitioner was in a position to say that had the transfer been considered at the first meeting after it was sent in, and the refusal then intimated, he could have found a purchaser who would have been unobjectionable, he would thus have been able to put forward a strong case of hardship which might have afforded ground for a rectification of the register. But this is not the state of the facts. The shares were entirely unsaleable, and could not have been disposed of by the petitioner even if the refusal by the directors had been timeously made. The prejudice therefore to the petitioner is entirely imaginary and fanciful.

In the English cases which have been cited on the point of unnecessary delay, the delay was always followed by liquidation, and accordingly the person who had failed to have his transfer registered was very deeply wronged, and was thereby put into the position of having his name put upon the list of contributors. Accordingly, if he could have alleged prejudice of that kind, that might have been a reason for striking his name off the register. But here there was no possibility of any prejudice being suffered. I am therefore for adhering to the Lord Ordinary's interlocutor and refusing the prayer of the petition.

LORD MURE.—I am of the same opinion. There was undoubtedly some delay in the first instance on the part of the directors to consider the transfer after it had been presented for registration. Nothing was done for several months after it had been given in, and the petitioner then had it in his power to complain to the Court that the company were wrong in the course they were pursuing, and to ask to have them ordained to rectify the register. But I do not think that on the merits he would necessarily have succeeded in any such application. For the directors were entitled to refuse to register a transfer without shewing any special cause. And even if the directors had been bound to shew cause for what they did, and the matter had been brought before us at once, it rather appears to me that we should not, in the circumstances of this case, have been able to find any sufficient grounds for ordaining the directors to substitute the name of the defender's wife for that of the defender. She was merely an annuitant in an alimentary fund, and had no separate estate of her own to enable her to meet calls upon the shares for which her husband was

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liable. This would, I think, have been a sufficient reason for the company to assign for their refusal to register the transfer, and I am of opinion that the defences must be repelled.

LORD SHAND.—The transfer which is the subject of discussion in this case was rejected by the directors of the company on 9th April 1884, and intimation of the rejection was then sent to Mr Duncan's broker, and it was not until April 1885—a year later, and a month after the first call was made upon the shares—that any notice was given to the company by the transferee that he considered himself entitled to have the transfer given effect to. And the ground of the Lord Ordinary's judgment is that so long acquiescence in his name being retained on the register prevents him from successfully maintaining his defence to the action for payment of calls. I am not disposed to differ from the Lord Ordinary upon that point. It appears to me that if an objection on the ground of unnecessary delay on the part of a company is to be insisted in, it must be taken timeously, and if not acceded to, then insisted on in the form prescribed by the 35th section of the Companies Act, 1862, viz., by a petition for rectification of the register.

But, apart from the plea of acquiescence, I think the petition which has now been brought must be refused on other grounds. The 35th section, to which I have referred, deals with two points, with reference to which a person may make application to the Court. In the first place, if a name be, without sufficient cause, entered in or omitted from a register of members, or, in the second place, if default be made, or unnecessary delay take place, in entering on the register the fact of any person having ceased to be a member of the company, the person aggrieved may apply to the Court to have the register rectified; and then the section proceeds,—“And the Court may either refuse such application, with or without costs, to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs.” It appears to me that the question we have to decide is whether, according to “the justice of the case,” Mr Duncan is entitled to have the register rectified. The directors, in my opinion, had a very good ground for rejecting the transfer, because the alleged separate estate to which this lady was entitled consisted merely of a fund for her maintenance, which was purely alimentary, and ceased with her life.

But further, in order to make out a case in which such an application should be granted, the petitioner must shew that he has suffered prejudice. Your Lordship in the chair has said enough to shew that there was no prejudice here to the petitioner. The shares were not in the market, and no purchaser could have been found for them. Unnecessary delay, no doubt, took place on the part of the directors, because it was incumbent upon them to have dealt with the transfer at the meeting immediately after it was sent in, but the petitioner was not prejudiced by the delay. Suppose that he had been informed after that meeting that the transfer had been rejected: Is there any reason to think that he could have found a purchaser—not a man of straw, because he would not have satisfied the directors, but a man of means? The whole circumstances of the case shew that no such purchaser could have been found. Accordingly I am of opinion that no order for rectification of the register can be granted by the Court, although I think there was unnecessary delay on the part of the company.

LORD ADAM.—I concur in the doctrine of law which is laid down by Mr **No. 63.**
Buckley, and is quoted by the Lord Ordinary,—“A transfer, to which no
 objection is or can be made on the part of the company, ought to be confirmed Jan. 6, 1887.
 by the directors at the first meeting at which in the ordinary course of business Property In-
 it can be confirmed, and thereupon registered. If not so confirmed at the first vestment Co.
 meeting at which in the ordinary course of business it can be done, there is of Scotland,
 ‘unnecessary delay’ within the meaning of the section.” But then, I think Limited, v.
 that the result is that, there being unnecessary delay, the remedy of the Duncan.
 aggrieved person is to present a petition for rectification of the register under
 the provisions of the 35th section of the Companies Act of 1862. This has
 now been done by the petitioner, and what we have now to consider is, whether
 we are satisfied of the justice of the case which he submits to us—involving as
 that does all the facts and circumstances connected with it up to the date when
 the petition was presented. There is one most material fact in the case, viz.,
 that so far back as April 1884 the petitioner had intimation that his transfer
 was not to be registered, and that he took no steps thereafter until the action
 for payment of calls was brought. Perhaps this might not be conclusive, but
 at any rate it is a most important circumstance. But when it is further apparent
 that the petitioner has suffered no prejudice through the delay, I have no
 difficulty in concurring with your Lordships in adhering to the Lord Ordinary’s
 interlocutor in the petitory action and in refusing the petition.

THE COURT adhered to the Lord Ordinary’s interlocutor, and further
 refused the petition.

WATT & ANDERSON, S.S.C.—PARTY—Agent.

WILLIAM MONCUR, Appellant.—*D.-F. Mackintosh—Rhind.* **No. 64.**
JOHN MACDONALD AND OTHERS, Respondents.—*Pearson—C. J. Guthrie.*

Bankruptcy—Sequestration—Election of Trustee—Sheriff.—A note of objec- Jan. 8, 1887.
 tions was lodged with a Sheriff against his confirming the election of a trustee Moncur v.
 on a sequestrated estate, in which the objector alleged that the person elected Macdonald,
 was unsuitable on various grounds, and that the cautioner proposed was insuffi- ac.
 cient. The Sheriff allowed a proof, and the trustee appealed to the Court of
 Session.

The Court *sustained* the competency of the appeal, but, without deciding as
 to the relevancy of the averments, refused to interfere with the Sheriff’s exercise
 of his discretion in ordering inquiry.

In a competition for the election of a trustee (in succession to Mr 1st DIVISION.
Charles John Munro, who had resigned) upon the sequestrated estates of Sheriff of In-
Murdo Macdonald, corn-factor, Inverness, **William Moncur**, writer, **Edin-** verness-shire.
burgh, having a majority of the creditors’ votes, was elected. The security M.
 fixed by the creditors was £100.

Objections were lodged on behalf of the bankrupt, of **John Macdonald**,
 the bankrupt’s brother—who was a creditor to the amount of £114,—and
 of **John Grant**, who was a candidate for the office of trustee.

The objectors stated ;—“(1) **William Moncur**, first named as trustee, is
 entirely unsuitable. It is averred that he is an old man, who was at
 one time a clerk, and is now lodging in a close in the Canongate in **Edin-**
burgh, and is without means or occupation. The person proposed as his
 cautioner is a clerk to **Mr David Howard Smith**, who is acting as agent
 in the sequestration. He is without means, and utterly insufficient as
 cautioner for a trustee in a sequestration.” (4) “The objectors allege that

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the parties proposing Messrs Moncur and Anderson [who was another candidate] are purposely endeavouring to appoint a man of straw to the post of trustee, in order that actions and claims against him, which might arise out of his administration, or the proceedings taken by him, or in his name, might be frustrated by the absence of means in the case both of himself and the person put forward as cautioner. It is also averred that Mr Charles John Munro, who recently resigned office, resigned in order to escape responsibility for claims of a similar character."

The Sheriff-substitute (Blair), on 7th December 1886, found the objections relevant, and allowed the objectors a proof of their averments.

Moncur appealed to the First Division of the Court of Session, and argued;—The outstanding assets of the estate were practically nil, and consisted of some debts which the bankrupt had asked should be handed over to him, as he was the only person who could make anything of them. Mr Munro—the former trustee—had discovered that shortly before the sequestration the bankrupt had conveyed over a valuable house property to his brother for an alleged illusory consideration—which it was intended to reduce—and consequently there was a reason for not giving effect to the objections stated on the part of the bankrupt and his brother. The allegations as to the appellant's unfitness for the post of trustee were irrelevant. It was not said that he was insolvent—the term "without means" was too vague. Besides, the whole body of creditors except the bankrupt's brother were satisfied with him. The averments as to his age and place of residence were quite insufficient and irrelevant to warrant the inquiry proposed by the Sheriff.¹ Further, the basis of the claim made by the bankrupt's brother was alleged advances by the bankrupt.

The respondents at first objected to the competency of the appeal, but having regard to previous decisions which were cited on the other side,² the objection was afterwards departed from.

They argued on the merits;—Such objections as were stated to the trustee here were relevant, and such as the Court were bound to consider.³ It was intended to prove that from infirmities or otherwise the appellant was unfit for the work of trustee. Further, the creditors were not entitled to dispense with caution, or to make it elusory.⁴

LORD PRESIDENT.—I think the respondents are satisfied that their objection to the competency of this appeal could not be maintained, and therefore it is not necessary to say more than that, looking to previous authorities, it would be impossible to sustain it.

Upon the merits the Sheriff-substitute's interlocutor allows an inquiry, and allows it in the shape of a proof of certain averments against the eligibility of one of the candidates for the office of trustee. That is a matter which I think the statute means to entrust to the discretion of the Judge in the Court below, and it is not desirable that this Court should lightly interfere with an order made by a Sheriff or Sheriff-substitute in the course of action taken by him in confirming the appointment of a trustee. The objections submitted by the respondents to the relevancy of the averments may no doubt have some weight, but I am not disposed to deal with these as if there was a formal record made

¹ Wylie, &c. v. Kyd, June 21, 1884, 11 R. 968.

² Tennent v. Crawford, Jan. 12, 1878, 5 R. 433; Galt v. Macrae, June 9, 1880, 7 R. 888; Wylie, &c. v. Kyd, &c., May 21, 1884, 11 R. 820.

³ Bell's Comma. (5th ed.) ii. 371; Threshie, Petitioner, May 30, 1815, F. C.

⁴ A. B., Petitioner, Feb. 19, 1833, 11 S. 412; Bell v. Carstairs, Dec. 17, 1842, 5 D. 318 (Lord Mackenzie, p. 323), 15 Scot. Jur. 131.

up for trial. This is an incidental inquiry in the course of a proceeding taken No. 64.
with a view to the election of a trustee, and if the Sheriff-substitute thinks it is Jan. 8, 1887.
not safe to proceed without having the facts cleared up and some further in- Moncur v.
vestigation, I do not think we ought to interfere. Macdonald,
&c.

LORD MURE concurred.

LORD SHAND.—The objections in the present case are personal to the proposed trustee and his cautioner, and are therefore different in character from such objections as relate to the validity of votes in an election—which the Court has sometimes had to consider. The Sheriff here holds the objections to be relevant. It is clear that as regards a final deliverance by a Sheriff confirming the election of a trustee there is no appeal, and although it has been held (as I think, on grounds which are not satisfactory) that interlocutory judgments prior to the final confirmation may be made the subject of appeal, I am disposed as far as possible to limit these.

The Sheriff being vested with the power of deciding the ultimate appointment, I do not think we should readily interfere with the exercise of his discretion in any preliminary steps he may think necessary to take. If he plainly transgresses the proper limits of that discretion, the Court will interfere, as was done in the case of *Wylie* (11 R. 968), but I do not think there is ground here for our interference. I further think that we must not scrutinise and weigh the averments made by the objectors in the same way as we should do under a closed record, and on the whole I am for refusing the appeal.

LORD ADAM concurred.

APPEAL refused.

D. HOWARD SMITH, Solicitor—JOHN C. BRODIE & SONS, W.S.—Agents.

BENJAMIN BREATCLIFF AND OTHERS, Pursuers (Reclaimers).—*Chisholm*. No. 65.
JOHN SMITH AND ANOTHER (Bransby's Trustees), Defenders
(Respondents).—*Murray—G. R. Gillespie*.

Jan. 11, 1887.
Breatcliff, &c.
v. Bransby's
Trustees.

Trust—Investment of trust-funds—Real security.—Held that an English will authorising investments on "real security" authorised investment on a railway mortgage.

By a will in the English form Mrs Mary Bransby of Bramham, York-2^d Division.
shire, bequeathed her whole personal estate to the Rev. Samuel Martin, Lord Kinnear.
Bathgate, and James Freeland, Bathgate, "their executors, administrators, M.
and assigns," in trust for certain purposes, giving them power to invest
"upon Government or real securities." The will was dated in 1844, and
Mrs Bransby died on 3d April 1845.

The beneficiaries in the trust now pursued trustees who had been assumed in 1867 upon the death of the original trustees, concluding for declarator that "the investment made by the defenders, on or about 1st November 1876, of £800 of the trust-funds on mortgage of the Girvan and Portpatrick Junction Railway Company was not an investment authorised by the said will or by statute, and was *ultra vires* of the defenders as trustees foresaid, and that the defenders should be found and declared to be liable as individuals for all loss arising from said investment," with a corresponding conclusion for accounting and repayment.

The pursuers stated,—“No interest has been received from the said company since Martinmas 1878 except a sum of £8, 16s. on 3d Novem-

No. 65. ber 1884, and the said mortgage is much depreciated in value, if not unrealisable. This investment was not authorised by the said will or by statute, and was *ultra vires* of the trustees. The pursuers have sustained loss through this investment having been made, and the defenders are personally liable for the loss sustained."

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Their plea was,—(1) The said investment not being authorised by the said will or by statute, was *ultra vires* of the defenders as trustees fore-said, and they are bound to make good the loss thereby occasioned.

The defenders stated,—“At the time of the purchase the said mortgage was a perfectly good security, and was secured to replace debentures of the Edinburgh and Glasgow Railway Company, which had been bought by the original trustees, and had been paid up by the company.”

They pleaded that, the investment being within their powers, they ought to be assolizied.

On 23d July 1886 the Lord Ordinary (Kinnear) sustained this plea, and assolizied the defenders from the conclusions of the summons, other than the conclusions for accounting.*

The pursuers reclaimed, and argued,—This was not a real security in the sense of the will, although there might be some elements of a heritable security in it. It was rather an investment in the business of a trading concern, and such an investment had been condemned.¹ Even if it were a real security, it was one of a bad class, and such as the Courts in England had refused to sanction,² the principal reason being that the

* “NOTE.—The only question argued was whether the investment of a portion of the trust-funds on the security of a mortgage by a railway company, assigning the undertaking in the usual form, was authorised by the trust-deed. The trustees are empowered to invest the estate upon Government or real securities; and the question is, whether a mortgage of the Girvan and Portpatrick Railway Company is a real security within the meaning of the power. I think it is, because it gives to the mortgagee the security of the whole undertaking,—that is, of the whole real and moveable property of the company. It is true that it is a security which cannot be made available to the creditor by the ordinary diligence of the law. But he has a different kind of diligence in his right to obtain the appointment of a judicial factor, through whose administration the undertaking may be managed or disposed of for the benefit of the company's creditors. The mortgagee has therefore the security of the real property, which is what is meant by a real security. The pursuers, however, maintain, on the authority of *Mant v. Leith*, 15 Beavan, 524, that a railway mortgage is not within the power given to the trustees, even assuming it to be a real security. There is much weight in the considerations stated by the Master of the Rolls against the eligibility of such securities. But it cannot be held in Scotland that they are improper investments so as to infer personal liability against the trustees, who have selected them in the exercise of a power expressly conferred by the trust-deed, since they are investments which the Legislature has empowered all trustees to make, unless they are expressly prohibited by the deed. It may be that the investment in question could not be supported by the subsequent enactment of the Trusts Amendment Act if it were not within the class of securities authorised by the trust itself. But the Act appears to me to suggest a sufficient answer to the argument founded on *Mant v. Leith*, that a railway mortgage is in its nature so improper an investment that trustees will not be justified in selecting it even if it be shewn to fall within a general power conferred upon them by the trust. It is not suggested that if they were entitled to invest in railway mortgages at all, the defenders were negligent in their selection of the mortgage in question, or that the Girvan and Portpatrick Railway Company was not in good credit when the investment was made.”

¹ *Whitely v. Learoyd*, March 1886, L. R., 32 Ch. Div. 196.

² *Mant v. Leith*, March 1852, 15 Beav. 524.

investor had not the ordinary remedies of a heritable creditor, viz., entering into possession and realisation. No. 65.

Argued for the respondents;—Assuming that real security meant, as it was understood to do in England, heritable security, this was a heritable security, the whole undertaking, stations, ground, &c. being mortgaged. Was it an eligible investment? No doubt the Courts of Chancery had held that it was not, but their rules were much stricter than the rules of the Scots law, since, until authorised by statute, trustees would by them have been prohibited from investing in mortgages at all. But even their rules had been much relaxed, for it was now by statute permissible to invest funds *in manibus curiæ* in railway mortgages.¹ Moreover, there was direct authority in Scotland to shew that the Court approved of such investments for judicial factors,² and that judgment had been followed by a circular by the Accountant of Court declaring that such securities would be accepted in factories if good of their kind.³ It was not said that this investment was anything but good when it was made.

Jan. 11, 1887.
Breatcliff, &c.
v. Bransby's
Trustees.

LORD JUSTICE-CLERK.—I think there is no ground for interfering with the Lord Ordinary's judgment. The procedure referred to by Mr Gillespie is a very strong commentary with regard to this matter. There is no doubt that there is a great deal of sound investment to be had in securities of this kind, and the Legislature and the Court have sanctioned them. The question is whether this is a real security, such as is permitted by the will. I think it is, both in the sense that it is something more than personal security, and also in the sense that it embraces a large quantity of heritable property.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

THE COURT adhered.

WALLACE & BEGG, W.S.—TAIT & JOHNSTON, S.S.C.—Agents.

MRS CATHERINE MULLEN OR CONGLETON, Pursuer (Respondent).—
Macfarlane—P. Smith.

No. 66.

JAMES ANGUS, Defender (Appellant).—*Ure.*

Jan. 12, 1887.
Congleton v.
Angus.

Reparation—Master and Servant—Fellow-servant.—A grain-mERCHANT employed a carting contractor to carry a quantity of grain from a ship to be stored with a storing agent. One of the bags of grain, while it was being hoisted into the store, fell upon the carter employed by the contractor and killed him. Its fall was due to the fault of a servant of the storekeeper. *Held* that the carter and the storekeeper's servant being engaged in common labour for a common object, the storekeeper was not liable to the carter's representatives for the consequences of his servant's fault.

Woodhead v. Garriess Mineral Co., Feb. 10, 1877, 4 R. 469, and *Maguire v. Russell*, June 10, 1885, 10 R. 1071, *followed*.

WILLIAM CONGLETON, a carter working for Robert Buchanan & Son, 2^d Division, carting contractors in Glasgow, was engaged in carrying a cartload of bags of grain from the ship's side to the store belonging to James Angus, forwarding agent and general storekeeper in Glasgow. While the bags were being hoisted into the fifth storey of Angus' warehouse, one of them was allowed to fall through the fault of one Gilchrist, a servant of Angus. It fell upon Congleton and killed him. Sheriff of Lanarkshire.
I.

¹ 45 and 46 Vict. c. 38 (Settled Land Act, 1882), secs. 21 and 32.

² Accountant of Court v. Lloyd, Dec. 1, 1877, 5 R. 289.

³ Quoted in Fraser's Thoms on Judicial Factors, p. 76.

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Robert Buchanan & Son were carrying the grain to the store under contract with David Bannerman, a grain merchant, to be stored there for him.

Congleton's widow raised an action to recover damages from Angus in the Sheriff Court of Lanarkshire.

She pleaded that the action had been caused by the fault of the defender, or of those for whom he was responsible.

The defender pleaded, *inter alia*;—(3) The pursuer is not entitled to damages for the death of the deceased, seeing that it was due to the fault or negligence of a person or persons engaged in a common employment with him.

The Sheriff-substitute (Lees), on 23d June 1886, repelled the defences, and decerned against the defender for £100.*

The defender appealed, and argued;—The principle of *Woodhead's* case¹ ruled the present, and overruled former cases which might be quoted for the pursuer.² The case of *Abraham*³ had been overruled in the subsequent case of *Rourke*.⁴ The principle of *Woodhead's* case had been carried out subsequently in such cases as *Wingate*,⁵ where a surveyor's clerk had been held to be a member of the organisation of a mine, and *Maguire*,⁶ where a workman laying tiles in a house had been refused a remedy against the master of a plumber who was working on the roof.

The pursuer argued;—The case did not disclose any common organisation such as *Woodhead's* case demanded. The present case was closer to the cases of *Abraham* and *Wyllie*, which were not overruled in *Woodhead's* case, but were distinctly said to be law, and capable of standing along with that of *Woodhead*. The effect of *Rourke's* case upon *Abraham* had also been considered in *Woodhead's* case. The recent case of *Gorman*⁷ was nearer the present in its circumstances than *Maguire's* case.

LORD CRAIGHILL.—The circumstances of the case are these: A Mr Bannerman, a corn-merchant in Glasgow, employed Buchanan & Son to carry from the place in which for the time it was stored a quantity of wheat to a store in Robertson Street, Glasgow, belonging to the defender. There were two contracts for the performance of this work. One was with Robert Buchanan & Son, carting contractors, and the other with the defender. The work to be done by Buchanan & Son was not merely to carry wheat to the building of which the store was a part, but to assist in raising the wheat from the lorry to the store, which was on the fifth floor of the building. Under the other con-

* "NOTE.— The defender further urges that the two deceased were in a common employment,—that is, I presume, in his employment. The principle of common employment has certainly been extended so as to cover a good deal, but I am not aware of any case in which it has been stretched to this extent. The recent case of *Gorman v. Morrison* seems adverse to this view; and I may also refer to the cases of *Wyllie v. Caledonian Railway Company*, 9 M. 463; *Calder v. Caledonian Railway Company*, 9 M. 833; and *Adams v. Glasgow and South-Western Railway Company*, 3 R. 215; and to the case of *Barclay v. Paton, Brown, & Co.*, in this Court."

¹ *Woodhead v. Gartness Mineral Co.*, Feb. 10, 1877, 4 R. 469.

² *Wyllie v. Caledonian Ry. Co.*, Jan. 27, 1871, 9 Macph. 463, 43 Scot. Jur. 220; *Gregory v. Hill*, Dec. 14, 1869, 8 Macph. 282, 42 Scot. Jur. 132.

³ *Abraham v. Reynolds*, Jan. 12, 1860, 5 Hurl. and Nor. 143.

⁴ *Rourke v. Whitmoor Colliery Co.*, 1876, L. R., 1 C. P. Div. 556.

⁵ *Wingate v. Monkland Iron Co.*, Nov. 8, 1884, 12 R. 91.

⁶ *Maguire v. Russell*, June 10, 1885, 12 R. 1071.

⁷ *Gorman v. Morrison & Son*, June 10, 1885, 12 R. 1073.

tract the wheat was not merely to be stored, but assistance was to be rendered by the defender in raising it from the lorry to his premises. And thus it came to pass that there was in the raising of the wheat to the loft a contribution of service by Buchanan & Son and a contribution of service by the defender, each through his servant assisting in raising the wheat from the cart to the store. In other words, this part of the contract was a joint work, or a work which constituted a joint employment.

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Such were the contracts and such the work to be done. The husband of the pursuer was a carter employed by Buchanan & Son. He carted a quantity of wheat on the day on which the accident occurred to the premises of the defender. He assisted in the raising of the sacks, and Gilchrist, a servant of the defender, was also employed in this work—his part being to receive the bags as they severally were raised, to release them from the sling in which they were hoisted, and then to place them in the part of the loft where they were to be kept. One of the bags had been raised to the level of the loft. Gilchrist caught the bag, but through some fault on his part the bag, in place of being brought into the loft, slipped from Gilchrist's hands, fell upon the pursuer's husband, and injured him so that he died. Damages are now sued for, and the question is, whether, in these circumstances, the pursuer is entitled to recover? Two grounds of liability are alleged. The first is, that Gilchrist was not fit for the work to which he was put by the defender. Were this established, personal fault would be brought home to the defender, and the liability of the latter would be a necessary result. But what has been alleged has not been proved. Indeed the contrary has, I think, been established. The other ground of liability is that there was fault on the part of Gilchrist in allowing the bag to slip from his hand, and that for this fault the defender must answer. That there was fault on the part of Gilchrist was not disputed at the debate. What was insisted on by the counsel for the defender was that as Congleton, the pursuer's husband, and Gilchrist were engaged in a common work or employment, the master of the one servant is not answerable to the servant of the other. This view of the law appears to me to be supported by the case of *Woodhead*, Feb. 10, 1877, 4 R. 469, by the case of *Wingate*, Nov. 8, 1884, 12 R. 91, and by the case of *Maguire*, June 10, 1885, 12 R. 1071. The principle upon which these three cases were decided—and they are the latest decisions upon the subject—covers the present case, and consequently I think that the interlocutor complained of by the defender must be recalled, and the appeal dismissed. There are, no doubt, earlier cases, the application of some of which to the present would not only justify but call for an opposite decision, and an ingenious attempt was made on the part of the respondent to shew that not the more recent but the earlier cases ought to govern the decision on the present occasion. In this, however, he did not succeed. The applicability of the more recent cases to the present seems to me to be perfectly plain, and unless these are to be disregarded our decision must be in conformity with the views of the law upon which they were determined. Once a plain ground of judgment has been adopted by the Court, not on one but on several occasions, trivial differences of facts not affecting the principle of decision are not a ground on which a different judgment should be pronounced.

LORD RUTHERFURD CLARK.—I cannot distinguish this case from *Woodhead* and *Maguire*.

No. 66. LORD TRAYNER.—Neither can I.

Jan. 12, 1887.
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The LORD JUSTICE-CLERK and LORD YOUNG were absent.

THE COURT pronounced this interlocutor:—"Find (1) that in September 1885 David Bannerman, grain merchant in Glasgow, employed Robert Buchanan & Son, carting contractors there, to deliver at the defender's store in Robertson Street, Glasgow, a quantity of wheat in bags; (2) that William Congleton, then in the service of the said Robert Buchanan, accordingly carted the said wheat to the said store; (3) that it was his duty to deliver it there, and in doing so to sling the bags before they were hoisted from the cart or lorry to the fifth storey of the building, in which they were to be stored, and to guide the guy-rope of the chain by which they were hoisted; (4) that John Gilchrist, a servant of the defender's, received the bags as they were hoisted to the said storey, and while so engaged allowed one of them to slip from his hold, when it fell upon Congleton and so injured him as to cause his death; (5) that this fault on the part of Gilchrist was the cause of the accident, as at the debate was admitted by the defender; (6) that the employment in which he and Congleton were thus engaged was a common employment, and for a common purpose, and was undertaken by Congleton with all its risks: Find in law that, these being the facts, the defender is not responsible for the injuries sustained by Congleton, and is not liable in compensation to the pursuers as representing him: Therefore sustain the appeal, recall the judgment of the Sheriff-substitute appealed against, assoilzie the defender," &c.

W. R. PATRICK, L.A.—DRUMMOND & REID, W.S.—Agents.

No. 67. JOSEPH FINDLAY, Pursuer (Respondent).—*Jameson*—*G. W. Burnet*.
GEORGE ANGUS, Defender (Appellant).—*G. R. Gillespie*.

Jan. 14, 1887.
Findlay v.
Angus.

Reparation—Precautions for safety of public—Fastening of a shed.—The front of a peat shed was closed by a door or shutter, 6 feet 3 inches in height, and 2½ cwt. in weight. This door was not hinged, but fitted into a frame, and was lifted bodily out when it was desired to open the shed. It was fitted with louvre boards, which could be opened from the outside, and which, when opened, enabled children to climb up the face of the door. The only fastening which prevented the door from falling outwards was an iron drop-bar, 3½ inches long, at the top. While this was in its place the door could not be opened. The shed stood on waste ground open to the public and frequented by children.

As three children of about ten years of age were playing about the shed, two of them climbed on the front of the door, and lifted the drop-bar, the consequence being that the door fell out and injured the third. *Held* that the owner of the shed was liable in damages, the fastening of the door not being sufficient for a shed standing in such a public place.

2D DIVISION.
Sheriff of
Aberdeen.
I.

GEORGE ANGUS, merchant and fish-dealer in Aberdeen, had, by leave of the Magistrates of Aberdeen, erected upon certain waste ground, reclaimed by the operations of the harbour commissioners at Aberdeen, a wooden shed for storing peats. The shed was a lean-to, its back being formed by the masonry of one of the railway arches. The front of the shed was secured by a door or shutter, 6 feet 3 inches in height, upwards of 8 feet in length, and 2½ cwt. in weight. This door did not move on hinges, but fitted into a frame, and when it was desired to open the shed it was lifted bodily out. The front of the door was fitted with louvre boards for the sake of ventilation, which could be opened or shut, somewhat in the

manner of a venetian blind, by a person on the outside of the shed, without stirring the door from its place. These louvre boards, when open, gave a foothold on the front of the door. The door, when fitted into its frame, was kept from falling outwards by an iron pin, 3½ inches long, which hung down from the beam at the top of the frame, and swung upon a nail. When it was desired to open the door this pin was pushed to one side, and the door was pulled forward till it was clear of it. Until the pin was pushed aside the door could not be taken out or fall out.

There was no thoroughfare over the waste ground on which the shed stood, but children were in the habit of resorting to it in the evening to play, and there was no wall or fence to keep them out.

On the 4th August 1886 Angus' workmen shut the shed, let the pin fall into its place, and left their work soon after six o'clock. Shortly after that a little girl, Rachel Findlay, ten years old, and two boys of the same age, came to the ground, and proceeded to play about the shed. In their play they collected pieces of peat they found lying about the shed. Wishing to get more peat, they began to shake the louvre boards of the door, and the two boys to climb on the face of the door. No one saw them remove the pin, but they were seen by several people climbing on the door and reaching up at it. The door fell out, and broke Rachel Findlay's leg.

Her father raised an action of damages against Angus. He pleaded that the defender was in fault, in respect he had not provided proper fastenings for the door.

The defender denied fault, pleading that the accident had been caused by the fault of the pursuer's daughter herself.

After a proof, in which the foregoing facts were disclosed, and were not seriously disputed, the Sheriff-substitute (Brown), on 2d April 1886, found that the pursuer had failed to prove fault in the defender, and assoilzied him.*

* "NOTE— I do not see that there is any room for doubt that it was the action of the boys that proximately caused the door to fall. The pursuer, however, contends that the fastening of the door was an insufficient one, and was not a reasonable precaution for the safety of the public in a place, where, if they had no right to be, they were at least tolerated both by the defender and the police authorities. The evidence, in my opinion, does not sustain the suggestion that the girl and her companions were in the proper sense of the word trespassers, for there is nothing to show that access to the open space on the reclaimed ground upon which the defender's premises are erected was restricted. But, on the other hand, I think it cannot be maintained that she met her injuries in a place which can at all accurately be described as a thoroughfare even for foot-passengers, and it seems to me that that is a circumstance to be taken into account in judging of the precautions which the defender used in securing his property so as to prevent accidents. The evidence is conflicting upon the question of the sufficiency of the fastening of the door. The opinions expressed on both sides are entitled to much weight, but while I should be disposed to hold that the balance of testimony is against the security of the door as being a mechanical contrivance absolutely perfect, I am on the other hand of opinion that the weight of the evidence proves that it was perfectly sufficient, if not tampered with, for at least the safety of the public; that some of the modes of security suggested by the pursuer are either impracticable or would seriously impede the defender's business, and that there was nothing unusual in the fastening of the door. I myself attach no value to the speculative risks so earnestly pressed by the pursuer, said to be involved in the suspension of such a heavy door on the resistance of an inadequate screw. It is time enough to deal with that case when the failure of such a security is the point actually in issue in a *lis pendens*. But it does appear to me to be very

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On appeal the Sheriff (J. G. Smith) found "that the injury sustained by the pursuer's daughter is attributable to the faulty condition of the door mentioned on record, and that the defender is liable in damages," and assessed the damages at £50.*

The defender appealed to the Court of Session, and argued;—If the defender had taken sufficient precautions he was free from liability. The sufficiency of the precaution was tested by this, that no accident could occur unless the safeguard were intentionally removed. That was the law of *Macgregor's*¹ case, and the facts here shewed that the boys had wilfully undone the door. Whatever the girl's remedy against the boys might be, she had no action against the defender. The case of *Beveridge*,² on which the Sheriff relied, had no application. There an accident occurred in the course of using a building for its ordinary commercial purpose, a use which all might have foreseen.

Argued for the pursuer;—The construction and fastening of the door

pertinent to consider in this question of sufficient fastening, first, that it was a precaution for safety adapted to the defender's business carried on in a locality which was at least not a resort of the public; and, secondly, that the security of the door was so far removed from the ordinary access of the public that interference with it would be properly described not only as deliberate but an act of sheer wantonness. In many respects the case bears a strong resemblance to that of *Balfour v. Baird*, December 5th, 1857, 20 D. 238, and looking to the grounds of judgment, especially those adopted by Lord Young in *Macgregor v. Ross*, March 2, 1883, 10 R. 725, I feel myself unable to arrive at any other result than one adverse to the pursuer's claim. Contributory negligence on the part of the injured girl is not pleaded, the case being that there was no fault of any kind on the part of the defender, and that the pursuer had herself to blame, in which is necessarily included the fault of her companions. In these circumstances I do not feel myself justified in finding contributory negligence, but the facts speak for themselves."

* "NOTE.— . . . I have no difficulty in holding the defender answerable for the occurrence. The owner or occupant of a building adjoining a public street or highway—or as in this case a place of public resort, and known to be so—is under a legal obligation to take reasonable care that it shall be so framed and maintained as to do no injury to passers-by. He is therefore answerable for the fall of a sign-board insecurely fastened (*Moak's Torts*, 247), the fall of a lamp suspended over the door in consequence of inherent decay (*Torry v. Ashton*, L. R., 1 Q. B. D.), or the fall of a broken down door in one flat caused by the swinging against it of a bale of goods which was being lowered from an upper flat (*Beveridge v. Kinnear & Co.*, 11 R. 387). In this last case Lord Young said the defenders were bound 'to have the door in such a condition as to resist all the ordinary pressure to which it was likely to be exposed'—a principle which entirely disposes of the defender's plea that but for the meddlesomeness of the children and if the door had been let alone the accident would not have happened. He knew, or ought to have known, that children were in the habit of playing about the premises, and he should have provided against their giving way to their natural instincts by making his door strong enough to be proof against every form of juvenile assault. What may be contributory negligence in a grown-up person is excusable as mere thoughtlessness on the part of a child; and a man ill performs his duties to the public who contents himself with so securing a heavy door like this as to be safe enough 'if let alone.' The case of *Balfour v. Baird* which was relied on by the defender, and referred to by the Sheriff-substitute, was the case of an accident which befell some boys when clambering over a pile of battens. The battens being properly piled in a place where the boys had no right to be, the owner of the timber was rightly found to be free from blame, but the decision has no bearing on the present question."

¹ *Macgregor v. Ross & Marshall*, March 2, 1883, 10 R. 725.

² *Beveridge v. Kinnear & Co.*, Dec. 21, 1883, 11 R. 387.

were faulty; nothing could be more certainly expected than that children would climb on this door, and if so dangerous a thing were left unguarded in a public place the owner was liable.¹ Precautions in such a case must ensure safety, not merely make it probable, and he who by insufficient precaution put it in the power of any idle or malicious person to do mischief was liable for the consequences.²

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LORD JUSTICE-CLERK.—These are always distressing cases, and this one is certainly very narrow. If the Sheriff had decided otherwise I do not know that I should have been in favour of altering his judgment. But as the case stands, the tendency of my opinion is entirely with the Sheriff-principal, and against the view of the Sheriff-substitute. My impression is that if this shed had been on private property, where the owner was entitled to rely on the protection of his own land against trespass, I should have thought it a different thing. But where, as here, the defender puts down a shed on property which does not belong to him, but is allowed by the public authorities to be used for such purposes, and where the public are admitted to be by some kind of tolerance, and where there is the possibility of this receptacle for peat being tampered with by children, I think that he is bound to take that into view in considering the nature of the fastenings which he places on this receptacle. The door was of unusual weight, and I think he is bound to take that into consideration also. It was sufficiently secured, if not tampered with, in respect of any ordinary pressure that might be exerted. But the bolt was a very slender protection, and the defender must have known that if tampered with there was a strong probability of the door falling so as to cause injury as in the present case. I think that the fact that this ground was public, or *quasi*-public, makes greater precaution necessary than in the ordinary case of operations on private ground, where the proprietor is entitled to exclude the public. There may be no danger in things if left to themselves—spring-guns will not explode if left to themselves—the question is whether these things ought to be put where they have been. I do not think it a sufficient answer to this claim that if the door had been left alone it might not have fallen.

LORD YOUNG.—I regret that this case did not take end in the Sheriff Court. My opinion entirely concurs with that expressed by your Lordship, which is in substance this,—that the door was insufficient with respect to its fastening having regard to the risks to which in the locality where it was it was exposed. The shed was on vacant ground,—temporarily vacant,—and it was explained to us that the owners tolerated the defender's presence there with his shed, just as they tolerated children playing there. The construction, therefore, of the shed and of the door and of the fastenings ought to have been such as to be sufficient looking to the risks to which in that place they were exposed. I agree in thinking that this was not the case, and in that respect that the defender was to blame. There is no more particular question raised here than this, whether, looking to the circumstances, the defender has or has not done his duty to others, and here I think he did not do his duty.

LORD CRAIGHILL.—This is a narrow case, and my mind has vibrated during the discussion between the interlocutor of the Sheriff and that of the Sheriff-substitute. In the end I have come to think that the conclusion at which your

¹ Campbell v. Ord & Maddison, Nov. 5, 1873, 1 R. 149.

² Clark v. Chambers, April 5, 1878, L. R., 3 Q. B. Div. 327.

No. 67. Lordships have arrived should be adopted. The defender can only be held liable if fault is established against him. The question is whether or not in having the door fastened in the way it was he did all that was reasonable against the possibility or probability of accident. These louvre boards could be converted into a ladder, and this ladder used for the purpose of reaching the bolt that fastened the door, and that which it is in the nature of boys to do would be done. The defender was bound to take that into contemplation in considering probabilities. On this ground I agree that the interlocutor of the Sheriff should not be disturbed.

LORD RUTHERFURD CLARK concurred.

THIS interlocutor was pronounced :—"Find (1) that the defender's building mentioned in the record is placed on ground not belonging to him, and in a locality open to the public, and to which the public resort; (2) That having regard to the risks to which it was thus exposed, the fastening of the door of the said building was insufficient: Find in law that in these circumstances the defender is responsible for the injury sustained by the pursuer's daughter, and is liable in damages accordingly: Therefore dismiss the appeal, and affirm the judgment of the Sheriff appealed against."

HENRY & SCOTT, S.S.C.—JOHN MACPHERSON, W.S.—Agents.

No. 68.

THE PULSOMETER ENGINEERING COMPANY, LIMITED, Pursuers
(Respondents).—*Jameson—Younger.*

ROBERT GRACIE, Defender (Appellant).—*Low.*

Jan. 14, 1887.
Pulsometer
Engineering
Co. Limited,
v. Gracie.

Lease—Hypothec.—The landlord's hypothec does not extend to articles sent to a commission-agent for exhibition as samples.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

GILBERT BOGLE & COMPANY, commission-agents, at 6 Waterloo Street, Glasgow, acted as agents for the Pulsometer Engineering Company, Limited. They were also yacht-agents, and the pulsometers manufactured by the pulsometer company were a kind of pump suitable for yachts; samples of them were on exhibition in the premises in Waterloo Street, and in consideration of the room they required Bogle & Company received from the manufacturing company, besides their commission on sales, a sum of £30 towards payment of their rent. The pulsometers shewn in Bogle & Company's premises were not for sale, but merely samples for exhibition. Besides these articles there was on the premises a very small quantity of ordinary office furniture.

Robert Gracie, who was factor for the owners of the premises, having raised a process of sequestration for rent against Gilbert Bogle & Company, attached the pulsometers. The pulsometer company presented a petition in the Sheriff Court of Lanarkshire craving interdict against the sale. They pleaded that Gracie had no right over these articles. Gracie pleaded that they were subject to the landlord's hypothec, being the sole stock and plenishing on the premises.

On 27th July the Sheriff-substitute (Guthrie) pronounced this interlocutor :—"Finds that the engines, &c., set forth in the prayer of the petition, belong to the petitioners, and are not subject to the hypothec of the landlord, represented by the respondent: Therefore continues the interdict already granted, and declares the same perpetual."*

* "NOTE.—The following propositions as to hypothec in urban tenements are, I think, well settled, and are to be found in Bell's Commentaries, ii. 30, and Principles, 1275 and seq., in the recent case of *Nelmes & Company v. Ewing*,

The defender appealed, and argued;—The true principle was stated by Lord Moncreiff in *Jeffray's case*,¹ viz., that articles brought into a house

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11 R. 193, and *Bell v. Andrews*, 12 R. 961, where the authorities are fully cited:—

"1. The landlord of urban subjects has a hypothec for his rent over all moveables brought into the place let.

"2. The hypothec as a rule applies only to articles belonging to the tenant; and therefore not to articles deposited with him for temporary purposes or in the course of his ordinary business, as things left with a jeweller or carpenter to be repaired.

"3. But in a question with the landlord, things necessary for the tenant's proper enjoyment of the place let according to its intended use, although not belonging to him, are presumed to be his, and are subject to the landlord's hypothec: and the true owner is held by reason of his having allowed them to be so brought into the place let, to have taken the hazard of the rent, and assented to the landlord's hypothec. When these things are the whole 'plenishing' of a house or factory or shop, to which the landlord looks as security for payment of his rent, and which if wanting he might insist on the tenants putting into his premises on the pain of removing, it does not appear in principle to be material whether the owner lends them for hire or gratuitously, yet, if they are let for hire it has been thought to be an additional ratio for the hypothecation that the lender takes or may take the risk into account in fixing the hire.

"4. This extension of the hypothec beyond the tenant's own moveables does not affect single articles lent or belonging to lodgers or members of the tenant's family, and not forming part of the permanent and ordinary furnishing of the house or shop. Thus in the latest case a daughter's pianoforte was held exempt, and in many Sheriff Court cases, pianofortes and sewing machines have been held not subject to hypothec though hire was paid for them. There is no authority for this practice where hire is paid beyond certain general dicta of Lords Moncreiff, Deas, and others, and indeed it is rather contrary to the case of *Penson v. Robertson*, June 6, 1820, F. C. It seems, however, to proceed on grounds of expediency and on the existence of a generally-known custom of hiring out such articles which precludes the landlord's reliance on them as securing his rent. In the latest cases the Court has avoided giving any opinion on the point whether such single hired articles are subject to hypothec; but the inclination of the judges in *Bell v. Andrews* is favourable to freedom, and Lord Shand doubts *Penson v. Robertson*. I think, therefore, that the first sentence of this paragraph may be taken as applying to single articles lent for hire.

"5. The landlord's hypothec extends over the goods in a shop—the rights of bona fide buyers being protected.—*Bell's Commentaries*, ii. 31, Principles, 1276-7.

"6. It does not affect the goods in a store or warehouse for which the owner pays store rent, or the cattle on a grazing farm for which the owner pays grazing rent (*Bell's Commentaries*, ii. 31, Principles, 1276) on the obvious ground that the business for which the warehouse or farm is let involves the temporary occupation of the premises by the cattle or goods of third parties, and that it would be inconsistent with the implied terms of the lease to allow a hypothec except over the unpaid store rent or grazing rent.

"7. The hypothec does not extend over the effects of a subtenant beyond the amount of the subrent unpaid, unless in urban subjects subletting be expressly excluded by the lease.

"Although this case does not quite readily fall under any of the propositions above set forth, it seems to me that, upon the whole, there is no ground of principle on which the landlord is entitled to these machines as falling within his hypothec. There is no question as to the property of the engines, but only as to the footing on which they were brought into the premises. They were

¹ *Jeffray v. Carrick*, Nov. 18, 1836, 15 S. 43.

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with the owner's consent, even although lent gratuitously, fall under the hypothec. That principle was also laid down in the case of *Wilson v. Spankie*,¹ a case cited by Sheriff Hunter as establishing the rule that a house is let on security of the furniture, which according to appearance belongs to the tenant.² The articles here in question were the entire plenishing of the premises, a very material consideration for the application of the doctrine.³

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK.—Mr Low has stated everything that could be stated for his client in this question, but I do not think he has succeeded in giving us either principle or authority for setting aside the judgment of the Sheriff-substitute.

These articles which are said to fall under the landlord's hypothec were not the property of the tenant, they were not his stock in trade, nor were they intended for residential occupation of the premises. This person has taken the premises as agent for the patentee of the pulsometers, but he is not an agent for sale, but an agent to exhibit samples that customers might purchase, not from him but from his principals. His chief business is that of a yachting-agent, and as incidental to that business he undertakes to exhibit these pulsometers.

Mr Low has failed to shew that these articles came under any exceptions to the general rule of the law of hypothec, viz., that the property of third parties does not fall under the landlord's right. The principle of the exceptions depends upon the articles found in the tenant's premises being subservient to the contract of lease. House furniture for example is presumed to be used for the purposes of occupation. But the nature of the possession of the tenant here was altogether apart from that, and did not relate to the contract of lease.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Find that the engines specified in the prayer of the petition belong to the petitioners, and are not subject to the hypothec of the landlord, represented by the defender: Therefore dismiss the appeal, and affirm the judgment of the Sheriff-substitute appealed against; of new grant interdict as craved," &c.

J. & J. Ross, W.S.—MENZIES, COVENTRY, & BLACK, W.S.—Agents.

certainly not in the position of hired or lent furniture, for they were not there for the use and enjoyment of the tenant, nor did he pay hire for them. On the contrary, he got a substantial payment from the owners for standing room, and I would class the respondents rather with owners of goods stored in a warehouse, or with subtenants, than with a lender or hirer. The letting of an office or warehouse for the exhibition and sale of the miscellaneous articles in which a commission-agent deals involves in varying degrees the possession of property belonging to third parties. The general rule, as Lord Moncreiff says (15 S. 43), applies properly only to the tenant's own property. There is as yet no authority for extending the hypothec to the goods of third parties in such circumstances as we have here; to admit it would be inconsistent with the character of the business for which the place was let, and inconvenient for trade."

¹ Dec. 17, 1813, F. C.

² Hunter, ii. 378; cf. also Lord Deas in *Adam v. Sutherland*, Nov. 3, 1863, 2 Macph. 6, 36 Scot. Jur. 7.

³ *Nelmes v. Ewing*, Nov. 23, 1883, 11 R. 193.

MAGISTRATES OF GLASGOW, Complainers (Respondents).—

Sol.-Gen. Robertson—G. W. Burnet.

DAVID Hall (Collector for Glasgow City Parish), Respondent
(Reclamer).—*D.-F. Mackintosh—Dickson—Younger.*

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Valuation of Lands Act, 1854 (17 and 18 Vict. c. 91)—Valuation-roll—Review by Court of Session—Poor-Law (Scotland) Amendment Act, 1845 (8 and 9 Vict. c. 83), sec. 37.—A parochial board assessed for poor-rates the owner and occupier of water-works on the annual value of the subjects appearing in the Valuation-roll without allowing deduction of the average cost of repairs, insurance, &c., in terms of the 37th section of the Poor-Law Act, on the ground that the assessor in preparing the Valuation-roll had already made these deductions.

In a suspension *held* (1) that for the purposes of assessment under the Poor-Law Act, 1845, the Valuation-roll as completed in terms of the Valuation of Lands (Scotland) Act, 1854,* was conclusive as to the yearly rent or value of lands and heritages entered therein, and that the Court of Session had no jurisdiction to review the process by which the entry there made was reached, and (2) that before assessment the suspender was entitled to have the above deductions made from the sum entered in the Valuation-roll.

* The 6th section of the Valuation of Lands Act enacts,—“In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year,” &c.

The 33d section enacts,—“Where, in any county, burgh, or town, any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax under any Act of Parliament, is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages, as appearing from the Valuation-roll in force for the time under this Act in such county, burgh, or town, shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding,” &c.

The 34th section enacts,—“In all questions and proceedings under any Act of Parliament relating to the franchise, or to the representation of the people in Parliament, it shall be sufficient to refer to an entry in the Valuation-roll in force for the time, or last in force under this Act in any county or burgh, and such entry shall be received and taken in all such questions and proceedings as conclusive proof that the gross yearly rent or value of the lands or heritages specified therein is at the date of such reference, and has been from the commencement of the year to which such Valuation-roll applies, of the amount therein set forth; and it shall be competent in all cases, notwithstanding anything in any existing Act of Parliament to the contrary, to refer to such Valuation-roll in such Appeal Court, although such Valuation-roll may not have been produced or referred to in the Registration Court,” &c.

The 41st section enacts,—“Nothing contained in this Act shall alter or affect any classification or power of classification, or any deduction or allowances, or power of making deductions or allowances, from gross rental, made or possessed by any body, persons or person, entitled to impose or levy assessments, but the same shall not affect the value to be inserted in the Valuation-roll in terms of this Act; and nothing contained in this Act shall exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment.”

† The 37th section of the Poor-Law Amendment (Scotland) Act enacts,—“That in estimating the annual value of lands and heritages, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their actual state, and all rates, taxes, and public charges payable in respect of the same,” &c.

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1st Division.
Lord M'Laren.
B.

Observations (per Lord Shand) upon the method of reaching the annual rent or value of water-works and such subjects for the purposes of entry in the Valuation-roll.

THE GLASGOW CORPORATION WATER-WORKS were entered in the Valuation-roll made up by the Assessor of Railways, Canals, &c. for the year ending Whitsunday 1885 at £114,670. This sum represented the valuation as amended in terms of an interlocutor (dated 30th September 1884) of the Lord Ordinary on the Bills (Kinnear), to whom an appeal had been taken against the assessor's original valuation by the Magistrates of Glasgow, acting as commissioners under "The Glasgow Corporation Water-Works Act, 1855." *

By notice, dated 9th February 1885, David Hall, collector of poor and school-rates for the City Parish of Glasgow, intimated an assessment on the corporation water-works for the year from 15th May 1884 of £563, 9s. 7d. of poor-rate, and £243, 13s. 4d. of school-rate—together £807, 2s. 11d.—upon an annual value of lands and heritages amounting to £11,696. The Magistrates objected to the terms of the notice, and intimated to the assessor that he had failed to make the deductions from the valuation which were allowed by the 37th section of the Poor-Law Amendment Act, 1845 (8 and 9 Vict. c. 83). In previous years, they stated, a deduction of 20 per cent had been allowed upon that head.

An offer of payment, under deduction of 20 per cent, having been refused by the assessor, he afterwards obtained a warrant for payment of the £807, 2s. 11d., with costs, and executed a poinding thereon.

The Magistrates thereupon brought a note of suspension and interdict of these proceedings, claiming that they were entitled to certain deductions under the 37th section of the Poor-Law Act, 1845.

The collector of poor-rates answered that the assessor had already, under the Valuation Act, 1854 (17 and 18 Vict. c. 91), and in accordance with the terms of Lord Kinnear's interlocutor,* allowed all the deductions to which the complainers were entitled, and that the valuation thus arrived at fulfilled all the requirements as to deductions of the 37th section of the Poor-Law Act, 1845.

The complainers replied,—“The explanations in answer are denied, and averred that this claim is not included in or covered by the deductions allowed under the provisions of the Valuation Act in making up the Valuation-roll. Further, the provisions of the said statute, and particularly section 33 thereof, make the Valuation-roll conclusive on the question of value, and the respondent is not entitled to open up that question, or to inquire as to how the said roll has been made up, and the value entered therein arrived at, or the purposes for which any deductions claimed under it may have been allowed.”

They pleaded, *inter alia* ;—(1) The amount stated in the Valuation-roll, made up by the assessor as the annual value of the undertaking of the complainers, is conclusive as regards the respondent, and he is not entitled to re-open that valuation or to inquire as to the basis upon which the same was made up. (2) The complainers being entitled to the deduction allowed to all other owners of lands and heritages within the

* Lord Kinnear's interlocutor was :—“ Finds that in fixing the annual rent or value of the lands and heritages belonging to the appellants, a deduction should be allowed from the gross revenue of all necessary outlays for management, maintenance, and repairs which are properly chargeable against revenue, and not merely of a proportion of such charges ; to this extent and effect sustains the appeal ; *quoad ultra* dismisses the same, and remits to the assessor to amend the valuation in accordance with this interlocutor.”

City Pariah, under section 37 of the Act 8 and 9 Vict. cap. 83, for which the respondent refuses to give them credit, the proceedings complained of ought to be suspended, and interdict granted against the respondent as craved.

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The respondent pleaded, *inter alia* ;—(2) The note falls to be refused, with expenses, in respect that the annual value of their lands and heritages upon which the complainers are assessed, is their annual value in terms of section 37 of 8 and 9 Vict. cap. 83. (3) All the deductions to which the complainers are entitled under section 37 of 8 and 9 Vict. cap. 83, having been allowed, the note ought to be refused, with expenses.

The complainers subsequently put in a minute, stating the several heads under which they claimed deductions from the annual value appearing in the Valuation-roll.* These heads and the different items

* These heads of deductions were—

"I.—REPAIRS.

"1. Repairs at Gorbals Works,	£1,615	7	2
"2. Alterations on Kelty bridges,	330	14	1
"3. Repairs on Corrie Burn aqueduct bridge,	95	8	11
"4. One-half of wages to inspectors and artisans, &c. in making repairs,	6,428	17	0
"5. One-half of cost of castings, ironmongery, &c. used in repairs,	1,516	4	6
"6. One-half of cost of masonry, stones, lime, &c. used in do.,	216	1	5
"7. One-half of cost of wright and wood work used in do.,	93	10	3
"8. One-half of leather and indiarubber used in do.,	24	7	8
"9. One-half of oils, paints, tallow, &c. used in do.,	67	7	6
"10. One-half of rope yarn and cotton waste used in do.,	31	3	9
"11. One-half of carriage of materials used in do.,	239	10	8

£10,658 12 11

"Deduct amount received for work and materials, 2,359 9 8

£8,299 3 3

"II.—INSURANCE.

"On buildings, 27 1 9

"III.—OTHER EXPENSES, not included in the foregoing, viz :—

"1. One-half of horses' keep, saddlery, &c.,	£136	10	9
"2. One-half of rent, &c. of workmen's houses,	131	4	3
"3. Compensation to owners of fishings on rivers Forth and Teith,	120	0	0
"4. Charges for general law business,	82	17	11
"5. Parliamentary expenses, general,	102	3	11
	572	16	10

"IV.—RATES, TAXES, and PUBLIC CHARGES payable in respect of the subjects assessed.

"1. One-half of rates and taxes,	£4984	15	11
"2. One-half of fee to public assessor for Valuation-roll, &c.,	51	7	6
"3. Stamps for mortgages,	18	12	6
	5,054	15	11
	£13,953	17	9

"And further, the complainers crave to be allowed the following deductions for depreciation or deterioration of the subjects belonging to them, viz :—"—

Four items, amounting in all to £2614 8 4

[The whole deductions claimed amounted accordingly to £16,568, 6s. 1d.]

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brought out as representing each were most of them identical with the particular deductions which had been already given effect to by the assessor under the 33d section of the Valuation Act, 1854, and which amounted in all to £16,733, 15s. 4d.

After a proof, at which evidence was led as to the method of valuing water-works, the Lord Ordinary (M'Laren), on 20th May 1886, pronounced this interlocutor:—"Finds that the complainers are entitled to deduction of the estimated or probable annual average cost of the repairs, insurance, and other expenses which are necessary to maintain the water-works and others constituting their undertaking in their existing state, and all rates, taxes, and public charges payable in respect of the same: Finds that the complainers are liable to be assessed for the relief of the poor on the annual value of their undertaking as appearing on the Valuation-roll, *videlicet*, on the sum of £114,670, under deduction as aforesaid: Finds the circumstances stated, shewing that the various elements of deduction here specified were to certain effects taken into account by the Court in fixing the annual value of the said undertaking, do not constitute a relevant answer to this complaint; and appoints the case to be further heard on the question of the amount of the deduction to be made, in terms of the preceding findings and of the Poor-Law Amendment (Scotland) Act, 1845."*

* "OPINION.— . . . The defence, shortly stated, is that under an appeal to the Lord Ordinary on the Bills against the assessor's valuation, Lord Kinnear, the Lord Ordinary officiating in the Bill-Chamber, after hearing counsel, reduced the assessable value by taking off a sum which his Lordship held to be the equivalent of the cost of maintenance, repairs, public burdens, and other outgoings. Thus, it is said for the defender, the complainers have already received the benefit intended by the statute in another form, and are not entitled to a second deduction in respect of the same outgoings.

"The apparent reasonableness of this contention appeared to me to recommend it to favourable consideration; but while willing, if possible, to give effect to it, I have not been able to remove the impression I originally formed of its essential unsoundness.

"I cannot adopt the suggestion that the Lord Ordinary on the Bills, in reducing the assessor's valuation to a lesser figure, was making the deduction contemplated by the Poor-Law Amendment Act.

"It is settled by decisions of this Court, and is matter of familiar and unvarying practice, that the deductions authorised by the Poor-Law Act of 1845 are deductions to be made in diminution of the sum in the Valuation-roll. This was of course known to the counsel who argued the case, and to the Lord Ordinary; and in the report of the case which has been furnished to me, there is nothing which suggests in the faintest degree that the Lord Ordinary was asked to anticipate, or meant to anticipate, the Poor-Law Act deductions from rental.

"The fixing of the annual value is very much a discretionary proceeding; the Judge is not bound by any fixed rules, and his decisions have not been considered always to have the same finality, as regards future valuations, which we are accustomed to attribute to the decisions of a Judge on strictly legal questions. It is therefore for consideration whether in this question I ought to look to the grounds of the Lord Ordinary's decision at all, or to look at anything except the sum in the Valuation-roll; taking that sum as a gross valuation from which certain statutory deductions are to be made.

"I may say, however, that I have carefully considered the note of Lord Kinnear's opinion, and that in my apprehension it does not support the respondent's contention.

"I understand that his Lordship expressed the difficulty, which has been felt in similar cases, of realising the case of a hypothetical tenant who would take over such an undertaking as the Glasgow Water-works at a yearly rent, especiall

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On 9th June following the Lord Ordinary further found that the claimers were entitled to deduction of all the sums claimed in their minute under the head of repairs, insurance, rates, taxes, and public charges, but not of the sum paid in compensation to owners of fishings and charges for law and parliamentary expenses, nor in respect of depreciation or deterioration of the subjects, and accordingly that the value on which the claimers ought to be assessed was £102,478.

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The respondent reclaimed, and argued ;—His main object was to obtain the judgment of the Court upon the question whether the double deductions which had been allowed were rightly so allowed or not. This had been a disturbing question for many years, and it had been impossible to get it settled, owing to the fact that one Lord Ordinary took one view and another another. There was no dispute as to the facts. They practically came to this, that deductions were given for the same items twice over, once in fixing the revenue, on the amount of which the entry in the Valuation-roll depended, and again in fixing assessable value under section 37 of the Poor-Law Act. It was important to inquire how the matter would have stood prior to the passing of the Valuation Act in 1854. Under section 37 of the Poor-Law Act the parochial board had had the same duty to perform as now fell upon the Judges in the Valuation Appeal Court under the 6th section of the Valuation Act, viz, to fix the rent for which, one year with another, lands and heritages would let. The board had then to consider what further deductions ought to be made, and if the Lord Ordinary was right in saying that a double deduction was legitimate now, then it was equally so before 1854.

in view of the statutory provision to the effect that the proprietors of the undertaking are not to make a profit by the sale of the water beyond the surplus which they are authorised to set aside as a sinking fund.

"It is plain enough, and it is known to the profession, that the application of the Valuation Act to public undertakings is difficult, and that the value of such concerns is arrived at by a highly artificial system of rules, which, as I have said, are not strictly obligatory, but are used as guides to the ascertainment of a reasonable value. In ascertaining the rent to be given by the hypothetical tenant, every element is taken into account which a tenant would consider preparatory to making his offer. Amongst these, repairs, insurance, maintenance, rates, and taxes are of course considered ; because no tenant, in considering what rent he could afford to give, would omit to take account of such outgoings. The larger the outgoings, the less rent would the tenant be able to give, other circumstances being supposed equal ; and therefore outgoings are rightly and necessarily allowed for in making the valuation as deductions from the gross income of the hypothetical tenant. But a deduction from gross income and a deduction from assessable value are very different things, and the Lord Ordinary in making the first of these deductions left the second entirely unaffected.

"The same distinction might, indeed, be taken respecting private property. I can imagine a tenant, anxious to remain in his house, warehouse, or farm, making a calculation to find what was the highest rent he could afford to offer, on the footing that he was to undertake repairs, taxes, insurance, and charges. He would certainly consider such repairs, taxes, &c., as elements of deduction from gross profits before he could arrive at the sum available for rent. But none the less would he be entitled, when he came to settle with the inspector of poor, to claim that these very elements should be deducted from the actual rent stated in the Valuation-roll, and to pay poor-rate only on the difference.

"It appears to me, indeed, that there is no real inconsistency between the judgment I propose and that which was given in the Valuation-roll appeal case, nor is there in reality a case of double deduction. The same elements undoubtedly enter into the two computations, but they enter these in different ways, and for different purposes. . . ."

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It would surely have been a strong thing to say that, in the first place, landlord's taxes were to be deducted in fixing the rent at which the subjects were let from year to year, and again to deduct them as specifically authorised to be done by the latter part of the same section 37. Surely the rent was something apart from landlord's taxes and such like obligations, whether it was the rent of a tenant actually paying rent, or the hypothetical rent paid by a party who himself occupied his lands. Rent could not be so ascertained, because such taxes were only exigible upon rent, and after it was fixed. In other words, the rent there meant was gross rent, which a tenant paid on the footing of the landlord performing his ordinary obligations, including, of course, the payment of taxes. Nor could the particular kind of subject to be dealt with make any difference. For instance, when land was in a proprietor's own occupation, the valuation tribunals did not permit a deduction for landlord's repairs and such like in order to reach the gross rent.¹ The fact that no tenant's profits were possible, or at least were allowed to be made, in a subject like the present, did not justify a deduction for taxes such as had been allowed, which was inconsistent with the nature of rent, and not contemplated as regarded any other description of subject; yet this was what Lord Kinnear had done.

But, in the next place, was it really the case that the water-works in question could not, in a statutory sense, be let? The statute gave a right to levy water-rates, and the collection of these assessments could be farmed out; and the question under the Valuation Act was, What would a hypothetical tenant pay for the right of collecting these rates? He would pay the full amount of rates, less tenant's profits. These profits would just be a reasonable remuneration for the cost of collection. This was the view taken in England, and particularly by Lord Blackburn in the case of the *Mersey Docks*.² Suppose one Judge was to perform both functions, i.e., was first to ascertain the rent, and, having ascertained it, was then to make the deductions specified in the latter part of clause 37 of the Poor-Law Act, he would surely decline to make the same deductions twice, whatever his views might be as to the one stage at which they ought to be made. That case had actually occurred,³ and the principle was there recognised that double deductions ought not to be allowed.

If the present question had arisen prior to 1854, gross rent would first have been struck and then the deductions specified in section 37 would have been allowed—or if the deductions had been allowed before gross rent was struck, then they would not have been allowed a second time. The Act of 1854 established two tribunals instead of one, but the Legislature did not intend to alter the principles of assessment. It was not provided that for all purposes of assessment rent must mean the amount in the Valuation-roll. At least that was not to be presumed. The sections of the Valuation Act which bore upon this matter were sections 6, 33, 34, and 41. The term "gross rent" occurred twice, viz., in sections 34 and 41. If sections 6 and 33 had stood alone they would have swept away the right to deductions altogether. They declared the Valuation-roll conclusive merely as regarded assessable rental, and made it the basis of assessment, without reference to deductions. But for section 41 the effect of section 33 would have been to repeal all other modes of ascer-

¹ North British Railway Co. v. Assessor for Leith, Feb. 9, 1884, 11 R. 558.

² Mersey Docks v. Liverpool, Nov. 19, 1873, L. R., 9 Q. B. 84 (Lord Blackburn, p. 92).

³ Edinburgh and Glasgow Railway Co. v. Adamson, June 28, 1855, 17 D. 1007.

taining assessable value, except that provided by it. It was on section 41 that the other side relied. But in order to prevail, they must shew that the deductions provided for in section 41 were deductions from gross rental. But the deductions which had been allowed by Lord Kinnear in order to reach the amount now entered in the Valuation-roll made that amount something different from gross rental. His Lordship had virtually held that while the amount entered in the Valuation-roll was gross rental in the case of all ordinary subjects, yet, that where a special subject like the present was being dealt with, it was not gross but net rental that was meant.

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—A further question was, whether, assuming that there was a double deduction in the present case,—off revenue first to arrive at the valuation, and then off that valuation, in respect of the provisions of the Poor-Law Act,—the Court could get behind the supposed finality of the Valuation-roll. It was no doubt true that this Court had no jurisdiction to deal with questions of valuation, but it could review and regulate assessment, and the roll was the basis of the assessment which was here in dispute.¹ Practically Lord Kinnear's decision came to this, that the entry in the Valuation-roll represented net and not gross rental, because he had deducted landlord's taxes and repairs. His Lordship had apparently so decided in ignorance of the fact that the same question had been fully considered by Lord Craighill and Lord Curriehill in the Valuation Court, and decided in a different way some years ago.² So, too, Lord Trayner in two recent cases³ had declined to allow the deduction of landlord's taxes, and Lord Kinnear had proceeded in another case upon the same footing.⁴

The respondents argued;—The position taken up by the reclaimer was irrelevant, (1) because it was not possible for the Court to which he was appealing to get behind the Valuation-roll, which constituted for the purposes of assessment conclusive evidence of the rent or value of the subjects to be assessed, and (2) because it was no answer to a claim for deduction from ascertained rent that the same deductions had been previously made from revenue in fixing the rent.

I. The duty of the assessing body under section 33 of the Valuation Act was to take the rent entered in the Valuation-roll and from that rent to make deductions under the 37th section of the Poor-Law Act.⁵ The statutory separation of the two functions was at the root of the question involved in the case. The argument upon the other side really came to this, that the parochial board—the assessing body under the Poor-Law Act—were entitled to review the actings of the assessor under the Valuation Act, or of the Lord Ordinary to whom there was an appeal. *De jure* the valuation found in the Valuation-roll must be held to have been arrived at as the gross rent of the subjects, and the deductions were made from something else than gross rent before gross rent was struck.

II. *De facto*, also the sum entered in the Valuation-roll was gross rent, being revenue with certain rough deductions made therefrom. The method adopted by the assessor might not have been the best method. He had

¹ Sharp v. Parochial Board of Latheron, July 12, 1883, 10 R. 1163.

² Dundee Gas Commissioners, Jan. 12, 1881, 9 R. 1240.

³ The City Parish of Glasgow v. The Assessor of Railways and Canals, Sept. 29, 1885, 24 S. L. R. 3; Magistrates of Glasgow, &c., Oct. 3, 1884, 12 R. 3.

⁴ Caledonian Canal Commissioners v. Assessor of Railways, Sept. 29, 1886, 24 S. L. R. 80. *Other authorities cited*.—Local Authority of Dalbeattie v. Assessor for Kirkcudbright, March 1, 1882, 10 R. 23; City Parish of Glasgow v. Assessor of Railways, Sept. 29, 1885, 24 S. L. R. 3.

⁵ Edinburgh and Glasgow Railway Co. v. Meek, Dec. 10, 1864, 3 Macph. 229, Lord President Colonsay and Lord Curriehill, p. 236, 22 Scot. Jur. 17.

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taken as his basis for arriving at the rent or value the gross amount of water-rate levied under the statute, with deduction of all necessary outlays for management, maintenance, and repairs. There was nothing in the Act of Parliament suggesting such a proceeding. It was a purely artificial system which had been brought into use in order to meet the exigencies of the formula prescribed in the 6th section of the Valuation Act. It might be that the formula was inapplicable to such undertakings as the present, and that very little was now left of the hypothetical tenant beyond his name,—the position here really being that such a tenant would give nothing by way of rent, inasmuch as profits being precluded and the available income being applied to other purposes than tenant's profits, the subject yielded nothing. The revenue, therefore, which was taken by the assessor as a basis, had no relation to rent, or the value of the subjects. It was an artificial basis for working upon by means of abatements and calculations. The contention of the reclamer that no deductions should be allowed by the assessor before fixing gross rent came to this, that the hypothetical tenant would have to undertake the management of the concern at a loss, because he would have to pay whatever outlays there were out of his own pocket.¹ The Act of Parliament could scarcely require the hypothetical tenant to act simply as the administrator of the proprietors of the undertaking. The only deduction which it was proposed to concede was an allowance for collection. But it must be kept in view that the subject remained in the hands of the proprietor. The hypothetical tenant or the farmer of the revenue did not enter into possession. Accordingly, the proprietor had to keep up the subjects, and Lord Kinnear was therefore right in deducting taxes and maintenance, and cost of collection. Whether the method was a good or a bad one, it was a roundabout way of striking gross rent. It was not necessary to say there was any double deduction. The assessor rather deducted a lump sum in name of burdens. It was said that the *Mersey Docks* case² was an authority to the opposite effect. But the importance both of that case and of the *Worcester* case³ was overrated, even assuming that the English and Scottish Statutes were identical, which they were not. The *Mersey* case merely decided that tenants' profits were not to be deducted, on the ground that the making of profits was not allowed by the statute. Accordingly, Lord Kinnear's judgment was quite consistent with that case.

At advising,—

LORD PRESIDENT.—This is a suspension by the Magistrates and Council of Glasgow, as Commissioners under the Glasgow Corporation Water-Works Act of 1855, against the collector of poor's-rates of the City Parish, and the ground of complaint is that, in charging the lands and heritages belonging to these commissioners for poor's-rates, the collector has not deducted the average cost of repairs, insurance, and other expenses necessary to maintain the lands and heritages in their actual state, and the rates, taxes, and public charges payable in respect of the same, under the provisions of the 37th section of the Poor-Law Amendment Act, 1845. The answer which the collector makes to this complaint is that these deductions have already been made to a greater or less extent in

¹ *Caledonian Canal Commissioners v. Assessor of Railways*, Sept. 29, 1886, 24 S. L. R. 80.

² L. R., 9 Q. B. 84.

³ *Corporation of Worcester v. Droitwich Assessment Committee*, 1876, L. R., 2 Exch. Div. 49.

making up the Valuation-roll, and ascertaining the annual value of lands and heritages in terms of the Valuation Act, 1854. No. 69.

I am of opinion with the Lord Ordinary that this is not a relevant answer to the complaint. But, as I do not arrive at that conclusion on the same grounds as the Lord Ordinary, I think it necessary to explain precisely the view I take of these statutes—I mean the Poor-Law Act, 1845, and the Valuation Act, 1854. Jan. 14, 1887.
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The 37th section of the Poor-Law Act, 1845, imposed two duties on the collector of poor's-rates or on the parochial board. It provided that, "in estimating the annual value of lands and heritages, the same shall be taken to be the rent at which, one year with another, such lands and heritages might, in their actual state, be reasonably expected to let from year to year." That rent having been ascertained, the board was then directed further to make the deductions which I have already mentioned.

The effect of the Valuation Act (17 and 18 Vict. c. 91) was to transfer the first of these duties from the assessing board to the assessor created by the statute. The parochial board and its officers have no longer anything to do with estimating the annual value of lands and heritages. They have only to take the estimate of the value of these lands and heritages as it appears in the Valuation-roll of the year, and then to make the deductions specified in the 37th section. The Valuation Act proceeds upon this consideration, that "it is expedient that one uniform valuation be established of lands and heritages in Scotland, according to which all public assessments leviable, or that may be levied, according to the real rent of such lands and heritages may be assessed and collected, and that provision be made for such valuation being annually revised." The term "real rent" there is used as in contrast with the old valued rent. The valuation is made under the statute for the purpose of fixing the value with reference to all assessments that are levied on what may be called actual value, or the real rent of the lands, as opposed to the artificial or ancient value known under the technical name of valued rent. The first important section in the statute for the present purpose is the 6th, which really repeats the words in the 37th section of the Poor-Law Act so far as regards the estimate of the annual value. It says,—“In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might, in their actual state, be reasonably expected to let from year to year.” That I take to mean the gross rent of lands—the amount of the actual rent paid if there be any, or the equivalent of that, by calculation or estimate, if there be not. And, while these words themselves are quite sufficient to shew that the entry in the Valuation-roll is to be an entry of gross rent, that is made still more clear by a subsequent part of the section, which provides that “Where such lands and heritages are *bona fide* let for a yearly rent conditioned as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act.” It is quite plain, therefore, that the intention of the statute is that where lands are let on lease, and the rent stipulated in the lease is the full payment made for the possession of the lands, that is to be taken as the “yearly value in terms of this Act,” and that, of course, must be gross rent. Then, this matter of ascertaining the value is carried through by the machinery which is provided in the Act, which lays the estimating of the value on the assessor, the estimate of the assessor being

No. 69. subject to review by the Commissioners of Supply of every county and the magistrates of every burgh under the 8th section of the statute, whose determination upon an appeal "shall be final and conclusive, and not subject to review." Jan. 14, 1887. It may be as well to mention in passing, that, by subsequent statutes (80 and 31 Vict. c. 80, and 42 and 43 Vict. c. 42), the Commissioners may be asked to state a case for the opinion of two Judges of the Court of Session, and the determination of the two Judges is declared to be, as the judgment of the Commissioners was, final and conclusive, and not subject to appeal. So that, wherever the value of lands and heritages has been thus ascertained under these Acts, it is final, and not subject to appeal, and the entry in the Valuation-roll necessarily remains for a year, and is the ruling estimate for that period. The matter cannot be carried any further.

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The clauses to which I have hitherto been referring are applicable to what may be called ordinary lands and heritages. But there are certain kinds of lands and heritages, which, being of a very peculiar description, especially as regards annual value, require a different arrangement, and, accordingly, in the case of railways and canals, there is a special provision in the 22d section. It is very difficult to estimate railways and canals according to the rule prescribed in the 6th section, because the subjects are not generally let, or capable of being let, and, accordingly, to ascertain their annual value by reference to the yearly rent at which they may be expected to let is not a very good criterion. Accordingly, a special provision is made by the 21st section for the case of railways and canals—the leading object of that section being, however, to enable the assessor to divide the *cumulo* value of the whole subject between the different parishes through which the railways and canals pass. But for this purpose there is a rule provided by the 22d section, a purely artificial rule, requiring that there shall first of all be an ascertainment of *cumulo* value, and a certain deduction made in respect of the stations, wharves, docks, and such like things, which form part of the composite subject, and it is needless to pursue that further. It is enough to say that the rule there established, although it is not perhaps the best that could be devised, has been acted on for a long time, and seems to work well enough.

But the subject we are dealing with here is not a railway or a canal, although it is a subject of a kind in some degree resembling a railway or a canal, because it is situated in a variety of parishes. Accordingly, section 23 provides for the case of such works,—“Where any water company or gas company, or other company, having any continuous lands and heritages liable to be assessed in more than one parish, county, or burgh, shall desire to have such lands and heritages assessed by the assessor of railways and canals, under this Act, it shall be competent to such water or gas or other company to make intimation in writing of such desire, . . . and thereupon such assessor of railways and canals shall be exclusively charged, subject to appeal as herein provided, with the valuation of the lands and heritages in Scotland of such water or gas or other company in terms of this Act.” And the assessor is to inquire into and fix *in cumulo* the yearly rent and value, “in terms of this Act.” Now, that certainly can mean nothing else than to inquire into and fix the gross rent or value, because in the leading section, section 6, that is the thing to be ascertained, and entered upon the Valuation-roll; and the object of this section is to ascertain the same thing in regard to those special kinds of lands and heritages, which are not very easily brought within the rule of the 6th section. Accordingly, the words “in terms

of this Act" must be held to refer back to that 6th section. Then the section goes on further to provide that, having ascertained the *cumulo* rent or value, the assessor is "to set forth in such Valuation-roll, in columns, the yearly rent or value, in terms of this Act, *in cumulo*, of the whole lands and heritages in Scotland belonging to or leased by each such water, gas, and other company respectively, and forming part of its undertaking, the names of the several parishes, counties, and burghs in which its said lands and heritages, or any part thereof, are situated, and also the yearly rent or value, in terms of this Act, of the portion in each such parish, county, and burgh, separately and respectively, of the lands and heritages belonging to or leased by each such water, gas, and other company respectively, and forming part of its undertaking." Then, in case the company which is applying under the 23d section to have the lands valued should be dissatisfied with the determination of the assessor of railways and canals, there is a provision for an appeal to the Lord Ordinary on the Bills, and in this appeal the Lord Ordinary on the Bills is made final, just as in the ordinary case the two Valuation Judges are.

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Before observing further upon the effect of these clauses, it is necessary to take into account section 33, which provides, "Where, in any county, burgh, or town, any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax under any Act of Parliament is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages as appearing from the Valuation-roll, in force for the time under this Act, in such county, burgh, or town, shall, from and after the establishment of such valuation therein, be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding." Now, taking these sections together, it appears to me that when the valuation has been made, either under the 6th by the ordinary assessor, or under the 22d or the 23d section of the statute by the assessor of railways and canals, and where that has been acquiesced in, or taken to appeal and finally determined, in the one case by the Valuation Judges and in the other case by the Lord Ordinary on the Bills, it is impossible to go back in any way on what has been done. The assessment, if acquiesced in, of course puts an end to every such inquiry, and if there is an appeal, in the one case or in the other, the judgment of the Court of appeal is final, and cannot be reviewed by any Court.

The natural conclusion to be drawn from these clauses appears to me to be that, when there is presented to us an entry in the Valuation-roll, according to which the assessment has been laid on, either with or without deduction, as may be the case with the particular assessment in question, we are bound to take the entry in the Valuation-roll as conclusive evidence of what is the gross rent or annual value of the lands and heritages in question. We have no jurisdiction to inquire whether the Valuation Judges, in the one case, or the Lord Ordinary on the Bills, in the other, has been right or wrong in affirming or altering the determination of the assessor. It would be to review their judgment if we were to consider how they arrived at the result, or whether they arrived at it rightly; and that is specially excluded by the provisions of this Act of Parliament, which declare their determinations to be final. Therefore the simple ground on which I reach the conclusion that the answer made to the complainers is irrelevant is

No. 69. this, that it is impossible for anyone here in this process to impugn the entry in the Valuation-roll for the year in question. It is conclusive, and it does not matter whether it was rightly arrived at or not, because the statute says it shall be held to be right—there shall be no review of it—it is final and conclusive.

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Therefore, I think we should be overstepping our jurisdiction altogether, if we inquired in what manner this entry in the Valuation-roll was arrived at. It stands as for the year—the ascertained gross yearly rent or value of the subject; and according to the 37th section of the Poor-Law Act, the person assessed is entitled to have certain deductions made from that gross rent or value. This is sufficiently apparent upon the face of the statute, as I have read it, but to remove all doubt upon the subject there is section 41, which provides that nothing in the Valuation Act shall alter or affect any classification, or any deduction or allowances, or power of making deductions or allowances from gross rental, made or possessed by anyone entitled to impose or levy assessments, but the same shall not affect the value to be inserted in the Valuation-roll in terms of this Act. Therefore, I am clearly of opinion that we cannot touch the entry in the Valuation-roll, or inquire in any way in what manner it was ascertained or reached. Upon these grounds, I am for substantially adhering to the judgment of the Lord Ordinary.

LORD MURE.—I am also for adhering to the judgment of the Lord Ordinary, and I have no difficulty in concurring with what your Lordship has said as to the finality of the decision of the Lord Ordinary on the Bills, when acting as an Appeal Judge under the Valuation Act in cases which come before him upon appeal from decisions of the railway assessor. We cannot get behind the valuation fixed by the assessor, which is final when not appealed, or behind that fixed by the Lord Ordinary on the Bills upon appeal. In either case it is the valuation so fixed which regulates the imposition of assessments, as provided in the Valuation Act; and I think this Court has no jurisdiction to interfere, or to inquire into the way in which the Lord Ordinary on the Bills proceeded, or as to what he actually did. The amount fixed by him, however, is to be subject, in respect of the provisions of the 41st section of the Valuation Act, to the deductions which may have been allowed by any other Act of Parliament to be made from gross rental in imposing the assessment.

In illustration of that view, it appears to me that when we look at the 6th section of the Valuation Act, it will be found to contain precisely the same provisions up to a certain point as the provisions of the 37th section of the Poor-Law Act. That is to say, it contains the provisions of section 37 up to that part of the section where the deductions are specified. In the 6th section of the Valuation Act, there is no provision about making deductions; so that when the assessor under the Valuation Act makes up his roll in terms of the 6th section, it is, in the ordinary case, a roll of the gross rental; and from that roll so made up the deductions specified in the 37th section of the Poor-Law Act may still be made in laying on the assessment. Indeed the board are bound to make them. That, I think, is the fair reading of the 6th section of the Valuation Act, as compared with the 37th section of the Poor-Law Act; and that point was, I conceive, decided in the case of the *Edinburgh and Glasgow Railway Company v. Meek*, 3 Macph. 229. If, therefore, a proposal had been here made to get behind the valuation made up by the ordinary assessor, it is clear to me that we

should have had no jurisdiction to entertain it, for the assessor's valuation is final. No. 69.

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In the same way, in the case of railways and canals, if an appeal is made from the special assessor's valuation to the Lord Ordinary on the Bills his decision is final. At first I had some difficulty in this case on the point whether the Valuation-roll made up under the provisions of the 21st, 22d, and 23d sections of the Act relative to railways and canals could be said to be made upon gross rental in the sense of the statute. By the 41st section of the statute, it is only valuations made upon the gross rental that are to be subject to the deductions. That is the expression in the 41st section, and my difficulty was this, that what is fixed as gross rental under the 6th section is itself by section 22 made subject to deductions. The 20th section provides for the appointment of an assessor. Of section 22 the rubric is this:—"Mode in which the yearly rent or value of railways and canals is to be ascertained," and it defines the mode of ascertaining the yearly value of railways and canals. The provisions are:—"The yearly rent or value, in terms of this Act, of the lands and heritages in any pariah, county, or burgh belonging to or leased by any railway or canal company, and forming part of the undertaking of such company, shall be ascertained as follows"—not in terms of the 6th section but "as follows"; "that is to say, there shall be deducted, in the first place, from the *cumulo* yearly rent or value of the whole lands and heritages in Scotland as aforesaid of each such railway or canal company," and so on. Now, that directs deductions to be made from the *cumulo* value of the lands. The difficulty I had was whether a roll made up, beginning with a deduction of 3 per cent, can be said to be a Valuation-roll setting forth the gross rental mentioned in the 41st section, the deduction having been expressly appointed to be made under section 22 from the *cumulo* yearly rental. What therefore is thus brought out as the value of railways and canals can scarcely, strictly speaking, be called gross rental (as in section 41), but a reduced rental, as provided in the 22d section. I thought that a point of considerable nicety. But I have come to be of opinion that it is practically settled by the decision in *Meek's* case to which I have already referred. There the Court unanimously held that a deduction was to be made in the case of a railway company. That railway company was assessed by the assessor of railways, and the provisions to which I have referred were necessarily before the Court when they pronounced their decision. I think that decision is applicable here, and it seems to settle the point that from the valuation made up by the assessor of railways and canals the same deductions have to be made as those that fall to be made from the valuation of the assessor who acts under the 6th section.

I am of opinion, therefore, that the decision of the Lord Ordinary should be affirmed.

LORD SHAND.—I am of the same opinion. I think the judgment of the Lord Ordinary ought to be affirmed.

It seems to me to be plain, as the result of section 33 of the Valuation Act, that the rent which is brought out by the assessor of railways and canals, or by the commissioners who deal with such valuations in the ordinary case, is to be taken as conclusive for the purpose of any parochial assessment. The clause expressly provides that the amount of rent so fixed shall be deemed and taken to be the just amount of real rent for the purpose of such parochial assessment.

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That being so, we have thereby provided the first term required by those who are imposing an assessment under the Poor-Law Act. We have the rent thereby fixed; and all that the persons who are imposing that assessment have to do thereafter is to proceed to make the deductions which the Poor-Law Act itself authorises. I agree with your Lordship in thinking that we must take what we find in the Valuation-roll as conclusively fixing the real rent, and that we have no authority to inquire into the particular mode in which that rent was reached, or to consider what deductions the assessor or the Lord Ordinary dealing with the matter took into view. Upon that ground I agree with your Lordships in thinking that the judgment should be affirmed.

I am, however, bound to say further that counsel for the reclamer have entirely failed to satisfy me that the view taken by Lord Kinnear is unsound in fixing the real rent as he did. They have not satisfied me that he has in any true sense made the same deductions which it was said are now asked for a second time. Certainly his Lordship in reaching the sum which he thought right, and fixing the valuation, did not profess to make deductions from rent. His Lordship, on the contrary, was seeking to arrive at the rent, and not, having ascertained the rent, to make deductions from it. The mode in which he proceeded was to look at the income and to make certain deductions from income or revenue as the means of reaching what he regarded as the gross rent to be entered in the Valuation-roll. A deduction for any such purpose is, in my opinion, not a deduction from rent in the sense contended for here; and therefore, if it were competent to go into that question at all, I should agree with the Lord Ordinary in the view expressed by him in this case.

I shall only say this further: A desire was expressed on the part of the reclamer that there should be an expression of opinion as to the soundness of the judgments of Lord Kinnear and the other Judges who have dealt with this matter of valuation in the Bill-Chamber. Even if it were competent to give such an expression of opinion, I should be very slow to do so, for this amongst other reasons, that the question that has been discussed before the Court was not whether the Valuation-roll originally made up and settled by Lord Kinnear was a right valuation. The argument was directed to another purpose, and any incidental argument in reference to the judgment of Lord Kinnear in the Valuation Court would not be exhaustive on a question of this kind.

But I am clear that, as the statute makes the Lord Ordinary sitting in review of the assessor of railways and canals final in the matter of valuation, he must be the judge of that matter, and this Court has no power to deal with it; and I think it would be improper that we should express any opinion upon it. If the parties should be advised that considerations have not been hitherto laid before the Lord Ordinary who deals with these valuations, which might affect his judgment, the proper course to pursue is to bring that under the attention of the Judge by a new appeal when the proper time comes. The parties must judge for themselves whether there are other circumstances or new arguments which have not hitherto been presented which might lead to a refusal to give deductions which have hitherto been allowed. With these matters we cannot deal, and I do not think the desire which the reclamer expressed to have an opinion from this Court on that subject can be acceded to in this case.

LORD ADAM.—The yearly rent or value of the subjects in this case was ascer-

tained by the Assessor of Railways and Canals under the 23d section of the No. 69.
 Lands Valuation (Scotland) Act. In my opinion the rent or valuation was
 ascertained by the assessor as the yearly rent or value which, under section 33 Jan. 14, 1887.
 of the Act, must be taken as the rental for assessment in all cases where the Magistrates of
assessment is upon real property. Therefore it is beyond all question that the Glasgow v.
 yearly rent or value, as specified in the 33d section, is gross rent; and if that is Hall.
 so, it seems to me necessarily to follow that the Water-Works Commissioners
 are entitled to the deductions specified in the 37th section of the Poor-Law
 Act. Upon these grounds I have no hesitation in coming with your Lordship
 to the conclusion that the interlocutor must be upheld. The case is quite
 clear.

As to whether the Lord Ordinary is right in the matter of making the deduc-
 tions in questions, I have not the slightest idea. The matter is so entirely
 artificial, and it is so impossible to suppose a hypothetical tenant who would
 pay rent when he was debarred from making profit, that I have not an idea
 whether the deductions are properly made or not. I am glad to say it is
 out of my province to deal with this matter, because the Lord Ordinary is
 final.

I am therefore of opinion the Lord Ordinary's interlocutor should be ad-
 hered to.

THE COURT adhered.

MILLAR, ROSSON, & INNES, S.S.C.—W. & J. BURNES, W.S.—Agents.

TRUSTEES OF THE FREE CHURCH OF SCOTLAND, First Parties.—*Balfour—* No. 70.
C. J. Guthrie.

LADY RAMSAY GIBSON MAITLAND AND OTHERS, Second Parties.—
R. V. Campbell—Wood.

FREDERICK CHARLES MAITLAND AND OTHERS (Maitland's Trustees).—
 Third Parties.—*R. V. Campbell—Wood.*

Jan. 14, 1887.
 Trustees of the
 Free Church of
 Scotland v.
 Maitland, &c.

Succession—Testament—Construction—Extrinsic evidence.—In the con-
 struction of a will and codicils, the Court is entitled to have regard to
 the state of the testator's circumstances at the dates when they were written,
 but not to indications of intention appearing in jottings or memoranda by
 him.

Succession—Testament—Double legacy.—A testator in his settlement, dated
 in June 1862, bequeathed (subject to his widow's liferent, which extended
 over the whole estate) a sum of £6000 to the General Trustees of the
 Free Church of Scotland, towards an endowment of the Free Church
 College, subject to certain discretionary powers given to the General As-
 sembly of that church. He bequeathed the residue to three nephews, to
 whom also he gave special legacies of £2000 each. In a codicil to the
 settlement executed in March 1864 he directed his trustees that "in ad-
 dition to all sums therein bequeathed by me, and particularly in addition
 to the sum of £4000 therein bequeathed by me to my brother F. C. M., to
 pay to him the annual interest on the sum of £6000, and if they see cause
 to do so, to set apart the said sum for his liferent use and behoof; . . .
 and at decease of both these liferenters," namely, F. C. M. and his widow,
 "to pay the said principal sum of £6000 to the General Trustees of the Free
 Church of Scotland for the benefit of the Free Church College in Edinburgh,
 to be applied in such manner as the General Assembly of the said Free Church
 may direct."

In a special case presented by the General Trustees of the Free Church, who

No. 70. claimed two legacies of £6000, and the residuary legatees, it appeared that the testator had entered annually in his books an estimate of his estate. The memorandum of January 1862 shewed a residue available for residuary legatees of £1931, 0s. 10d.

Jan. 14, 1887. Trustees of the Free Church of Scotland v. Maitland, &c. The memorandum of 20th January 1864 (being three months before the date of the codicil) shewed a residue available for residuary legatees of £3176, 3s. 2d. The testator died in September 1865.

The effect of the codicil as in 1864, assuming it to have created a new legacy of £6000, would have been to extinguish the residue and to diminish the prior legacies *pro rata*, including the legacy to F. C. M.

Held that the codicil could not be construed as giving a second legacy of £6000 to the Free Church.

1st Division. **B.** **MR JOHN MAITLAND**, sometime Accountant of the Court of Session, died on 6th September 1865, survived by his wife, who died on 8th February 1886.

Mr Maitland left a trust-disposition and settlement, dated 12th June 1862 and registered 12th September 1865, by which he conveyed his whole means and estate to trustees for certain purposes. These purposes were,—(First) For payment of debts and expenses; (second) for delivery to Mrs Maitland of all the furniture and other articles which belonged to him; (third) for payment at the first term after his death of legacies to Mrs Maitland (£1000) and her two sisters (£500 each); (fourth) for payment to his wife, in the event of her survivance, of the free annual income or proceeds of the residue of his means and estate; (fifth) for payment at the first term after the death of the survivor of himself and his wife of various legacies, all free of legacy-duty, to the persons afternamed,—“To the said Frederick Charles Maitland, my brother, the sum of £4000, to Mrs Helen Maitland or Hog, my sister, widow of James Maitland Hog, Esquire, of Newliston, . . . the sum of £4000; to the said Sir Alexander Charles Gibson Maitland, Baronet, my nephew, and the heirs of his body, the sum of £2000; to the said George Ramsay Maitland and the heirs of his body the sum of £2000; to the said Keith Ramsay Maitland and the heirs of his body the sum of £2000; to my niece, Mrs Jean Hamilton Maitland or Bulwer . . . the sum of £2000” (here followed four legacies of £250 each to other relatives); “and to the General Trustees of the Free Church of Scotland, also free of legacy-duty, (first) the sum of £2000 to be placed to the fund for Aged and Infirm Ministers of the Free Church of Scotland; (second) the sum of £6000 to be employed by them towards the endowment of the Free Church College at Edinburgh, and the free annual proceeds of which sum shall be applied by said General Trustees (subject to such conditions and directions as the General Assemblies of said Free Church shall see fit to impose) either to the principal or principal librarian of said college, or to any one of the permanent professors, or as remuneration to any party to be named by said General Assemblies, and connected with the said college as a lecturer therein or otherwise, or partly to two or more of such persons, or the said proceeds may be otherwise applied separately, or in conjunction with, or as a supplement to the proceeds of any other endowment fund belonging to the said college as the said General Assemblies may direct; and with power to said General Assemblies, from time to time as circumstances may in their opinion require or render expedient, to recall, vary, or alter the application of said principal sum and proceeds thereof, or to add the said fund to and merge the same in any other fund or endowment belonging to the said college, but so as that the same shall always be applied in connection with the said Free Church College at Edinburgh, it being my wish and intention

by this bequest to advance the influence and usefulness of the said college by aiding in making a suitable provision for one or more distinguished ministers, missionaries, or members of the Free Church connected, or whom the General Assemblies may connect, with the said college at Edinburgh." The sixth purpose provided for payment of the residue of the estate to Sir Alexander C. G. Maitland, Bart. (now deceased), George Ramsay Maitland (also now deceased), and the said Colonel Keith Ramsay Maitland, and their respective heirs, executors, and successors *per stirpes*.

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On 7th March 1864 the testator executed the following holograph codicil to his settlement, which was registered on 12th September 1865,—“I, John Maitland, Accountant of the Court of Session, with reference to the trust-disposition and settlement executed by me on the 12th day of June in the year 1862, do hereby direct my trustees therein named and designed, and those who may be hereafter named by me or assumed by them, as therein mentioned, and that, in addition to all sums therein bequeathed by me, and particularly in addition to the sum of £4000 therein bequeathed by me to my brother Frederick Charles Maitland, to pay to him the annual interest on the sum of £6000, and if they see cause to do so, to set apart the said sum for his liferent use and behoof, but still so as to preserve the liferent thereof to my wife, Mary Isabella Wood or Maitland, in the event of her surviving my said brother; and at decease of both of these liferenters, namely, Frederick Charles Maitland, and, in the event of her survivance, my said wife also, I direct my said trustees, after the death of both of these parties, or at my death, in case I should survive both, to pay the said principal sum of £6000 to the General Trustees of the Free Church of Scotland for the benefit of the Free Church College in Edinburgh, to be applied in such manner as the General Assembly of the said Free Church may direct.—In witness whereof,” &c.

After Mrs Maitland's death a question arose as to the amount bequeathed to the trustees of the Free Church, and a special case was accordingly presented by these trustees as first parties, the residuary legatees as second parties, and the trustees under the settlement and codicil as third parties. The question put to the Court was,—“(1) Are the first parties hereto entitled, under the said trust-disposition and settlement and codicil, to two legacies of £6000 each, or only to one?”

The first parties maintained that in addition to the legacy of £2000 under the settlement they were entitled to two separate legacies of £6000 each under the settlement and codicil respectively. The second parties maintained that the first parties were entitled only to one legacy of £6000, and that the true intent of the codicil was merely to subject the sum of £6000, given by the settlement to the first parties, to a liferent in favour of the testator's brother, Mr Frederick Charles Maitland, preferential to Mrs Maitland's existing liferent of the same sum.

It was admitted that the gross value of the estate at the date of the testator's death was £39,742.

It was further stated by the second parties in the case that the testator was in the practice from the year 1847 till his death of keeping a private cash-book and ledger, and of making up in the latter balance-sheets of his affairs as at 20th January in each year. Further, on the same date in each of the four last years of his life, the testator prepared “annual memoranda,” which he entered in his ledger, in which he estimated the value of his estate at each date, deducting legacies and other burdens,

No. 70. and bringing out the balance available for the residuary legatees.* All these were holograph of the testator.†

Jan. 14, 1887. The first parties admitted the accuracy of the above statement, but Trustees of the Free Church of Scotland v. Maitland, &c. disputed the competency of taking the memoranda into consideration in the construction of the settlement and codicil.

The first parties argued ;—(1) The presumption, when there were two separate gifts of the same amount to the same person in separate documents, was in favour of a double legacy. That had been settled by *Muir's* case,¹ and the present case was, in one respect at least, stronger, because here the settlement was referred to by its date in the codicil, and in *Muir's* case it was considered not improbable that the first deed had been forgotten when the second was executed. Besides, the second bequest

* The residuary fund so brought out in the memoranda on 20th January 1862, was £1931, 0s. 10d., on 20th January 1864, £3176, 3s. 2d., and on 20th January 1865, £6536, 16s. 4d. The value of the estate as at 20th January 1862 was estimated at £41,431, 0s. 10d., at 20th January 1864, £42,676, 3s. 2d., and at 20th January 1865, £39,536, 16s. 4d. In the last year the testator excluded a sum of over £6000, which he had expended on account of the Free Church Offices in Edinburgh, and which had appeared on both sides in previous balance-sheets.

† The annual memorandum for 20th January 1864, being immediately before the execution of the codicil, was—

"As at the 20th Jany. 1864.

"1st. As affecting residuary legatees—

Total estate as on 20th Jany. 1864, pr. valuation col., p. 121,	£42,676	3	2
Deduct burdens pr. Settlement, debts and expenses, as before stated, top of p. 161 (top of right hand page there),	39,500	0	0
Estimate—Remains for Residuary Legatees,	£3,176	3	2

"2d. As affecting provisions to Mrs M.—

1st. In liferent—Legacies, Class 2d, fo. 160 (left hand of that folio),	£26,500	0	0
Residuary fund as above,	3,176	3	2
Sum,	£29,676	3	2
2d. In fee—Legacy £1000, furniture £1000, as before,	2,000	0	0
Estimate, Mrs M.—Together, fee and liferent,	£31,676	3	2"

And for 1865—

"Br. 1st. As affecting my Residuary Legatees—

Total Estate at 20th Jany 1865, pr. valuation col., page 122,	£39,536	16	4
Deduct burdens, pr. Abstract of Settlement, p. 161,	£31,500	0	0
Less J. C. Fraser, since dead,	500	0	0
	£31,000	0	0
Add debt due to F. C. Trustees,	2,000	0	0
	33,000	0	0
Remains for Residuary Legatees,	£6,536	16	4"

¹ Royal Infirmary v. Muir's Trustees, Dec. 16, 1881, 9 R. 352; Horsburgh v. Horsburgh, Jan. 12, 1847, 9 D. 329 (Lord Fullerton, p. 382), 19 Scot. Jur. 118.

here differed in three particulars at least from the first,—it was not free of legacy-duty, it was to be devoted generally to the benefit of the Free Church College, and the powers given in regard to it were much wider than in regard to the first. These distinctions strengthened the presumption in favour of a double legacy. Besides, there was no sufficient reason for denying effect to either document. It was true that there were no direct words of bequest in either case,—and that there was in both a mere direction to pay. But the direction in the codicil surely imported much more than a *morata solutio*. If that had been all that was intended, it could have been done in a much simpler way. So, too, the description in the codicil of the objects to which the fund was destined was not a mere summary by way of reference to the settlement. It was not so worded. (2) It was incompetent to refer to the memoranda and other documents as interpreting the testator's intention. The Court might place themselves in the position of the testator when making his will, or as had been said, might sit in the testator's chair, and make themselves acquainted with his surrounding circumstances. But the documents could not be looked at further than to shew what the circumstances surrounding the testator were.¹ The only case where evidence was allowable was that of a latent ambiguity. It might be legitimate for the Court to have regard to the fact that a gift of a second legacy under the codicil would have left only about £600 to be divided as residue. But provision was made for the residuary legatees by the will; and if the testator had meant to favour them with residuary bequests, he would not have made other bequests to them. Lord Cairns had stated the law as it now stood in regard to the admission of evidence in such matters in the case of *Charter*.² In *Livingston's* case,³ the ground for admitting the undelivered letter may have been either that it was of a testamentary nature, or that it was a document of debt. In *Ritchie's* case,⁴ the letter which was admitted was held to be of a testamentary nature. (3) The memoranda, if they were competent evidence at all, were mere jottings, and threw no real light on the matter.

The second parties argued;—(1) The alleged second bequest in the codicil was merely a reference back to the legacy previously given by the settlement. The language used in the codicil in regard to the disposal of the legacy briefly repeated the longer details of the settlement. The codicil consisted of two grammatically distinct directions; under the first direction, the first parties could have made no claim. The £6000 referred to in the second direction was the same £6000 as was referred to in the first, and that was undoubtedly the £6000 of the settlement. The important matter in the second direction, in the testator's view, was the date of payment, and the testing-clause also afforded evidence of this. The only novelty in the codicil was the imposition of the new liferent. The codicil all through referred back to the settlement, and the two ought

¹ *Campbell v. Campbell*, July 8, 1880 (H. of L.), 7 R. 100; *Wilson v. O'Leary*, March 7, 1872, L. R., 7 Chanc. App. 448; *Scott v. Sceales*, Feb. 5, 1864, 2 Macph. 613, 36 Scot. Jur. 298; *Jarman on Wills*, 425; *Thoms v. Thoms*, March 30, 1868, 6 Macph. 704, 40 Scot. Jur. 364; *Glendonwyn v. Gordon*, July 20, 1870, 8 Macph. 1075, aff. May 19, 1873, 11 Macph. (H. of L.) 33, 45 Scot. Jur. 183; *Catton v. Mackenzie*, July 19, 1870, 8 Macph. 1049 (Lord President, p. 1055), 42 Scot. Jur. 618, (H. of L.), March 1, 1873, 10 Macph. 12; *Gray v. Gray's Trustees*, May 24, 1878, 5 R. 820.

² *Charter v. Charter*, June 1874, L. R., 7 Engl. and Ir. App. 364 (Lord Chancellor Cairns, p. 376-7).

³ 3 Macph. 20.

⁴ 8 R. 101.

No. 70. really to be read as one deed. But even if they were distinct deeds, the slightest indication of a contrary intention on the part of the testator appearing on the face of the document would overcome the presumption in favour of a double legacy.¹ It had been held that merely small points of difference were not effectual as indicating separate legacies.² (2) In construing the deed, the Court was entitled to have regard to all the facts and circumstances which were before the testator. The memoranda were admissible to shew that the testator had counted up his funds, and had ascertained that the residue would amount in each year to a certain sum.³ They were further admissible to shew that the testator had taken no account of the second legacy of £6000, assuming that it was bequeathed.

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At advising,—

LORD PRESIDENT.—The question raised in this special case arises out of the settlement and codicil left by the late Mr John Maitland. The competing parties are one of the special legatees on the one hand, and the residuary legatees on the other, and the inquiry is, whether the special legatee, the first party, is entitled under the operation of the settlement and codicil to one legacy of £6000, or to two legacies of that amount. The legatees maintain that the settlement gave them a legacy of £6000, and that the codicil gives them an additional legacy of the same amount.

In determining a question of this kind we have one general rule to guide us, namely, that where a settlement gives in express terms a legacy of any particular amount, and a subsequent codicil gives another to the same person of a like amount, without there being anything to shew a contrary intention, both legacies will be payable, and not one only. The question, therefore, comes to be, is that rule applicable in the present case, or is there anything to take it out of the general rule?

A variety of facts and circumstances have been submitted by the second parties under reference to which they seek that this settlement and codicil shall be construed. Some of these statements appear to me to be admissible in evidence, while others clearly are not. Anything in the nature of a declaration of intention, or any statement of the testator's from which an inference can be drawn, subsequent to the execution of his testamentary papers, appears to me to be quite inadmissible. On the other hand, we are entitled to inquire into the facts affecting the position of the testator at the time when he made his settlement, and also at the time when he made his codicil. We are entitled to know, for example, what was the amount of his estate at each period according to his own estimate, because considerable light may be thus obtained in ascertaining his intention as expressed in his testamentary writings under reference to the fact

¹ *Horsbrugh v. Horsbrugh*, 9 D. 329 (Lord Jeffrey, p. 387).

² *Whyte v. Whyte*, 1873, L. R., 17 Eq. 50; *cf.* also *Barclay v. Wainwright*, 1797, 3 Vesey, 461; *Moggridge v. Thackwell*, May 1792, 1 Vesey, 464; *Tatham v. Drummond*, 1864, 33 L. J. Chanc. 458; *Chancy v. Wootton*, 1725, 2 White and Tudor's Leading Cases, 356; *Hooley v. Hutton and Ridges v. Morrison*, 1 Brown's Chanc. Cas. 389, 391; *Allan v. Callow*, 1796, 3 Vesey, 289; *Russell v. Dickson*, 1853, 4 Clark's House of Lords Cases, 293 (Lord Chancellor Cranworth, p. 304); *Kippen v. Darley*, 1858, 3 Macq. (H. of L.) 203.

³ *Dickson on Evidence*, i. 154, 166; *Williams on Executors*, i. 170; *Livingston v. Livingston*, Nov. 7, 1864, 3 Macph. 20, 37 Scot. Jur. 10; *Ritchie v. Whish, &c.*, Nov. 19, 1880, 8 R. 101; *Smith v. Smith's Trs.*, Nov. 26, 1884, 12 R. 186.

that his estate was of greater or less value at one period and at another. To this extent, and to this extent only, I give effect to the statement which is set forth by the second parties.

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By his principal settlement the testator makes provision for certain legacies, to be paid to his wife and her sisters, and for a liferent of the whole residue in favour of his widow. These small legacies which are first provided are to be paid immediately, and are not to be subject to the liferent. The legacies which are given under the fifth purpose are to be paid on the death of the survivor of the spouses. The objects of his benevolence under that purpose are, in the first place, certain of his relatives, and in the second place, the trustees of the Free Church. He had a brother and a sister, to each of whom he bequeathed, by this fifth purpose, a sum of £4000, and four nephews and a niece, to whom he left £2000 a-piece. He then gives to the Trustees of the Free Church a sum of £2000 for the fund for Aged and Infirm Ministers of the Free Church, and then a sum of £6000, to be employed towards the endowment of the Free Church College in Edinburgh. With regard to this latter sum he expresses his intention in the settlement at very considerable length as to how it is to be applied, although he leaves a good deal to the discretion of the General Assembly of the Church, but he makes it a fundamental condition of the gift that it is to be applied for the promotion of the influence and usefulness of the Free Church College. It is important to observe that the testator's directions as to the application of this bequest are very precise and full. As regards the residue of his estate, he leaves it to his three nephews, his apparent intention being to make up to them the difference between the amount of the legacies bequeathed to his brother and sister on the one hand, and to his nephews and niece on the other. So stands his settlement, and it is to be kept in mind that at the time when it was executed in 1862 the testator had left for his residuary legatees according to his own estimate, and after providing for all the primary purposes of the trust, £1931. His estate was thus fully disposed of by the settlement, and we find that the residue was of small amount when compared with the sum which was bequeathed in special legacies.

We now come to the codicil, which is certainly expressed in terms which are, to say the least of it, ambiguous, as regards the testator's purpose and intention. It may be naturally divided into two parts, the first of which has reference to the bequest to his brother, Frederick Charles Maitland, and is in these terms:—"I, John Maitland, . . . with reference to the trust-disposition and settlement executed by me, . . . do hereby direct my trustees, . . . in addition to all sums therein bequeathed by me, and particularly in addition to the sum of £4000 therein bequeathed by me to my brother, Frederick Charles Maitland, to pay to him the annual interest on the sum of £6000, and, if they see cause to do so, to set apart the said sum for his liferent use and behoof, but still so as to preserve the liferent thereof to my wife, Mary Isabella Wood or Maitland, in the event of her surviving my said brother." I do not think that as regards the practical effect of these words there can be much difficulty. The testator's intention is, that there shall be given to his brother, Frederick Charles, a liferent of a sum of £6000 preferential to the liferent of that sum which his widow would have enjoyed. At the same time he preserves his widow's right subject only to that preferential liferent. But there are certain words which have been founded on on both sides—I mean the words "in addition to all sums bequeathed by me." It seemed to be contended on the part of the first parties

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Jan. 14, 1887. I do not attach importance to them, because I think their meaning is satisfied
Trustees of the when we find that an additional sum is given to Frederick Charles beyond what
Free Church of he received under the original settlement. Nothing more is meant than that
Scotland v. the testator has a purpose and intention, which is otherwise clearly brought out,
Maitland, &c. to give to Frederick Charles, in addition to the bequest made to him in the settlement, a *liferent*, preferential to that given to his widow.

But there are other words which demand attention—I mean the words “the sum of £6000.” If the testator had added after them the words “therein bequeathed to the trustees of the Free Church,” all ambiguity would have been at an end. It is the omission of some such words as these which creates the ambiguity, and this too by way of contrast, because in speaking of the £4000 the testator calls it “the sum of £4000 therein bequeathed by me to my brother,” but in speaking of the £6000 he uses no such words. But I think this may be accounted for by the fact that in the settlement there are two sums of £4000 and only one sum of £6000, and in speaking of the £4000 the testator naturally enough distinguishes it as the sum “therein bequeathed to my brother,” while in speaking of the £6000 he did not require to apply any distinguishing terms, because there is only one such sum mentioned. So much for the language of the first part of the codicil, and it is to be observed that both it and the latter part are expressed in the form of directions to pay. The words used are not properly words of bequest, and yet the first direction has all the force of a bequest.

The second part of the codicil is as follows:—“And at decease of both of these *liferenters*, namely, Frederick Charles Maitland and, in the event of her survivance, my said wife also, I direct my said trustees after the death of both of these parties, or at my death in case I should survive both, to pay the said principal sum of £6000 to the General Trustees of the Free Church of Scotland for the benefit of the Free Church College in Edinburgh, to be applied in such manner as the General Assembly of the said Free Church may direct.” If it was here intended by the testator to give an additional bequest of £6000 over and above the £6000 contained in his settlement, one cannot but feel that he has expressed himself ambiguously, for there can be no doubt that this part of the codicil is capable of two readings. It may mean that he gives an additional £6000 besides the £6000 bequeathed in his settlement; it may mean that he merely gave the direction for the purpose of making it clear that, while the original £6000 was to be *liferented* by his brother, it was to go, as already provided, upon the death of both *liferenters*, to the Free Church College. And this identity of the two sums is supported in some degree by contrasting the very short way in which in the codicil he refers to the object to which that sum is to be applied with the very lengthy and special way in which he describes that object in the settlement. The former is, in fact, just a very short summary of the second part of the fifth purpose of the settlement. This does not, perhaps, go for very much, but it tends to increase the ambiguity and the difficulty of arriving at the testator's true intention in the matter.

The way in which this question presents itself to my mind is not exactly the same as in many cases of double legacies. It is not whether the legacy is additional or substitutional; it is rather whether the testator meant by it to give a legacy at all, and whether he did not mean the legacy to stand as it was left in

the settlement, with a direction, notwithstanding the alteration in the first part No. 70/ of the codicil, to carry out its application in the manner there described.

That being the nature of the question, we are entitled to consider the position of the testator at the date of the codicil as affecting the question of intention. I have mentioned that, at the date of the settlement, the residue of the testator's estate, according to his own estimate, was £1900. I see that at the date of the codicil it amounted to £3176, assuming that there was not a second legacy of £6000. If there was a second legacy of £6000 bequeathed by the codicil, then not only would there be no residue, but there would be a deficiency, which would require to be made up by a proportional abatement from the legacies in the settlement. Now, that is a fact affecting the position and purpose of the testator which we are well entitled to take into account. Is it probable that, after making his nephews his residuary legatees—there being a small surplus over at the time of his original settlement—the testator should by the second part of his codicil not only wipe out the surplus, but actually create a deficiency, which could only be met by an abatement of all the legacies contained in the fifth purpose of the codicil? I think that this is a very improbable result, especially considering that, as regards the nephew Frederick Charles, whom the codicil was certainly intended to benefit, the testator would there be giving with the one hand a liferent of £6000 and taking away with the other a part of his original bequest to him of £4000, to which he expressed his intention of making an addition. Assuming that the codicil is difficult to read, and that there is a plain ambiguity about it, I think this is a consideration sufficient to turn the balance, and to lead us to the conclusion that it was not the intention to give a second bequest of £6000, but that the second purpose of the codicil was truly a direction that the £6000, after the liferent in favour of the testator's brother, and the further liferent in favour of his widow, was to go to its original destination, namely, for the benefit of the Free Church College.

I am for answering the question in accordance with these views, and for finding the first parties entitled to only one legacy of £6000.

LORD MURK.—I am of the same opinion, and your Lordship has given so full an exposition of the clauses of the settlement and codicil, and of the rules of construction applicable to them, that I have very little to add. As to the general rule, by which the Court should be guided in cases of double legacy, there can be no difficulty after the decision in the case of *Muir's Trustees* (9 R. 352). The rule which was there adopted was that where two legacies identical in amount, are made in two different writings, both may be claimed, unless there are expressions to be found in the instruments, or something in the surrounding circumstances which may competently be brought into consideration, and which are sufficient to shew that the testator did not intend to make two bequests. In the two short testamentary writings, which we were called upon to construe in the case of *Muir's Trustees*, there was nothing to shew that it was not the testator's intention to make a double legacy. In the present case there is not much more light to be got from the documents themselves than there was in the case of *Muir's Trustees*, but we are entitled to look at those surrounding circumstances, and the conditions of things which would necessarily be present to the mind of the testator at the dates when he executed the respective deeds, and to judge from these whether the second £6000 was to be cumulative or in substitution of the first.

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I agree with your Lordship in thinking that the position of the testator's estate and the amount of it, at the dates to which I have referred, have an important bearing upon the solution of the question raised in the present case. We have under the testator's own hand an account of the state of his funds from year to year, and it is plain that when he came to make the additional provision for his brother, which is contained in the codicil, he had to consider deliberately, having regard to his general settlement, where it was to come from, and what the fund was to be out of which he was to give this additional provision. It is also clear that there was no sufficient amount of residue out of which he could make a second legacy of £6000. As your Lordship has explained, the result of making a second bequest of such a sum would, as at the date of the codicil, have been not only to produce a deficiency, but to lead in addition to an abatement from all the legacies left under the settlement. This is not a likely thing for an experienced man of business, as Mr Maitland undoubtedly was, to have done. The two sums which he required to have chiefly in view in making the codicil were the £4000 bequeathed to his brother and the £6000 bequeathed to the Free Church. He designates the £4000 as the sum already destined to his brother, and he does this because there is another sum of £4000 bequeathed in the settlement, from which it was necessary to distinguish it. There is, however, only one sum of £6000 in the settlement; and consequently he did not require to identify it further than by mentioning it as the £6000, the interest on which was to be paid to his brother during his lifetime, instead of to his own wife, so that his brother was to have a liferent of that sum, preferential to the liferent of it which he had already given to his wife, while the principal of the same £6000 was after the death of both liferenters to go to the Free Church. This appears to me to produce a consistent reading of the two deeds; and in the surrounding circumstances I think that it is the disposition of his property which the testator would naturally have made. I am therefore of opinion that the first parties are not entitled to two legacies of £6000, but that the sum of £6000 mentioned in the codicil is the same as that bequeathed by the settlement.

LORD SHAND.—The question in this case is one of considerable difficulty. It is this, whether under the codicil the testator gave an additional legacy to the trustees of the Free Church besides the £6000 bequeathed by his settlement, or whether the £6000 mentioned in the codicil was in substitution of the former legacy, or merely imported a reference to it. I do not think it has been argued that the case is one of substitution, and accordingly the point is narrowed to this, Is the £6000 mentioned in the codicil a reference to the legacy given by the original settlement, or is it a new legacy?

There is undoubtedly in both cases a direction to pay the sum of £6000, and, accordingly, I think the rule applies, which was laid down in the case of *Muir's Trustees*, and previous cases, that where two legacies of the same amount are given to the same person by two different testamentary writings, both are effectual, unless, looking to the terms of the writings themselves, taken with the surrounding circumstances, there is enough to shew that the testator did not intend to give a double legacy. The question here is whether, notwithstanding the directions to pay which we find in the two deeds, it was really not intended that two legacies should be given. I am of opinion that on a sound construction of the terms of the codicil a double legacy was not given.

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A question has been raised as to how far the Court is entitled to take into consideration certain documents and memoranda which have been brought under our notice by the second parties. It appears that the testator was in the habit of making up a balance-sheet of his affairs, and of entering in his cash-book an annual estimate of his means. It has been contended that we may look at such facts as this, which appears in the estimate or memoranda dated 20th January 1865. There is an entry there to this effect,—“Remains for residuary legatees, £6536, 16s. 4d.” The codicil in question is dated 7th March 1864. And if a second legacy of £6000 were bequeathed by the codicil, it is clear that there would have remained for the residuary legatees only a sum of £536 and not the much larger sum mentioned in the entry. I am of opinion that the Court cannot look at this entry for the purpose of drawing any conclusion from it bearing on the controversy between the parties. The result of holding otherwise would be that a mere jotting in the handwriting of the deceased (having no claim to the character of a testamentary writing) would be allowed to control the effect of a regular testament or codicil. I think this document must be entirely laid aside; and for my part, I place it entirely out of view and out of mind.

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But while the Court is not entitled to look at these memoranda, I think that in judging of the testator's meaning in the disposal of his estate by the terms used by him, we are entitled to know what the pecuniary circumstances of the deceased were. We have very full information about this. Because we know the state of the funds of the deceased, and how he was situated precisely from time to time, under the testator's own hand. There are two circumstances of importance, which may be noted before coming to the construction of the deeds themselves. The settlement is dated 12th June 1862. By it he gave a legacy of £6000 in addition to a sum of £6000, which he had actually expended for assisting to build certain offices in Edinburgh for the Free Church. The codicil is dated a year and nine months later, and there was no substantial addition in the meantime to the testator's funds. He had not acquired any increase of means out of which he could have provided a second legacy of £6000, and there was no change in his circumstances such as would suggest the probability of such a bequest being made. There is another consideration which is even more material. If there were a second legacy under the codicil, the result would be that in order to meet it it would be necessary to encroach on all the other legacies. The testator was not in possession of funds to pay such a legacy at the time when the codicil was made without making an abatement from all his bequests.

Taking these circumstances into consideration in construing the two deeds, I think there is enough in the terms of the codicil itself to lead us to the conclusion that the testator had no intention to give a double legacy. It is plain that the reference to the £6000 in the early part of the codicil, as an addition to the legacy in the settlement, is limited to the giving an addition to the liferent in favour of Frederick Charles Maitland. The words “in addition to all sums bequeathed by me,” are inserted as a parenthesis in the first direction, and are applicable to it alone, and that direction was merely to enlarge the liferent of Frederick Charles Maitland by giving him the interest on the sum of £6000, in addition to his legacy of £4000. When we come to deal with the second direction regarding the payment to the trustees of the Free Church, the words I have quoted have no bearing upon it. There is no indication in the second direction

No. 70. as in the first that an addition is intended to be given, and the absence of this, in contrast to what is said in the first direction, is very significant. Where the testator means to give an addition he says so; when in a farther and substantive direction he refers to the previous legacy given he omits any reference to an addition. There the language by which "the said principal sum of £6000" is described is just a short summary of the much longer description of the legacy in the principal deed. It is no doubt true that there is a presumption in such a case as the present in favour of a double legacy, but very slight circumstances indeed may sometimes displace that presumption. I think the presumption is here displaced, and I am therefore of opinion that the first parties are not entitled to more than one legacy of £6000.

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LORD ADAM.—I think this is a very difficult and a very narrow case. I quite approve and adopt the law as expressed by your Lordship in the case of *Muir's Trustees*, to the following effect:—"One rule, at least, is well settled, and that is, that when exactly the same amount is given twice in the same paper, the presumption is that it is a mere repetition arising from some mistake or forgetfulness; but where the same amount is bequeathed in two distinct testamentary papers, both equally formal, then both legacies are payable, unless it can be shewn from the settlement of the deceased, or by other competent evidence, that his intention was to give one legacy only." I think that is a distinct and accurate statement of the law.

We have heard an argument upon the competency of the evidence as to the testator's position and circumstances at the dates of the execution of the settlement and subsequent codicil, and I agree with Lord Shand in the opinion which he has expressed in regard to that matter. I think the rule of law applicable to it is accurately stated in the passage which has been quoted from Mr Jarman's book on Wills (i. 425-430), to the effect that evidence to prove intention as an independent fact is inadmissible. The Court is not entitled to look at contemporaneous jottings or other writings for the purpose of arriving at the testator's intention as expressed in his testamentary papers. These are not competent. But it is not only competent, but in the present case it is most material, to look at the memoranda which have been produced for the purpose of seeing the amount of the testator's estate at the two dates of the making the will and the codicil. In the latter document the testator tells us what addition he intended to make to the provisions under his settlement. The addition consists of a liferent in favour of his brother of a sum of £6000. That is the only addition specified in the codicil. There is further a direction to pay the £6000 to be liferented to the Free Church Trustees after the death of the two liferenters, but this latter direction is not, as matter of construction, affected by the words contained in the first portion of the codicil as to its being "in addition." Yet, if it were to be treated as an additional legacy, it would be a much greater addition than that which the testator has particularly specified. I think the contention that the second £6000 is the same as that previously conferred by the settlement must be given effect to.

THE COURT answered that the first parties were entitled to only one legacy of £6000.

COWAN & DALMAHOY, W.S.—MAITLAND & LYON, W.S.—Agents.

JAMES M'KECHNIE, Pursuer (Appellant).—*Shaw—Salvesen.*
 THOMAS COUPER, Defender (Respondent).—*Darling—Guy.*

No. 71.

Jan. 20, 1887.

Reparation—Precautions for public safety—Relations of wheeled vehicles to foot-passengers.—Foot-passengers on a country road with footpaths on either side are entitled to walk upon the road itself, and the drivers of vehicles are bound to keep clear of them.

JAMES M'KECHNIE, a labourer, forty-seven years old, brought an action 2D DIVISION.
 to recover damages for injuries received by him in consequence of having been knocked down by a milk-cart belonging to the defender, Thomas Couper, in the early morning of 8th February 1886. It appeared that the pursuer had left his house at Torrance of Campsie that morning between five and six to walk into his work in Glasgow. The roads were very slippery in consequence of a slight thaw following on a frost. As M'Kechnie was walking on the road, at a point where it is thirty feet broad, with a narrow footpath on either side, he was overtaken by the defender's cart, driven by a lad of seventeen, and knocked down, his leg being injured. The footpaths had no kerb. Sheriff of Stirlingshire.

The defender pleaded that his servant had exercised due care, and that the pursuer had contributed by his own carelessness to the accident.

The boy had not been driving the cart above five or six miles an hour, but both the Sheriff-substitute (Mitchell), who awarded the pursuer £10 of damages and expenses, and the Sheriff (Muirhead), who only gave him £5 and Small Debt Court expenses, were of opinion that the accident had been caused by the failure of the driver to keep a proper look-out.

The pursuer appealed to the Court of Session. The Court intimated to counsel for the pursuer that he need not argue the question of fault. His argument was confined to the question of the amount of damages and expenses. The defender's counsel argued that there was no fault, and that the damages were sufficient in any event.

LORD JUSTICE-CLERK.—It appears to me that instead of the Sheriff's judgment being too favourable to the pursuer, the proper view of the case would lead to a different conclusion. The pursuer was doing nothing but what he was entitled to do, and the driver of the milk-cart was bound to take precautions to avoid a foot-passenger in the middle of the road, where he was entitled to be. I am of opinion that he did not take sufficient precautions.

There is no doubt as to the relations between wheeled vehicles and persons on the road. We have had occasion to determine these more than once. There is no doubt that it lies on the driver to keep clear of foot-passengers. If a person is guilty of such fault as to increase the burden of that obligation, that is another matter, but the primary obligation is undoubted—to keep clear of foot-passengers.

I am quite unable to understand in what view the Sheriff made the alteration he did. On the contrary, I think the Sheriff-substitute was rather niggardly in the sum he awarded. My opinion is that we should give £20 and expenses in both Courts.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Find that early in the morning of 8th February 1886 the pursuer, while walking on the public road between Torrance of Campsie and Glasgow on his way to his work, was knocked down and severely hurt by a cart be-

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longing to the defender; (2) that he was so injured by the fault and negligence of the defender's servant in charge of the cart in driving it rapidly in the dark without any precautions taken for the safety of persons using the road; (3) that the accident was not caused by any fault or neglect on the part of the pursuer: Find in law that the defender is liable to the pursuer in damages for the injuries sustained by him as aforesaid: Therefore sustain the appeal: Recall the interlocutor of the Sheriff-substitute of 19th July last, and interlocutor of the Sheriff of 27th October following: Assess the damages at £20," &c.

GILL & PRINGLE, W.S.—CARMENT, WEDDERBURN, & WATSON, W.S.—Agents.

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MAGISTRATES OF GLASGOW, Pursuers (Respondents).—

Sol.-Gen. Robertson—J. C. Thomson—G. W. Burnet.

ALLAN FARIE, Defender (Reclaimers).—*D. F. Mackintosh—C. S. Dickson—Ure.*

Property—Compulsory sale—Water-Works Clauses Act, 1847 (10 and 11 Vict. c. 17)—Railways Clauses Act, 1845 (8 and 9 Vict. c. 33)—Mines and Minerals.—Held (dis. Lord Mure, rev. judgment of Lord M'Laren) that the provision of the Water-Works Clauses Act, 1847, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, ironstone, slate, or other minerals" applied to minerals of every kind which the seller might find it profitable to work, and therefore applied to ordinary clay having a commercial value.

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Lord M'Laren.
M.

THE LORD PROVOST AND MAGISTRATES OF GLASGOW, as Commissioners under certain Glasgow Water-Works Acts, were authorised by an Act of Parliament passed in 1866 to make certain reservoirs and other works on part of the lands of Farne and Westthorn belonging to Mr Farie. The Commissioners agreed with Mr Farie to pay him £11,000 for the lands acquired, and in 1871 Mr Farie executed a disposition in their favour conveying the lands to them,—"Excepting always and reserving to me and my forebears the whole coal and other minerals in said lands, in terms of the clauses relating to mines in 'The Water-Works Clauses Act, 1847.'"

* The Act 10 and 11 Vict. c. 17, sec. 18, provides that the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug and carried away, or used in the construction of water-works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

Sec. 22 provides that if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings of the undertakers desires to work them, he is to give notice to the undertakers thirty days before he commences to work. If the undertakers think that the working is likely to damage their undertaking, and if they are willing to make compensation to him for the mines, "then he shall not work the same." The amount of compensation is to be fixed as in other cases of disputed compensation.

Sec. 23 provides that if before the thirty days are out the undertakers do not intimate their willingness to treat, the owner, lessee, or occupier, may work the mines and drain them, "so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner."

These clauses are nearly identical with the 70th, 71st, and 72d clauses of the Railways Clauses Act, 1845 (8 and 9 Vict. c. 33).

The extent of land acquired was twenty-one acres. After entering on the land the Commissioners constructed reservoirs, &c., occupying about fifteen acres. The rest continued to be used for grazing.

Mr Farie had for some years been working a seam of clay in his adjoining lands, and in March 1885, having come within about thirty feet of the land acquired by the Commissioners, he intimated to them that he proposed to work the clay in the lands acquired by them, unless they were to avail themselves of their right to prevent him by paying him compensation for the clay. The clay was worked from the surface by open cast workings, the greatest depth in the workings being between twenty and thirty feet.

The Commissioners then raised an action against Mr Farie, concluding for declarator that they were, as proprietors of the land conveyed to them, proprietors also "of the seam of clay lying in or upon the said pieces of ground, and that the said seam of clay is not comprehended or included in the clause of reservation contained in the said disposition of the whole coal and other minerals in said lands, in terms of the clauses relating to mines in 'The Water-Works Clauses Act, 1847,' nor comprehended under or included in any other words or clause of reservation in the said disposition, but is the absolute property of the pursuers." They further asked for declarator that the defender was not entitled to work or win the "said clay contained within the boundaries of the pieces of ground disposed to the pursuers as aforesaid, either by mines or quarries, open cast or otherwise, or by any means whatever." Finally, they concluded for interdict against his entering on their lands for the purpose of working the clay.

They averred;—"The pursuers, in December 1865, caused pits to be dug to a depth of about six feet upon the lands on which they proposed to construct their said operations, and found the subsoil, at a depth of about two feet from the surface, to consist of the ordinary clay which is known to extend over the whole of this district, and which they considered most suitable for the construction of their said works. The pursuers further applied for and obtained permission from Mr Farie, in or about January 1866, to make borings in said lands for the purpose of ascertaining the nature of the strata underneath. The result of these borings shewed that, at about two feet below the surface (which consisted of ordinary soil and loam), the subsoil consisted of ordinary red clay, which reached, in the boring made in the centre of the ground on which it was proposed to construct the reservoirs, to a depth of about six fathoms, with about nine fathoms of mud and sand below. In giving such permission, Mr Farie, who was well aware that the subsoil of the said lands consisted mainly, if not entirely of clay, stipulated that the rock beneath the clay should not be pierced, in order to secure that the surface water should not flow into the old coal workings below."

The defender admitted that he knew there was clay under the lands, but *quoad ultra* denied this statement.

The pursuers further averred;—"The works authorised by the pursuers' Act have cost in all about £100,000, of which about £52,000 has been expended in or upon the lands so acquired from Mr Farie. The purpose for which the lands were acquired was well known to the said Mr Farie, who was also well aware that the existence of clay below the surface was the principal inducing cause for the pursuers making the said purchase; and the said reservoirs were constructed in his knowledge, and without any objection by him, and have been used by the pursuers, as commissioners foresaid, since their completion several years ago. It was understood and agreed between the defender's author and the pur-

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Nq. 72: suers that the whole clay in the lands was included in the said purchase, and that the clause reserving coal and other minerals did not comprehend clay.”

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The defender denied this.

The pursuers also averred ;—“ If the said workings are extended into the pursuers' lands the soil will be lost, and the ground will cease to have any agricultural or feuing value. It will also be rendered useless for the construction of reservoirs by the pursuers, owing to the removal of the clay which is necessary for that purpose, and any reservoir which could possibly be constructed in the bottom of the excavation left by the defender would be at too low a level for the pursuers' purposes.” They made no statement as to the commercial value of the clay.

The defender estimated the value of the clay which he would be prevented from working if the pursuers obtained decree at £10,000.

The pursuers pleaded ;—(1) The pursuers being proprietors of the lands disposed to them by the foresaid disposition, and the said seam of clay not being within the clause of reservation therein contained, are entitled to decree of declarator and interdict, with expenses, as concluded for. (2) It having been well known to the defender's author that the undisturbed possession of the clay in the land acquired by the pursuers from him was essential to the purpose for which the purchase was made, and the clay having been included in the subjects sold by him, the defender is not entitled to adopt the proceedings now complained of. (3) *Separatim*, The exercising of the claim made by the defender to work the clay in the pursuers' lands being incompatible with the safety of the pursuers' works, or with further construction necessary in connection therewith, the pursuers are entitled to decree, as concluded for.

The defender pleaded ;—(1) The pursuers' averments are irrelevant. (3) The pursuers not being proprietors of the said seam of clay, but the same being within the clause of reservation in the said disposition, the defender should be assoilzied. (4) The defender being proprietor of the said seam of clay, *et separatim*, being entitled to work and win the same (subject to any right the pursuers may have to have the same left unworked on paying compensation therefor), the defender should be assoilzied. (5) *Esto* that the working of the clay in question by the defender would be injurious to the pursuers' property, they are not entitled to prevent the same except on condition of their paying compensation to the defender in terms of the statute.

The Lord Ordinary (M'Laren), on 16th December 1885, found, decerned, and declared in terms of the second declaratory conclusion of the summons, and also in terms of the conclusions for interdict.*

* “ **OPINION.**—The pursuers purchased the subjects condescended on for the purposes of their undertaking. The subjects are, in part at least, not in actual use, but are said to be adjacent to one of the reservoirs of the Commissioners, and to be required for the extension of their works. The conveyance reserves to the seller the property of the coal and other minerals, in terms of the ‘Water-Works Clauses Act,’ an Act which, in the clause referred to, provides for the future compulsory acquisition of the minerals by the undertakers, in case the owner of the reserved estate shall signify his intention of working the minerals.

“ In the present case the owner is desirous of excavating a bed of clay forming the subsoil of the portion of land referred to, and the question is whether he can work the bed of clay or compel the Corporation to pay for it ; in other words, whether the bed of clay is part of his reserved mineral estate.

“ It is agreed on all hands that in the application of such statutory provisions the parties are entirely outside the common law rights and obligations which, in the absence of contract, regulate the use of the reserved mineral estate.

The defender reclaimed, and argued;—The sections of the Water-Works **No. 72**
 Clauses Act being identical with those of the Railway Clauses Act, the

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"The statute has taken away or displaced the common law right of support by substituting for it a right of compulsory purchase.

"I am not sure that it is possible to give a universally applicable definition of what is included in a reservation of mines and minerals. For the defender it is contended that the word 'minerals' is to be understood in its widest sense, as including everything contained in the substance of the earth, and capable of being worked to profit. I think that this definition is too wide, and that the expression must be interpreted with reference to the ordinary use of language in private agreements, and not in its geological or natural history meaning. A nearer approach to a definition would be—everything that is usually wrought under the denomination of mineral, and capable in the particular case of being profitably worked.

"For example, a grant of minerals, or a reserved right of working minerals, in this country would not, in my opinion, carry with it the right of digging sand or gravel out of the surface of the ground, and thereby destroying the estate in the surface. But a grant of minerals in California or Australia might reasonably and probably be understood to confer the right of digging and turning over the auriferous sands which are the objects of mining enterprise in these parts of the world.

"In our country the fire-clay which is associated with coal in the coal measures is commonly wrought along with the coal and ironstone where it is of good quality. I have no doubt that the right of working it would pass under a grant in the terms of the conveyance in question; and this, not because it is mineralogically different from ordinary clay, but because it is one of the things ordinarily wrought as a mineral, and is thus within the fair meaning of the term, as used in a deed or contract. The right of mining would of course include the right of removing what crops out at the surface. So also a grant of minerals in a private deed has been held to include the valuable china clay of Cornwall, which is produced by the decomposition of the granite rocks, and is peculiar to that district.

"Here, however, the thing which the defender claims to work is the common clay which constitutes the subsoil of the greater part of the land of this country, which never can in any locality be wrought by underground working, but under all circumstances is only to be won by tearing up and destroying the surface over the entire extent of the workings. When such a right is claimed against the owner of the surface, I ask myself—Did anyone who wanted to purchase or acquire a clay field, whether by disposition or reservation, ever bargain for it under the name of a right of working minerals? In the case of a voluntary sale of land with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay field was not within the fair meaning of the reservation. That being so, I see no reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed. The consequences of the reservation are different, but the thing to be reserved is, to my mind, essentially the same, being neither more nor less than the right to work such substances and strata as are ordinarily known by the denomination of minerals in contracts between sellers and purchasers, or superiors and feuders.

"I was referred to a reported case in which Mr Justice Kay held that clay was included in the term 'minerals,' as used in the 'Railway Clauses Act.' I have the greatest respect for the opinion of that learned Judge, but the decision of a single Judge of a co-ordinate Court does not relieve me from the necessity of acting on my own opinion clearly entertained. I was also referred to the decisions of Judges of this Court, to the effect that, in the particular cases, freestone wrought for the purposes of building, and limestone for calcination, were minerals within the meaning of the statute. I do not mean to express any doubt as to the soundness of these decisions, because my opinion in this case is

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cases decided under one Act were authorities for the construction of the other. The result of the cases was that there was no obligation on the mineral owner except to win the minerals properly.¹ The company bought no right of support at first: they were only obliged to do that when the owner came to work his minerals and so threaten their support. That destroyed the analogy between the present case and cases of ordinary sales, for there undoubtedly a right of support existed. The owner then was entitled to work the clay if it was a mineral. In England it had been held to be, both at common law² and under the statutes.³ In Scotland freestone had been held to be a mineral,⁴ so had limestone worked from the surface,⁵ and in the case of *Nisbet Hamilton*,⁶ the test appeared to be taken which had been approved by Lord Justice Mellish in *Hext's* case—viz., capacity of being wrought to profit. That test was undoubtedly satisfied here. To take any other test would lead to absurdity, e.g., it was said that the test was whether the substance required to be reached by mining or not. That would not do as a test, for coal or ironstone might crop out on the surface.

Argued for the pursuers;—The nature of the subject sold, and the use to which it was to be put, took this case out of the English rule. The ground had been bought for a reservoir just because it was clayey, and the soil itself was to be used for a reservoir, instead of something being laid upon it as in the case of railways. The local situation of the clay was such that it came within the conveyance to the Commissioners, and that brought it under the rule of *Nisbet Hamilton's* case, where stone in a cutting had been held to be at the disposal of a railway company.⁷ But in any event the statutory reservation would not apply unless clay was a mineral. What was a mineral? The statute in its 18th section started by using the expression "mines." That struck the note for the whole section: a mineral was a substance recovered by mining. The definition in *Hext v. Gill*⁸ was obviously too broad for, according to it, if you had clay or other substances coming to the top the railway company would acquire them, if there was a thin line of soil they would not. In *Bennett's* case⁹ the minerals could easily be separated from the under-

rested entirely on the essentially superficial character of the stratum proposed to be wrought, and the known use of the terms 'mining' and 'minerals' in this country, terms which are confined, as I think, to strata ordinarily wrought by underground workings, and only by removal of the surface in these exceptional cases where the lie of the strata makes this the more economical mode, or it may be the only mode, of working them.

"I may add that I have not thought it necessary to investigate this case by a proof—(1) because there is no dispute as to the subject being the ordinary subsoil clay (I assume of a superior quality, and workable to profit); and (2) because the question of the meaning of the statute is one as to which proof appears to me to be unnecessary or inadmissible."

¹ *Great Western Railway Co. v. Bennett*, 1867, L. R., 2 E. & L. App. p. 27.

² *Hext v. Gill*, 1872, L. R., 7 Ch. App. 699; *Attorney-General of Man v. Mylchreest*, 1879, L. R., 4 App. Ca. 305.

³ *Midland Railway Co. v. Checkley*, 1867, L. R., 4 Eq. 19; *Midland Railway Co. v. Haunchwood, &c., Co.*, 1882, L. R., 20 Ch. Div. 552; *Loosemore v. Tiverton, &c., Railway Co.*, 1882, L. R., 22 Ch. Div. 25.

⁴ *Jamieson v. North British Railway Co.*, Dec. 18, 1868, 6 S. L. R. 188.

⁵ *Per Lord Adam (Ordinary)* in *Caledonian and Glasgow and South-Western Railway Coa. v. Dixon*, Nov. 13, 1879, 7 R. 216.

⁶ *Nisbet Hamilton v. North British Railway Co.*, Jan. 15, 1886, 13 R. 454.

⁷ L. R., 7 Ch. App. 699.

⁸ L. R., 2 E. & L. App. 27.

taking, not so here. The series of English cases started from a rule of the common law different from ours. *Hart v. Gill* was their common law rule. Ours was laid down in the cases of *Menzies*¹ and of the *Duke of Hamilton*.² In the former freestone was held not to be included in "mines and minerals." In the latter "coals and other metals, fossils, and minerals" was held not to include freestone.

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At advising,—

LORD PRESIDENT.—The circumstances of the case are very simple. The land in question was taken by the pursuers by notice in common form under the Lands Clauses Act, and the matter of compensation was referred to arbiters. Ultimately, however, parties settled the amount of compensation without going to the arbiters. Upon that a disposition was granted by Mr Farie to the Water Commissioners conveying to them this piece of land they had agreed to take, and containing this reservation—viz., "Excepting always, and reserving to me and my foreaids, the whole coal and other minerals in said lands, in terms of the clauses relating to mines in 'The Water-Works Clauses Act, 1847.'" It is necessary, therefore, to resort to these clauses of the Water-Works Act, because on the construction of them the whole question turns.

The first of them is the 18th; it provides,—“The undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the water-works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.”

Then the 22d section provides that, “except when otherwise provided for by agreement between the undertakers and other parties, if the owner, lessee, or occupier of any mines or minerals lying under the reservoirs or buildings belonging to the undertakers . . . be desirous of working the same,” he shall give notice of his intention to do so thirty days before the commencement of the working. If it shall appear to the undertakers after inspection that the working of the minerals is likely to damage their undertaking, and if they are willing to pay compensation for the minerals, they shall not be worked, the amount of compensation being settled as in other cases of disputed compensation.

The 23d section is the only other section to which it is necessary specially to refer; it provides that “if before the expiration of such thirty days the undertakers do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines and to drain the same by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner.”

I confess that I do not see much difficulty in construing these clauses and applying them to the present case. Everything that can be called a mineral is reserved in this statutory transference. It is an absolute reservation, and so complete is it that the owner's right to work his minerals comes into operation

¹ *Menzies v. Earl of Breadalbane and Holland*, July 17, 1822, 2 Sh. App. 225.

² *Duke of Hamilton v. Bentley*, June 29, 1841, 3 D. 1121, 13 Scot. Jur. 499.

No. 72. to the effect of destroying altogether the works for which the land has been acquired, unless the undertakers intimate that they desire part of the minerals to remain unworked and offer compensation therefor.

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The only restrictions upon working are those introduced by the 23d section, viz., first, that no wilful damage shall be done to the works, i.e., no damage that is not necessary to the working out of the minerals, and second, that the owner shall not work in any unusual manner. With these restrictions, the owner's right to work is absolute. Now, the mode of working the minerals will depend upon their situation. Some are worked by deep mining, some from the surface by means of open cast workings. If the latter be the method, the obvious result will be to destroy the reservoir in the case of water-works.

That is the proper construction of these clauses on the face of them, but there is a very authoritative judgment of the House of Lords which places the matter beyond doubt. I mean the case of the *Great Western Railway Company v. Bennett* (1867, L. R. 2 E. and L. App. 27). That was the case of a railway, but the clauses regulating the case of a railway in the Railways Clauses Act are substantially the same as those in the Water-Works Act; there is no real distinction between them.

The judgment in that case was given by three very eminent lawyers, Lord Chancellor Chelmsford, Lord Cranworth, and Lord Westbury, and it is only necessary to read a sentence or two from their opinions to shew what their view of the matter was. The Lord Chancellor says,—“This section,” viz. the 78th, “appears to me to leave the mine owner to work his mines exactly as he would if the surface belonged to him, unless the railway company chooses to prevent him by expressing willingness to make him compensation.” Lord Cranworth says,—“Independently of the statute, I think the contention of the company would have been unanswerable. I should be extremely sorry if this case should at all bring into doubt the doctrine which was enunciated and acted upon by this House in the case of the *Caledonian Railway Company v. Sprot*,”—that was a case which occurred before the passing of the Railways Clauses Act—“which doctrine is this, that if I sell my land for the purpose of a railway being made upon it, I impliedly sell all necessary support, both subjacent and adjacent, that is required for the purpose of supporting that railway . . . But the difficulties which had arisen upon this subject were, I presume, what gave rise to these provisions of the Railways Clauses Act which are now under discussion. It was obviously the intention of the Legislature, in making these provisions, to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purposes of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered, nothing but the surface. That being so, justice obviously requires that when the mine owner thinks it beneficial to him to work his mines, and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all.” Lord Westbury's opinion is expressed in substantially the same terms.

The effect of that judgment seems to be to put the construction of these clauses beyond all doubt. The mine owner is to go on when he finds it con-

venient to work out the minerals adjacent or subjacent just as if he had not sold the surface to the undertakers. If his workings are to be open cast, it will be in his power to open them on the very bed of the reservoir or the line of the railway company as the case may be.

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At first sight this seems to be a great hardship, but in truth it is no hardship at all. The operation of the statute is very beneficial to the undertakers. It does not put them under the necessity at first of taking more than the surface, they are not required to pay for any support either adjacent or subjacent, and so they escape from the payment of money which otherwise they would have had to pay. It is only when the necessities of the mineral owner compel him to approach the undertaking with his works that it becomes necessary for the undertakers to come forward and pay for so much of the minerals as is necessary to give them support. The case of *Bennett* was a case of coal mining, but the coal required to be worked out in such a way as to withdraw support from the surface.

The only question that remains then is,—whether clay is a mineral in the sense of the Water-Works Act. Upon that matter I think there can be no doubt at all. The minerals contemplated are not confined to any particular species of the substances which constitute the crust of the earth. There is no doubt that freestone is included. That was decided by Lord Kinloch in the case of *Jamieson* (6 S. L. R. 188). So is limestone. That was decided by Lord Adam in the case of *Dixon* (7 R. 216), and in like manner, Mr Justice Kay in the case of the *Haunchwood, &c. Company* (L. R., 20 Ch. Div. 552), decided that the reservation comprehended clay. In short, the term “mineral” appears to me to have been interpreted to mean everything under the surface, however deep or shallow its situation, that can be worked to profit, i.e., is of commercial value.

The case of *Dixon* (7 R. 216) is a case of considerable importance, for although the point was not carried to the Inner-House, it was very clearly raised. I see there that there had been negotiations between the mineral tenant and the railway company as to the purchase of limestone, which could only be worked from the surface, and the railway company, in order to try the question as to whether the mineral tenants were entitled to work it out by open cast working, presented a note of suspension and interdict in the Court of Session. Lord Adam in his note gives this account of these proceedings,—“In the month of June 1878 the respondents’ workings had been carried up to within ten feet of the centre of the railway. Thereupon the complainers, the railway company, presented a note of suspension and interdict, in which they sought to have the respondents interdicted from quarrying or working the limestone lying under the railway by means of open cast workings, or otherwise so as to destroy the surface of the railway. They did not dispute the respondents’ right to work otherwise than by open cast workings. On the 16th July 1878 the Lord Ordinary on the Bills passed the note, and interdicted the respondents from quarrying or working the limestone by means of open cast workings. This interlocutor was adhered to by the Second Division of the Court on 26th October 1878.” (That was merely a judgment passing the note to try the question.) “The case came thereafter to depend in the Court of Session, and was finally disposed of by an interlocutor of the Lord Ordinary, of date 11th February 1879, deciding the case against the complainers, and refusing interdict.”

Now, as Lord Adam, the Lord Ordinary in this case, was Lord Ordinary in

No. 72. the previous case also; I take his account of it as perfectly authentic. There is a judgment by him applicable, I think, directly to the present case; that was a case of limestone workable only by open cast working, and so the undertaking of the company required to be absolutely taken possession of and destroyed. The case of the *Haunchwood, &c. Company* (L. R., 20 Ch. Div. 552), was decided practically on the same grounds.

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The subject in the present case is a large bed of clay, which has been wrought for a long time and has continued to be worked down to the present time. The workings have now reached the neighbourhood of those water-works, and Mr Farie proposes to work on, unless the Commissioners propose to purchase the clay. They say it is their property, and even if it is not, that he is not entitled to work it. If the construction of the Water-Works Act be what I have said, and there is a mineral to be worked, I cannot see how either of these propositions can be maintained.

In the case of *Nisbet Hamilton* (13 R. 454) the judgment of the Court contains a passage which has a pretty distinct bearing on this matter. Lord Adam, who delivered the judgment, in which we all concurred, says, with reference to the 70th section of the Railways Clauses Act, "the word 'minerals,' as there used, is necessarily subject to construction. Common earth and sand are minerals, but nobody will contend that they are intended to fall within the description of minerals in that 70th section. Stone may or may not fall within it according to its quality and value. Where it is valuable, it certainly does, as was decided in the case of *Jamieson v. The North British Railway Company* (6 S. L. R. 188). But, where the stone is of such a quality or description as to be of no merchantable value, I am of opinion that it does not."

That is, I think, a just distinction, on which we must proceed here. The question is, is this clay of merchantable value? The parties differ as to what it is worth, but it is not disputed that it is of merchantable value. Mr Farie says that the value of the clay which he would be prevented working is £10,000. Even if that be an exaggeration, it is plain that money can be made of it, and therefore, I think, it is a mineral in the sense of the statute.

I am for assoilzieing the defender.

LORD MURE.—I have found the question here raised, as to whether the bed of clay in dispute is part of the defender's reserved mineral estate, to be attended with a good deal of difficulty; but after considering it in all its bearings I have not been able to see my way to any other conclusion than that at which the Lord Ordinary has arrived.

The main leading facts on which the question depends are as follows:—The twenty acres of ground, on which the pursuers' reservoirs and works are formed, were acquired by them from the predecessor of the defender in 1871 under a disposition in which there is reserved to the defender "the whole coal and other minerals in the lands, in terms of the clauses relating to mines in the Water-Work Clauses Act, 1847." The subsoil of the ground so acquired consisted mainly of a bed of ordinary clay, beginning at about two feet below the surface and extending to a considerable depth.

It appears from the statements in the record as now amended that the pursuers and the late Mr Farie were both aware of the existence of this bed of clay; and it further appears that before the transaction was concluded the pursuers, who considered such a subsoil very suitable for the construction of their

reservoirs, obtained permission from Mr Farie to make borings on the ground for the purpose of ascertaining the nature of the strata underneath. This they accordingly did, when they ascertained that the depth of the clay at the place where they proposed to construct their reservoirs was about six fathoms; and they were informed at a meeting which took place between Mr Farie and their engineer that the seam of coal lying nearest the surface of the ground had all been worked out, but that the lower seams of coal remained unwrought. It is further stated that when this permission was granted Mr Farie stipulated that the rock underneath the clay should not be pierced, in order to prevent the risk of any surface water getting down to the coal workings below. These allegations as to the meeting with Mr Farie and the result of the borings are denied by the defender, but I understood that the pursuers were ready to instruct them.

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Having thus ascertained the general character of the ground, and that it was suitable for the purposes of the reservoir and works which they had in view, the pursuers took the necessary steps for concluding a purchase, and obtained a conveyance of the ground from Mr Farie for the sum of £11,000—being at the rate of between £500 and £600 an acre. Matters having been so arranged, the pursuers proceeded to construct their works in the manner set out in the third article of the amended record; and it is pretty plain, from the description there given of the way in which the reservoirs were constructed, that the body of water was made to rest upon the clay formation, which had been dug into and used as the most suitable *solum* for the reservoir.

So standing the facts as to the acquisition of the ground, the construction of the reservoirs, and the object for which they were constructed, intimation was given to the pursuers on the part of the defender in the year 1885, that he was desirous of working out the bed of clay under the ground acquired by the pursuers, and requiring them to state whether they would avail themselves of their right to prevent him from working out the clay by making compensation in terms of the statute. The pursuers say they are not bound to make compensation; and the practical result appears to be this, that unless the pursuers are prepared to pay to the defender £10,000, or such other sum as the value of the clay underneath the twenty acres may amount to, the defender proposes to proceed to carry his clay workings into the pursuers' lands, and so to endanger, if not to destroy, the whole of the pursuers' reservoirs and works.

It is not denied that the clay in question can only be worked by open cast; so that it is plain that, if the defender's clay workings are carried on in the way they have hitherto been, which it is intended to continue, the removal of the clay to the extent of from twenty to thirty feet below the land purchased will involve the destruction of the pursuers' reservoirs and works, and even the agricultural value of the ground. And the question raised for consideration under this reclaiming note, is whether that is a proceeding which the defender is in law entitled to have recourse to.

I am humbly of opinion that he is not, because I do not think that the terms of the clause of reservation are sufficient in the circumstances of this case to include seams of clay of the nature here in question. Dealing with the case as one falling to be disposed of by the rules of common law, and without reference to the provisions of the Water Clauses Act, to which I will immediately advert, I hold it to be settled by the decisions to which we have been referred, that a mere general reservation of "mines and minerals" in a disposition does

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not necessarily include substances, such as stone, clay, or sand, although these substances may, in a geological and scientific sense, sometimes be described as minerals. Such a reservation must I apprehend be held to be restricted to those substances which, in common parlance, are understood to be "minerals," viz., substances usually got by mining, as distinguished from quarrying or open working. If the intention be to reserve every kind of substance that can be said to come in any view under the description of a mineral, the granter of the disposition ought I conceive to make those substances matter of special reservation. That I think is the fair import of the decisions I have mentioned.

The first is that of *Menzies v. Lord Breadalbane*, reported in the Faculty Collections, June 10, 1818, and in the House of Lords, July 17, 1822, 1 Sh. App. 225. The clause of reservation in that case was very comprehensive, and bore that "the haill mines and minerals which may be found within the bounds of the said lands, of whatever nature and quality, with the liberty of digging, winning, and away leading the same," were excepted. But it was held that these words did not include what was described as "a vein of stone of a rare species, peculiarly fitted for architectural purposes." The report shews that the case was very deliberately and anxiously considered, and the usual arguments for maintaining that such a stone was a mineral appear to have been used, and, in particular, the argument that "all substances under the soil from which rent and profit may be derived fall under the legal description of minerals." That argument was however rejected, and the Court, altering the judgment of the Lord Ordinary, held—one Judge dissenting—that the stone was not such a substance as fell within the reservation. The report further bears that, on a reclaiming petition against that judgment, four of the Judges thought the interlocutor right, while the remaining Judge still doubted, and the interlocutor altering that of the Lord Ordinary was adhered to.

On appeal this last interlocutor was affirmed, and the Lord Chancellor (Eldon), on giving judgment, and after shortly explaining the difference as to the principles that are to be applied to the construction of a feu and a lease in such a matter, thus expresses himself:—"On the other hand, in the case of a feu everything is given that is not specially reserved. It does appear to me to be the better opinion, that mines and minerals in this feu did not mean stone quarries, and that the opinion of the majority of the Judges is therefore right."

In the other case, viz. that of the *Duke of Hamilton v. Bentley*, June 29, 1841 (3 D. p. 1121), the same question was raised, and the same decision pronounced, relative to a clause which reserved to the Duke "the liberty of working coal and other fossils and minerals," and under which it was held, on the authority of the case of *Menzies*, that freestone was not comprehended in the reservation.

It appears from the report that pretty much the same arguments were maintained on the respective sides as those used in the case of *Menzies*, and it was in addition contended, on the part of the Duke, that the case was distinguishable from that of *Menzies*, inasmuch as there could be no doubt that freestone was a "fossil," which was a word not used in the reservation in the case of *Menzies*. It was, however, on the other hand, contended, on the part of the defender, that a reservation of "fossils, mines, and minerals in a Scotch deed of conveyance did not comprehend freestone quarries, the term 'mineral,' in particular, being one to be used in a popular, and not in a strictly scientific, sense." It was further contended that where it was intended to reserve freestone quarries

it was the practice to reserve this expressly, and the reference given to the No. 72.
Juridical Styles of the period shewed that to be the case.

On considering these arguments the Lord Ordinary gave effect to those of the Magistrates of Jan. 21, 1887.
defender, and the Court, on the case coming before them on a reclaiming note, Glasgow v. Farie.
unanimously adhered; and, as the opinions of the Judges seem to me to be very important, I must ask your Lordships' attention to them somewhat in detail. Justice-Clerk Boyle says,—“Though I doubted in the case of *Menzies v. Lord Breadalbane*, my opinion was overruled, and that case was affirmed in the House of Lords; and it seems to me to establish a principle affirmative of the Lord Ordinary's interlocutor. I think that, under a fair construction of the clause of reservation, the defender is entitled to work a freestone quarry, and that a principle was meant to be established in *Lord Breadalbane's* case, which decides this case.” Lord Meadowbank was “of the same opinion. Whether right or wrong, the House of Lords having given a certain meaning to the exceptions in question, you are bound to adopt the same meaning. But if you go to common parlance, I do not think that freestone quarries are to be comprehended under mines and minerals.” Lord Medwyn agreed, and said,—“I consider this a stronger case than the one referred to. If you were to ask anyone whether a common freestone quarry comes under a reservation of mines and minerals, they would answer that it did not.” And Lord Moncreiff added,—“I am of the same opinion. I do not see that it is possible to distinguish the case of *Lord Breadalbane* from the present.”

The decisions in these two cases appear to me to settle in the most authoritative manner that by the law of Scotland, as adjudicated in the Court of last resort, a reservation of “mines and minerals” in a disposition of property does not comprehend a reservation of freestone, or of a right to work freestone within that property. That being so, the question at once arises whether, if the proposal here made had been to work a quarry of freestone instead of a bed of clay under the land in question, in respect of this general reservation of “minerals,” I could, consistently with the law laid down in these cases, give effect to that proposal. I am of opinion that I could not, and that I should, in respect of those decisions, have been bound to reject it.

And, if I am right in this, the next question which arises is whether on principle any different rule can be laid down and applied in the case of clay. I am of opinion that it cannot. In a popular sense, or, to use the expression of Lord Meadowbank and Lord Medwyn in the case of *The Duke of Hamilton*, in “common parlance,” I do not think that common clay is ever classed under the words “mines and minerals” any more than common, or uncommon, freestone, as the freestone in the case of *Menzies* is said to have been; and if in selling a property the seller intends to reserve a right to prevent the purchaser from making use of portions of that property, which both the clay and the freestone are, and which are not generally understood to be minerals, he is, I think, bound to make this a matter of express and special reservation.

In the opinion which I have just read of Lord Justice-Clerk Boyle in the case of the *Duke of Hamilton*, he speaks of the principle laid down in the case of *Menzies*, which he considered himself bound to adopt and give effect to. Now, as I read the case of *Menzies*, as decided in the House of Lords, the main principle given effect to there is that of requiring a clause of “special reservation” of the particular substance intended to be reserved, wherever that substance is not generally and popularly understood to be a mineral. Lord Eldon's

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words are, "in a feu everything is given which is not specially reserved," and he adds—"It does appear to me to be the better opinion that mines and minerals in this feu did not mean stone quarries." In the present case, however, there was an omission on the part of the defender's predecessor to give effect to this broad principle of "special reservation." Instead of doing so, he has used the general words the "whole coal and other minerals," and in respect of this omission the defender is, I think, now precluded from insisting on the claim he is making to work out the clay under the pursuers' property. I think that clay was disposed to the pursuers absolutely, and that no reservation of it was made to the defender.

Such being the conclusion I have come to in dealing with the case as one of Scotch conveyancing, I do not consider it necessary to go into any detailed examination of the English decisions mainly relied on by the defender.

Your Lordship has referred to the opinion of Lord Kinloch in the case of *Jamieson* against the *North British Railway Co.* I have great respect for any opinion of Lord Kinloch; but I consider myself bound by the higher authority of the cases to which I have referred, and which have remained unchallenged since 1841. I am quite unable to look upon the opinion of a Judge sitting as Lord Ordinary in the Outer-House as sufficient to supersede deliberate decisions of this Court and of the House of Lords which do not seem to have been brought under his consideration. The same observation applies to the opinion of Lord Adam in the case of *Dixon* against the *North British Railway Co.* It is said that I concurred in the result of the judgment of this Division in the case of *Nisbet Hamilton*. But I am not aware that by doing so I am to be held responsible for all the observations which may have been made argumentatively in delivering judgment in that case. In my view of the case, it was not necessary to decide whether freestone was a mineral or not; and as I read the case, the point was not actually decided. It appears to me therefore, notwithstanding these recent decisions, that, upon the authority of the cases of *Menzies* and of *Hamilton*, a reservation of "mines and minerals" in a disposition of heritable property in Scotland cannot, on sound construction, be held to apply either to freestone or to clay; and that the defender has no right to take up the position he has here done.

But your Lordship has, as I understand, indicated an opinion that the words of the Railway and Water-Works Clauses Acts must be interpreted as extending the common law rules, and as meaning mines and minerals of every description, and under any scientific denomination. I am obliged to differ from your Lordship in that respect. For as I read the words of reservation in those Acts, which are "coal, ironstone, slate, or other minerals," they are in no respect more comprehensive than the words "mines and minerals." They are not so comprehensive as those used in the case of *Menzies*, and I am not aware that it has ever as yet been decided that a wider construction must be given to such words when used in a disposition of property under either of those Acts than when they are used in a disposition of property at common law.

There are, no doubt, most material provisions in the Water-Works Clauses Act, following the Railway Clauses Act, as to the way in which, under a reservation of mines and minerals, the minerals are to be worked. That is where these Acts alter the common law; but they do not, as I apprehend, alter the common law in any other respect; and I am unable to find any expressions in the opinions of the Judges in the case of *Bennett* (2 E. and I. Appeals, 27) which are calculated to shew that they held the re-

reservation under the Railway Clauses Act to include minerals which were not covered by a reservation of "mines and minerals" at common law. I am myself very clearly of opinion that it does not; and I cannot assume, in the absence of any express provision to that effect, that it was the intention of the Legislature, in providing for the mode in which minerals were to be worked under or near a railway, to alter the common law rules as to what a reservation of minerals was intended to cover, and so to supersede decisions that had been deliberately pronounced as to what substances a reservation of "mines and minerals" could be held to include. The judgment in the case of *Bennett* was pronounced to regulate the mode of working coal, under the Railway Clauses Act. There was no question there raised as to what was covered by the word "mineral." The only question was as to how the coal was to be worked; and I think the observation of the Lord Ordinary in this respect is quite correct when he says that the "statute has taken away or displaced the common law right of support, by substituting for it a right of compulsory purchase." In all other respects it appears to me that the statute has left the common law as to mines and minerals where it was.

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Reference has been made to the case of *Hext v. Gill* (L. R., 7 Chan. App. p. 699), where a peculiar kind of clay, called China clay, was held to be a mineral. But that was done after an investigation into the character of the substance there in question; and, after a careful investigation, the Court came to the conclusion that that particular kind of clay was a mineral. But while they came to be of opinion that it was a mineral, they took very good care to prevent the owner of the reserved right from doing any injury to the property in which it was found, and they granted an injunction against working the mineral, because it could not be worked without destroying the substance of the property from which they proposed to take it. So that practically the decision was in favour of the owner of the ground. In examining that decision it appears to me to have been pronounced mainly in respect of the previous case of *Bell v. Wilson* (L. R., 1 Chan. 303), where the Lords Justices, altering Vice-Chancellor Kindersley, held freestone to be a mineral. In giving judgment in the case of *Hext*, Lord Justice Mellish refers to *Bell v. Wilson* as a leading authority on the subject, and seems to have considered himself bound by that decision; and, applying the rule there laid down as to freestone to the case of China clay, held upon the evidence that the clay was a mineral. It is clear, therefore, that in deciding the case of *Hext* the Lord Justices started with quite a different rule from that laid down in the judgment of the House of Lords in the case of *Menzies*, and of this Court in the case of the *Duke of Hamilton*. I am of opinion, therefore, that a decision such as that of *Hext*, proceeding as it does upon the decision of *Bell v. Wilson*, which is directly at variance with what I conceive to be the rules of the law of Scotland in such matters, cannot be regarded as an authority in Scotland in dealing with a question of this description.

In the case of *Hext* Lord Justice James, in concurring with the judgment, though not I think very cordially, says,—“But for these authorities,” *i.e.*, *Bell v. Wilson*, and others, “I should have thought that what was meant by ‘mines and minerals’ in such a grant was a question of fact, what these words meant in the vernacular of the mining world, and commercial world, and landowners, at the end of the last century, upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral.” In these

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observations I entirely concur, but I think that his Lordship should not have stopped at the end of the last century ; for I believe the impression to which he has referred prevailed to a much later date, and that if, even at the present time, the question were put to any of the same classes of persons whether clay was considered to be a mineral, the answer of the great majority would be that it was not. But even if I am wrong in that, it ought, I think, to have been proved that the clay here in question was a mineral. In the English cases to which we have been referred there was inquiry, and particular ingredients appear to have been found in the clay which led to its being held to be a mineral. Here, however, there has been no such inquiry ; the substance in question is just ordinary clay, and there is no evidence to shew that ordinary clay is a mineral.

In the case of the *Duke of Hamilton* Lord Moncreiff refers, in his opinion, to various authorities as to the meaning of the word "fossil." That suggested to me to look into the usual sources of information as to the meaning of the word "clay," and I thought I could not do better than endeavour to ascertain what Dr Johnson said in his Dictionary as to the ordinary understanding of mankind as to the meaning of the word. In the larger edition of his Dictionary I find clay divided under three heads, and defined (1) unctuous and tenacious earth, "such as will mould into a certain form ; (2) earth in general ; (3) dirt or moistened earth" ; and in the smaller edition it is defined as a "common sort of earth." In the Imperial Dictionary the definition is "a species of earth which is firmly coherent and compact." So that these compilers describe clay as being earth or a species of earth ; and if clay is, in these circumstances, to be dealt with as a mineral, in the sense in which the words "mines and minerals" are used in a reservation in a deed of conveyance, it appears to me that sand, gravel, and even some kinds of subsoil, must also be held to be reserved. That is a very startling result for all railway and water companies, and for all owners of property in the disposition of which mines and minerals are reserved. For it will necessarily expose them to the risk of being obliged to give up considerable parts of their property, or to pay large sums in compensation, wherever the holder of the reserved right can shew that he can make a profit by working and disposing of substances which have, in my opinion, never before been held in Scotland to be covered by such a reservation.

This is a risk against which such proprietors are, I think, entitled to be protected upon the authority of the two leading decisions I have referred to ; and I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD SHAND.—I concur not only in the judgment which your Lordship proposes should be given in this case, but also in the reasons contained in your Lordship's opinion.

The property with which we have to deal in this case consisted, as it was conveyed to the Lord Provost, Magistrates, and Town-Council of Glasgow as Commissioners under the Glasgow Corporation Water-Works Act, of an area of about 21 acres, and it appears from the statement of the parties—indeed from the statement of the Water Commissioners themselves—that of these 21 acres they have occupied for the purposes of their statute about 15 acres, so that there remains 6 acres of this property so conveyed unoccupied by works of any kind, while the powers of the company to make any extension of their works under their statutes have expired. And as we are told by the pursuers

in article 3 of the condescendence, the northern portion—that is, the 6 acres which are referred to in the same article, which have not been used,—not being at present required for the pursuers' works, is let by them for grazing purposes. The parties are agreed that the ground does contain clay, the defender alleges clay of a valuable character, for his statement is, that it is estimated, upon his view of the case, that the clay in the lands in question, which he would be prevented from working if the pursuers were to obtain the decree they ask, is worth not less than £10,000. That is not admitted by the pursuers, but the argument was taken on the concession, which could not be withheld, that this clay was of commercial value—a circumstance which is put beyond question by the fact that Mr Farie, the defender, has been working the very same seam, and is working it now to profit on the lands immediately adjoining, the workings being in such a position that they are now approaching close to the line of the property held by the Commissioners.

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Now, that being the state of the property and the character of the substance contained in it, the conclusion of this action is for declarator that the Water Commissioners are proprietors of the whole of the land, and for a declarator, further, that the defender is not entitled to work or win any part of the clay which it contains, and for an interdict in these broad terms. I am clearly of opinion with your Lordship that no such declarator or interdict can be granted. If, as following upon the result of this decision, the defender should in the course of working the clay—taking out the substance in question—infringe any particular right which the pursuers may have, by the mode of working, or by the way in which an approach is made, and should thus exceed the rights reserved, a right to interdict will still remain with the Water-Works Commissioners, but that must be maintained in a different action from this, not in an action for interdict against the defender working any part of the clay, but in an action raising a special question and founding upon particular circumstances which it could be shewn would be a violation of rights belonging to the pursuers.

That being so, the question raised by the action is, whether this clay throughout the whole extent of ground is the property of the Magistrates, and has been conveyed to them by the conveyance quoted in the summons. The conveyance expressly bears to be granted with this exception:—"Excepting always and reserving to me and my foresaids the whole coal and other minerals in said lands, in terms of the clauses relating to mines in the New Water-Works Clauses Act, 1847." Now, the argument presented on the reclaiming note (and I rather fancy for the first time), and which has moved, if I am not mistaken, my brother Lord Mure to differ from the opinion which your Lordship has expressed, was rested upon certain old cases which occurred in this country, having reference to the interpretation of private grants, as between superior and vassal, of property containing a reservation of mines and minerals. Upon these cases I have simply to say that I hold that they are entirely away from any question as to the meaning of the terms "mines and minerals" contained in a conveyance to a railway company under the Railway Clauses Act, or to a water company under the Water-Works Clauses Act. It appears to me that an entirely different question will arise as to the interpretation of the terms "mines and minerals" in an ordinary conveyance (not to a public company under the Clauses Acts), or in a lease, it may be, of a landlord, and that other considerations, which do not arise in such a question as we have here, must enter into the decision of cases which arise upon such conveyances or

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leases. There is certainly at the outset this broad distinction between the two classes, settled by the authorities, that in the ordinary case, notwithstanding the reservation of mines and minerals, there is an obligation of support, and nothing is more clearly settled than this, that there is no such obligation in the case of a conveyance to a railway company, or to a water company under the statutes. The circumstance that the reservation is given in the terms of the statutes, and in reference to the provisions therein contained, has been distinctly held to result in this, that there is no such right of support given, but that, on the contrary, if the right of a support is desired in a case in which minerals are in the ground, that must be bought and paid for in a subsequent transaction. There, to begin with, there is a vital difference between all such cases of private transaction and the case of a conveyance under these statutes. But this matter is put beyond all question, as it humbly appears to me, by what their Lordships in the House of Lords have laid down in the leading case of *Bennett*, which has ruled a great many cases since its date. In that case, as your Lordship has already pointed out, there had been an argument founded upon the House of Lords' decision previously given in the case of the *Caledonian Railway Company v. Sprott*, and Lord Cranworth takes care to say,—“Independently of the statute, I think the contention of the company would have been unanswerable,” and he goes on to say,—“The difficulties which have arisen upon this subject were, I presume, what gave rise to these provisions of the Railway Clauses Act which are now under discussion.” So that the statute was intended for the very purpose of obviating any questions which could have been raised upon such decisions as were founded upon in the argument for the pursuers upon this branch of the case. “It was obviously,” his Lordship adds, “the intention of the Legislature to create a new code as to the relation between mine owners and railway companies where lands were compulsorily taken for the purpose of making a railway.” The opening passage of Lord Chelmsford's opinion is also worthy of notice. But it appears to me that there is a further argument upon this branch of the case to be derived from the decision in the case of *Nisbet Hamilton v. The North British Railway Company*. It was pleaded before us that a reservation of mines and minerals such as we have here, a reservation in these terms, did not include freestone, but that the freestone had been conveyed to the company, and the question between the parties was whether it was so. Miss Nisbet Hamilton in raising that action contended that the stone which formed part of the embankment of the line was reserved. The company, on the other hand, raised the opposite argument. And what was the view which was there stated by the Court in the opinion as delivered by Lord Adam? It was in these words,—“The word ‘minerals’”—that is, the word “minerals” as used in the Railway Clauses Act—“is necessarily subject to construction. . . . Stone may or may not fall within it according to its quality and value. Where it is valuable it certainly does, as was decided in the case of *Jamieson v. The North British Railway Company*; but where the stone is of such a quality and description as to be of no merchantable value, I am of opinion it does not.” Now, if it could have been successfully contended upon the authority of cases applicable to the common law that freestone did not fall within the exception, there was no occasion for the proof or a great part of the argument which took place in that case. The real argument proceeded upon the assumption that freestone would fall under the reservation; it certainly does, as I humbly think, if it be

of a valuable nature, and upon that view the decision of the Court proceeded. **No. 72.**
 That was an unanimous decision, and it appears to me a direct authority by Jan. 21, 1887.
 this Division of the Court, that the contention which was maintained on the Magistrates of Glasgow v. Farie.
 authority of these older cases, that freestone is not, within the meaning of the
 Railway Clauses Act, a mineral, cannot succeed.

But I may further notice that the Lord Ordinary in the judgment he has given does not seem to have given any countenance to the argument which was presented on the reclaiming note, for I observe that with reference to this matter of freestone he does not take the view, or indicate the view, that "minerals," in the sense in which it is used here, is to be confined to metaliferous substances. What his Lordship says is this,—“I was referred to the decisions of Judges of this Court to the effect that in the particular cases freestone wrought for the purposes of building, and limestone for calcination, were minerals within the meaning of the statute. I do not mean to express any doubt as to the soundness of these decisions, because my opinion in this case is rested entirely on the essentially superficial character of the stratum proposed to be wrought.” So that his Lordship does concur in thinking that freestone is a mineral within the meaning of the clauses, but adds—“and upon the known use of the terms ‘mining’ and ‘minerals’ in this country, terms which are confined, as I think, to the strata ordinarily wrought by underground workings, and only by removal of the surface in these exceptional cases where the lie of the strata makes this the more economical mode, or it may be the only mode, of working them.” The ground of judgment of the Lord Ordinary, therefore, is that, according to his view, the exception includes only substances which are to be removed by mining, and will not cover subjects wrought from the surface. There is no indication of opinion that freestone is not included in the term minerals; on the contrary, his Lordship is of opinion that it is.

Now, having said so much upon the leading argument which was presented on the part of the Commissioners, I shall only add a few words as to the view I take of the law as applicable to this case. It appears to me to be the result of *Bennett's* case with reference to the particular code which the Railway Clauses Act and the Water-Works Clauses Act lay down for the decision of questions of this kind, where lands contain any substance below the surface which can be got and removed so as to produce profit, that (first) there is given a right to the surface only, including such parts of any mines, or coal, freestone, slate, or other minerals under the surface, as shall be necessary to be dug or carried away, or used in the construction of the works; and (second) that there is no right to support given,—that is, no right which can prejudice or affect the right of the proprietor granting the conveyance to get and remove any substance underneath the surface which can be got and removed so as to produce profit. It appears to me that the authorities upon that subject in the law are clear, following upon the case of *Bennett*, which no doubt dealt with coal only, but which still is a clear authority for the determination of any question of this kind. We have in this Court the case of *Jamieson*, to which your Lordship referred, and which was approved by the unanimous judgment of the Court in the recent case of *Nisbet Hamilton*, and in addition to that we have the case which your Lordship mentioned, decided by Lord Adam, applying to limestone, and putting that in the same position as a mineral which was excepted from the conveyance. Then again in England we have a stream of cases. One of the leading authorities is the case of *Hertz*, which was cited in the argument, in which there is a very

No. 72. clear description by Lord Justice Mellish of what is to be held as comprehended under the term "minerals." There is the case of the *Attorney-General of Man* (4 App. Ca. 305), in which Judges of great eminence gave the same extensive meaning to the word "minerals"; and finally there is the valuable and clear judgment by Lord Justice Kay (in which I beg to express my entire concurrence) in which it seems to me he dealt with the very point the Court is now deciding, and decided it in accordance with the opinion your Lordship has expressed. It is quite true, as has been observed, that although the China clay in the ground in the case of *Hext* had been reserved, the proprietor was not held entitled to work the clay, but the reason of that, as stated by the learned Judges, was that, taking the grant as a whole, they were of opinion that it was so expressed that the only right of working given to the landowner was here and there to open places by which he could get the materials so as to work underneath and take it away, whereas the right, if exercised in the way the proprietor contended for, would have removed the substance altogether, and taken away the whole ground, including the whole surface; and the Court, while holding that the China clay was embraced in the term "minerals," refused to allow the whole of the subject to be removed as was proposed, because there was a defect in the expression of the title, from which it was clear that the proprietor was not to be entitled to take away the very substance he had sold. In regard to the case of *The Midland Railway Company v. The Haunchwood Brick and Tile Company*, it is true that, while that was a case in which the clay in question was simply used for making bricks, it appears that the bricks were of more value than usual, because there was a certain strain of iron to be found in the clay. But it is quite clear, upon reading the report, that the judgment did not rest upon any special view of that kind, but that Mr Justice Kay's judgment would equally apply to the case of any clay which was of commercial value for the purpose of making bricks, such as the clay in question in this case undoubtedly is.

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The judgment which your Lordship proposes is, I think, very much supported by the consideration of what occurs when questions of compensation are raised by proprietors who demand compensation from a water company or a railway company taking their land. If the railway, to take that case in the first instance, is to carry its works entirely upon the surface, and it is quite clear that it is a level surface, and there is to be no cutting, what does the company pay for? The railway company takes and pays for the surface, and the surface only. There is nothing in the statute entitling them, or at least requiring them, to take more, for the statute expressly bears that the undertakers shall not be entitled to any mines, &c., except only such parts as are necessary to be dug, carried away, or used in the construction of the works. If, again, the company have to make excavations or deep cuttings, then what do the company pay for? I take it, simply for the surface to be occupied by them down to the formation level, as was explained by Lord Adam in the case of *Nisbet Hamilton*, and nothing more; and in that case they take, and are entitled to take away what is used in the construction of the works—what is dug and used in the construction of the works. If companies had at once to take and pay for clay, sand, or gravel, or other minerals to a great depth, claims of compensation would be made on quite a different principle, and the hardship to public companies would be very great. I have only further to add that it is, I think, impossible to read the words of section 18 of the Water-Works Clauses Act, and the corresponding

section to the Railway Clauses Act, as limited to mines in the sense which the Lord Ordinary seems to adopt, that they must refer only to underground workings, working by shafts and underground mines. The statute reserves the right to two separate things in the expression used. It says the undertakers shall not be entitled to any mines of coals, ironstone, slate, and adds, "or other minerals," and the words "or other minerals" in that sense surely must mean something more than metals such as ironstone, or minerals limited to such substances as coal. And that it certainly does mean more is, I think, very clear when you look at what follows. They are not to be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the water-works. Now, can it be suggested that the company would ever use coal, ironstone, or slate in the construction of their works, or that a railway company in making its railway has to use coal, ironstone, slate, or other minerals? It seems to me very plain that what the Legislature must have had in view is other minerals or substances than coal, ironstone, and slate, because neither of these can be used in the construction of the works; and the very first substance that occurs to one in reference to a cause of this kind as embraced under the word "minerals" which the company would be most likely to use is freestone or other stone, and if stone, then clay and gravel and sand, all of them substances of value which may be dug up and taken away and used by the undertakers in the construction of their works. Accordingly, I hold with your Lordship that the word "minerals" in this case is not to be taken in any narrow sense which would exclude freestone, the very substance of all others which the company might find useful in making embankments and bridges, but must include that, and on the same principle everything which is of value, if one be right in holding that the company really paid for the surface only, and did not pay for support. If it happen that the property does not contain any valuable substance below the surface, the company no doubt will get support, but in that case they do not get support because they have bought and paid for it, but from the circumstance that it is not worth the proprietor's while to proceed to take away what lies under the surface. Accordingly, I entirely concur with the observation made by Mr Justice Kay in the case of the *Midland Railway Company* that the whole question as to the right of working the substance on the part of the owner who has reserved it depends upon his being able to shew that it is of commercial value. If it be not of commercial value, then it would not be a *bona fide* proceeding on his part to give notice that he was to take away the substance lying under the surface—if his purpose was to harass the railway company, and not to use anything valuable to himself, and I cannot doubt in that case that the owner who had reserved his minerals would not be entitled to execute any working which would affect or take away the surface. But if an owner who has reserved his minerals, and has not given any obligation of support, under these statutes desires to remove the freestone, coal, ironstone, sand, clay, or gravel, which may be worked to profit, it appears to me that each of these substances are in the same position—that they are reserved to the owner; and accordingly I concur with your Lordship in holding that we should give judgment to the effect which your Lordship proposes.

LORD ADAM.—As I was the Lord Ordinary in the case of *Dixon* (7 R. 2'

No. 72. and as I was also chiefly responsible for the judgment of the Court in *Nisbet Hamilton's* case (13 R. 454), there can be no doubt about my opinion in the present case.
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The lands here were disposed under this reservation :—"Excepting always and reserving to me and my forefathers the whole coal and other minerals in said lands, in terms of the clauses relating to mines in 'The Water-Works Clauses Act, 1847.'" These clauses are admittedly in substance identical with the corresponding clauses in the Railway Clauses Act, and it follows therefore that all decisions pronounced upon the Railway Clauses Act apply to similar questions raised under the Water-Works Act. No distinction can be taken between the two classes of cases.

Lord Mure and the Lord Ordinary are of opinion that this case must be disposed of just as if it were the case of a voluntary sale with a reservation, and their Lordships think that the fact that it is a statutory sale with a statutory reservation makes no difference.

In my humble opinion it is there that the Lord Ordinary has gone wrong. If this had been the case of a voluntary sale I should probably have come to the same conclusion as the Lord Ordinary, but a statutory sale is something quite different.

In considering the question I think we must consider what the intention of the Legislature was in enacting the clauses as to mines and minerals in the statute. All that railway companies and water-work commissioners require for the purposes of their undertakings is the use of the surface and the necessary support. It would be altogether out of the question to compel them to buy valuable mines and minerals under or near their undertaking, before the owners required to work them. While the provisions of the statute are therefore of great advantage to the railway company, they are of no disadvantage to the owner, for he is entitled to work the mines and minerals just as if the company was not there. When he wants to work them he must give notice, and then he may either proceed to work them or obtain compensation.

The reason of the Act applies just as much to clay or other valuable substance or material in or under the ground, as it does to ironstone or coal. The Act, I think, ought to receive a liberal interpretation in this respect. Clay is a mineral, for it is neither an animal nor a vegetable, and if it is a mineral it falls under the purpose and intention of the Legislature. We must look therefore at this case in an entirely different light from the case of a voluntary sale and a voluntary reservation.

Now, looking at it as a case of statutory sale, is clay included in the terms "mines and minerals"? In the *Haunchwood Co.'s* case (20 Ch. Div. 552) to which your Lordship has referred, there was a bed of clay very much in the same position as the clay here. It was about three or four feet below the surface, and all that was said of it was that it was "of some value."

There was another case of clay to which your Lordship did not allude—I mean the case of *Loosemore v. Tiverton, &c. Railway Co.* (22 Ch. Div. 43.) There was a proof in that case, and Lord Justice Fry says,—"On the balance of testimony I have come to the conclusion that this clay, although it does not appear to have been worked before, and although it does not appear to have been worked in the neighbourhood, was nevertheless clay of commercial value, and was therefore a mineral within the meaning of section 77."

That is the very point which we have here. All that was said is that it was

of some commercial value, and therefore it is a mineral within the meaning of No. 72. the Act, and that brings out the very point which is involved in the present case.

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There are two other cases which illustrate the point that "commercial value" is the true test, although not occurring under the general Acts. The first is the case of the *Midland Railway Co. v. Checkley* (4 Eq. 19). That was the case of a canal, and it was under a private Act of Parliament, but its clauses were very similar to the clauses of the general Act. The rubric there is, "*Held* that the reservation of mines and minerals within and under the land included everything below the surface available for agricultural purposes, which could be made useful for any purpose, and included the right of quarrying, as well as underground mining."

Lord Romilly, M.R., says,—“Stone is, in my opinion, clearly a mineral; and in fact everything except the mere surface which is used for agricultural purposes; anything beyond that, which is useful for any purpose whatever, whether it is gravel, marble, fireclay, or the like, comes within the word ‘mineral,’ when there is a reservation of mines and minerals from a grant of land. . . .”

The other case is that of *Hext v. Gill* (7 Ch. 699), which was a case of China clay. That was a special case, because it was the case of a voluntary sale, and the principle applied was that the grantor of the conveyance was bound to do nothing to derogate from his grant. If that were the principle to be applied here the Commissioners would probably be protected, but it does not apply to a case like the present.

As to the method of working, it is superfluous to say anything. The law is established by the case of *Bennett* (2 E. & L. App. 27), and it is that the owner of the mines and minerals is entitled to work them just as if the lands had not been sold to the Water-Work Commissioners under the restrictions specified in the 23d section of the Water-Works Act—viz., that no wilful damage is to be done, and that there is to be no working in an unusual manner.

In the present case no question can be raised on either of these points. It is a matter of admission that the clay has been worked for a considerable time, and it is because it has been worked up to the margin of the property acquired by the Commissioners that the question has arisen; there is no allegation that it is being worked in an unusual manner.

I am of opinion that the clay is of commercial value, and that being so that it falls under the reservation.

THE COURT recalled the interlocutor of the Lord Ordinary, and assolizied the defender.

CAMPBELL & SMITH, S.S.C.—HAMILTON, KINNAR, & BEATSON, W.S.—Agents.

No. 73.

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Murray, &c.
v. Gregory's
Trustees, &c.

THOMAS GRAHAM MURRAY AND OTHERS, First Parties.

HENRY JOHN HOOD AND ANOTHER (Mrs Gregory's Trustees),
Second Parties.—*Pearson—Murray.*

DOROTHY JANET GREGORY AND OTHERS (Dr Gregory's Heirs-at-law),
Third Parties.—*C. J. Guthrie.*

ROBERT ARTHUR WHITTING AND OTHERS (Frederick W. Gregory's Trustees),
Fourth Parties.—*C. J. Guthrie.*

SIR ARCHIBALD ALISON, BART., AND OTHERS, Fifth Parties.—
D.-F. Mackintosh—Low.

Succession—Vesting—Effect of ulterior destination of residuo to "nearest of kin."—In a postnuptial contract of marriage the spouses conveyed, "each of them to the other, in case of his or her survivancy, in liferent," and to the children of their marriage in fee, divisible as after mentioned, their "whole estate and effects, heritable and moveable," it being declared "that the said funds and estate hereby settled upon the children of the present marriage in fee in manner above mentioned shall be divisible amongst such children in such shares as their father should appoint, and failing such appointment, equally." The deed further declared "that in the event of the dissolution of the said marriage by the predecease of any of the said spouses without leaving children, or of the decease of all such children during the lifetime of the survivor," then "it shall be in the power of the said married parties severally to dispose by testament of the proper share of the said funds and effects belonging to the said parties severally, but such disposition not to take effect until the decease of the longest liver of the said married parties, and failing any such disposition, then, and in that case, the said whole funds and estate settled by these presents shall, after the decease of the said parties, suffer division in manner after mentioned,—that is to say, the whole funds and estate above mentioned belonging or which may belong to" the husband "shall fall to and become the property of his own nearest of kin," and the wife's property to her nearest of kin. Then followed a declaration that the surviving spouse should, in the event of a second marriage, have power to settle the half of his or her estate on the spouse and children of the second marriage.

The husband was survived by his wife and by one child, who predeceased his mother.

In a competition for the husband's estate raised after the death of the surviving spouse between the representatives of the husband's nearest of kin at the date of his death and those nearest of kin to him at the date of his widow's death, *held (dies. Lord Shand)* (1) that the husband's estate did not vest in the legatees till the death of the surviving spouse; and (2) that the persons then called to the succession were his nearest of kin as at that date.

Question, whether the nearest blood relations or those entitled to succeed as heirs *in mobilibus* would have been entitled to take under the destination to "nearest of kin," if the same persons had not represented both classes.

1ST DIVISION.

M.

ON 25th March 1840 a postnuptial contract of marriage was executed by Dr William Gregory, Professor of Medicine in the King's College of Aberdeen (afterwards Professor of Chemistry in the University of Edinburgh), and Mrs Lisette Scott or Makdougall Gregory, his wife. The deed bore,—“The said Dr William Gregory and Mrs Lisette Scott or Gregory . . . do hereby mutually and reciprocally give, grant, assign, and dispose, each of them to the other in case of his or her survivancy, in liferent during all the days of the lifetime of such survivor, and to the children of their marriage in fee, divisible as after mentioned,” their whole heritable and moveable estate “at present belonging to either of them the said married parties, or in which they have at present any

vested rights or interests, or which may pertain or belong, or become due or indebted to either of them during the subsistence of their marriage." No. 73.

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Then followed a special conveyance by Dr Gregory in favour of his spouse in liferent and the children of the marriage in fee of his share in certain testamentary funds in which he had an interest, and a similar conveyance by Mrs Gregory in favour of her husband "in liferent, for his liferent use allenarly, and to and among the children of the marriage in fee."

Then followed a declaration "that the said funds and estate hereby settled upon the children of the present marriage in fee, in manner above mentioned, shall be divisible amongst such children, in such shares and proportions as the said Dr William Gregory shall direct and appoint by any writing under his hand, and failing such division, shall fall and belong to the said children, equally divisible among them, share and share alike, the shares belonging to the said children being payable to them severally upon their attaining majority in the case of sons, or attaining majority or being married in the case of daughters, whichever of the said events shall first happen; but declaring that after the decease of the longest liver of the said Dr William Gregory and Mrs Lisette Scott or Gregory, and until such provisions shall become payable to their said children severally, it shall be in the power of the trustees after named to advance to and for the maintenance, support, and education of such children such proportion of the interest or annual revenue arising from their said provisions as may seem expedient to them, or the whole of such interest or annual revenue if necessary, and even to advance to or for the behoof of any of the said children, being sons, the whole or such proportion of their several provisions as may be necessary for establishing such children in a profession even before their attaining majority."

The deed then proceeded,—“In the event of the dissolution of the said marriage by the predecease of any of the said spouses without leaving children, or of the decease of all such children during the lifetime of the survivor of the said married parties, then, and in either of these cases, it shall be in the power of the said married parties severally to dispose by testament of the proper share of the said funds and effects belonging to the said parties severally, but such disposition not to take effect until the decease of the longest liver of the said married parties, and failing any such disposition, then, and in that case, the said whole funds and estate settled by these presents shall, after the decease of the longest liver of the said married parties, suffer division in manner after mentioned,—that is to say, the whole funds and estate above mentioned belonging or which may belong to the said Dr William Gregory shall fall to and become the property of his own nearest of kin, and the whole funds and estate above mentioned belonging to or which may belong to the said Mrs Lisette Scott or Gregory shall fall to and become the property of her own nearest of kin, as also declaring that in case after the dissolution of the said marriage by the predecease of either party leaving children, the survivor of the said married parties shall enter into a second marriage, then, and in that event, notwithstanding of the above provisions, it shall be in the power of such party so contracting a second marriage to settle and secure the one just and equal half of the proper means and estate above mentioned, belonging to or that may be acquired by such party upon his or her spouse and children in such second marriage.” Then followed a nomination of certain persons “to be trustees for the purpose of carrying the provisions of the marriage settlement into execution.”

Dr Gregory died on 24th April 1858, survived by his wife and

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James Liebig Gregory, the only child of the marriage. James Liebig Gregory died on 5th May 1863, survived by his wife and by an only child, Henry Makdougall John Fairfax Gregory, who died on 21st June 1881 while still in minority. Dr Gregory's widow died on 24th May 1885.

This was a special case, which raised a question depending upon the construction of the above quoted provisions of the marriage-contract as to the right to the price of certain subjects in Princes Street, Edinburgh, which had been bought by Dr Gregory in 1848, and to which he had made up a title. After his death his widow made up a title to the subjects on the assumption that she was vested in the fee, and in 1877 the subjects were sold for £7500, an agreement being entered into between Mrs Gregory and her grandson, H. M. J. F. Gregory, of the first part, and the purchasers, of the second part, by which the purchasers agreed to accept a conveyance from Mrs Gregory with the consent of her grandson, for all interest he might have, the price to be held by certain trustees, viz, Mr T. G. Murray, W.S., and others, for behoof of those who should be found to have right to the subjects under the marriage-contract. These trustees granted a declaration of trust to the effect that the sum in question was to be held as a *surrogatum* for the house.

H. M. J. F. Gregory left a general disposition and settlement in which, in the event of his predeceasing his grandmother, he bequeathed to her all right which he might be found to have had to the £7500.

The parties to the special case were (1) the trustees under the declaration of trust; (2) the trustees under Mrs Gregory's will; (3) the heirs-at-law of Dr Gregory and of H. M. J. F. Gregory, as at the date of Mrs Gregory's death, and their guardians; (4) the trustees of H. M. J. F. Gregory's heir-at-law, as at the date of the death of the former on 21st June 1881, their contention being that, assuming he had any right to the £7500, it was incompetent for him to test upon it during his minority; and (5) Dr Gregory's next of kin as at the date of Mrs Gregory's death.

The question asked was,—“To which of the parties hereto does the price of the said subjects belong?”

The second parties maintained that they had right to the price in one or other of the following ways, viz.—(1) The fee of the subjects was in Mrs Gregory, and they had right to the price under her last will and testament; (2) the fee was in James Liebig Gregory, and on his death descended to H. M. J. F. Gregory, and he, by his general disposition and settlement, validly bequeathed the price of the subjects to Mrs Gregory, and they had now right thereto under her last will and testament; (3) the fee was in the next of kin of Dr Gregory—the next of kin falling to be ascertained as at his death—that is, in James Liebig Gregory, was then taken up by H. M. J. F. Gregory, and the right to the price passed to Mrs Gregory's trustees as in case 2.

The third and fifth parties maintained that Mrs Gregory took only a liferent of the subjects, with a fiduciary fee for the ultimate beneficiaries, and that the vesting of the beneficial fee was suspended until her death.

The third parties maintained, separately, that they, being the heirs-at-law of Dr Gregory as at the death of Mrs Gregory, were entitled to the price of the subjects.

The fourth parties maintained that if the fee of the subjects was in H. M. J. F. Gregory they, as representing his heir-at-law, were entitled to the price of the subjects, it having been incompetent for him while in minority to test on the price.

The fifth parties maintained, separately, that they, being the next of kin of Dr Gregory as at the death of the said Mrs Gregory, were now entitled to the price of the subjects. No. 73.
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It was admitted that the fifth parties were Dr Gregory's next of kin as at the date of his widow's death, whether according to the blood relationship of each individual to the testator, or according to the lines of succession in moveables by the common law of Scotland.

Argued for the second parties ;—(1) A conveyance to a parent in life-rent and the children *nascituri* in fee, as a rule implied a fee in the parent. But in the case of a conveyance between spouses in a marriage-contract it was no doubt different.¹ The Lord President (Inglis) had stated in *Cumstie's case*² that the decision in the case of *Frog's Creditors*³ would not be further extended. It was not therefore contended that the fee had been in Mrs Gregory, and their first alternative contention was departed from. But the fee had vested in her son, and was carried through her son to her grandson, and by him conveyed to her. Vesting took place at Dr Gregory's death without his having made a will. The words "failing any such disposition" were the key to the second branch of the clause. A clause of return or destination over to next of kin did not suspend vesting. That argument was removed by *Balderston's case*.⁴ The death of the surviving spouse was a mere period of distribution. It was said that the reserved power to make a settlement suspended the vesting, but in any case, as regarded Dr Gregory's estate that reserved power came to an end on Dr Gregory's death. The case might have been different if the father had been the surviving spouse, or if there had been no child alive at his death. (2) But even if vesting was postponed, the next of kin when the succession opened to them were to be sought for as at the date of Dr Gregory's death. It was not likely that the testator should look for persons to succeed at an indefinitely late period. The decision in *Wannop's case* (*Haldane's Trustees v. Murphy*)⁵ could not stand alongside of the decision in the case of *Mortimore*⁶ in the English Courts. The present was a contrast to *Wannop's case*, for there, the fee being destined to the children of the life-renters, or of one of them, if they or either of them should marry, which neither of them did, it was impossible to say until the death of both who would take. There was nothing of that kind here to suspend the vesting after Dr Gregory's death.⁶

It was maintained that a person in minority, as H. M. J. F. Gregory was when he executed his will, could not test upon heritable subjects. But the state of the facts was that he had made up his title. The subjects had been sold, and he tested upon the price of them. A minor might test upon moveables and might sell heritage.

The third parties argued ;—Vesting was postponed until Mrs Gregory's death. Upon that question they adopted the argument of the fifth parties. "Nearest of kin" was a flexible term, and meant nearest blood relations according to the nature of the succession, and that being in this case heritage it must go to Dr Gregory's heirs-at-law as at the date of

¹ *Mackellar v. Marquis*, Dec. 4, 1840, 3 D. 172.

² *Cumstie v. Cumstie's Trustees*, June 30, 1876, 3 R. 921.

³ *Frog's Creditors v. His Children*, Nov. 25, 1735, M. 4262.

⁴ *Balderston v. Fulton*, Jan. 23, 1857, 19 D. 293, 29 Scot. Jur. 293, contrasted with *Robertson v. Houston*, May 28, 1858, 20 D. 989, 30 Scot. Jur. 590 ; *Haldane's Trustees v. Murphy*, Dec. 15, 1881, 9 R. 269 (Lord President, p. 279).

⁵ *Mortimore v. Mortimore*, May 15, 1879, L. R., 4 App. Ca. 448.

⁶ *Jarman on Wills*, ii. 129 ; *Ferrier v. Angus*, Jan. 21, 1876, 3 R. 396.

No. 78. *Mrs Gregory's death.*¹ What was conveyed was a *universitas*, which was to be distributed according to the quality of the succession. The testator's intention was the guide in all such questions, and in none of the cases cited for the second parties did the contingencies exist which it was contended suspended the vesting here.

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The fourth parties argued that assuming that the fee vested in H. M. J. F. Gregory, it was undisposed of by his will, which was incompetent to convey heritage,—it having been executed while he was in minority. The £7500 was expressly stated in the case to be a *surrogatum* for the subjects sold.

The fifth parties argued;—The vesting was postponed here until the widow's death, and upon that event the estate vested in those who would have been Dr Gregory's next of kin had he died at that date, as conditional institutes under the deed. The presumption of vesting *a morte testatoris* was overcome if it could be shewn from the terms of the deed that the testator had a different intention. There was here a destination in favour of the next of kin, who were *personæ predilectæ* and came in as institutes.² If, in place of the words "next of kin" the destination had been to A, B, C, or to a class, there would have been no question.³ The fee after Dr Gregory's death might have been in Mrs Gregory as fiduciary fiar, subject to defeasance, or it might have remained in Dr Gregory's *hereditas jacens*. Either of these views met the feudal difficulty. But this was not an invocation of the law of intestate succession, and it was only in such a case that one went back to the date of the testator's death to ascertain who the next of kin were. The view taken by the majority of the Court in *Wannop's* case was in point here. Nearest of kin meant nearest in blood at the date of the testator's death.⁴ The fact that the estate which was being dealt with here was heritage shewed that the next of kin must be *personæ predilectæ*, otherwise the destination would have been to heirs-at-law. The case was not one of intestacy.⁵ The cases of *Balderston* and *Mortimore* had been cited on the other side. But these were cases where the testator had really invoked the law of intestacy. "Nearest of kin" included all those entitled to the office of executor, but did not include heirs *in mobilibus*.⁶

At advising,—

LORD PRESIDENT.—The decision of the question raised in this special case depends upon the construction of the postnuptial marriage-contract entered into between Dr and Mrs Gregory, which is in some respects a peculiar deed. There is no trust,—there are no doubt persons named as trustees to see to the execution of the deed, but there is no conveyance to trustees, and no directions

¹ *Mitchell's Trustees v. Waddell*, Dec. 7, 1872, 11 Macph. 206, 45 Scot. Jur. 150; *Nimmo v. Murray's Trustees*, June 3, 1864, 2 Macph. 1144, 36 Scot. Jur. 571; *Connell v. Grierson*, Feb. 14, 1867, 5 Macph. 379, 39 Scot. Jur. 196; *Boyd v. Denny's Trustees*, Dec. 15, 1881, 9 R. 299.

² *Donaldson's Trustees v. MacDougall*, July 20, 1860, 22 D. 1527, 32 Scot. Jur. 684, H. L., Feb. 14, 1862, 4 Macq. 314, Paters. App. 1108.

³ *Haldane's Trustees v. Murphy*, 9 R. 269 (Lord President, p. 278).

⁴ *Young's Trustees v. Janes*, Dec. 10, 1880, 8 R. 242; *Haldane's Trustees v. Murphy*, 9 R. 269 (Lord Deas, p. 281).

⁵ *Maxwell v. Maxwell*, Dec. 24, 1864, 3 Macph. 318 (Lord Kinloch's note), 37 Scot. Jur. 153; *Connell v. Grierson*, Feb. 14, 1867, 5 Macph. 379 (Lord Kinloch's note); *Cockburn v. Dundas*, June 10, 1864, 2 Macph. 1185, 36 Scot. Jur. 594; *Stodart's Trustees*, March 5, 1870, 8 Macph. 667, 42 Scot. Jur. 330.

⁶ *Young's Trustees v. Janes, &c.*, Dec. 10, 1880, 8 R. 242.

are given to them. The conveyance is by the spouses, "each of them to the other in case of his or her survivancy, in liferent during all the days of the lifetime of such survivor, and to the children of their marriage in fee, divisible as after mentioned," and then follow words of general description, comprising the whole of their estate. Then comes a particular conveyance by the husband to the wife of certain funds, and in like manner the wife conveys to the husband her proper share of certain funds. There is further a declaration that the fee of the funds settled upon the husband and wife is to be equally divisible among the children of the marriage unless there is an apportionment in virtue of the powers conferred by the deed, and there is a provision for an advance for the maintenance and education of the children. Then comes the provision and declaration upon which the decision of the case more particularly turns. But before considering that provision, it is important to notice one or two facts in the history of the parties, which have given rise to the present question.

The first event, of course, was the marriage. The husband died in 1858. There was one child of the marriage, James Liebig Gregory, who died in 1863, survived by an only son, who was born in 1862 and died in 1881 leaving a settlement in favour of his grandmother. She died in 1885, also leaving a settlement, and her testamentary trustees are the second parties to this case. The other parties are the heirs-at-law of the husband, who are the third parties, and the heirs-at-law of his grandson, who are the fourth parties. The claims of the third and fourth parties proceed upon the footing that Dr Gregory's estate, so far as here in question, was converted into heritage, that it vested in his son and then in his grandson, and so passed to them either as heirs-at-law of himself or of his grandson. With reference to this contention, it is enough to say that the purchase of the house in Princes Street could not have the effect of operating conversion so as to affect his succession as regulated by this deed. For reasons to which I shall refer, the parties of the third and fourth part are also excluded upon a construction of the deed itself. But in the first place it is clear that the subject we are dealing with is not a heritable subject. The competition, accordingly, comes to depend between Mrs Gregory's trustees, and the fifth parties, who were Dr Gregory's next of kin as at the date of the death of the survivor of the spouses.

The view upon which the claim of Mrs Gregory's trustees is founded is that at Dr Gregory's death the fee of his estate passed to his son, that on the death of the son it passed to his grandson, Henry, by the operation of whose will it now comes into the hands of his grandmother's trustees. Of course that contention depends upon the assumption that the estate vested at Dr Gregory's death in his only son, and that on his death it vested in his child, and in order to ascertain whether this is a correct assumption or not it is necessary to construe the provision and declaration of the clause to which I have referred. It provides that "in the event of the dissolution of the said marriage by the predecease of any of the said spouses without leaving children, or of the decease of all such children during the lifetime of the survivor of the said married parties, then, and in either of these cases, it shall be in the power of the said married parties severally to dispose by testament of the proper share of the said funds and effects belonging to the said parties severally, but such disposition not to take effect until the decease of the longest liver of the said married parties." Pansing there, it is very clear that there is no vesting in the children of the marriage until the decease of the last survivor of the spouses, because there is a

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destination over in the event of the child or children of the marriage predeceasing the last survivor of the spouses. As regards Mrs Gregory's share of the joint estate, no question arises, because she has exercised the reserved power of disposal, which she had as well as her husband, in favour of her testamentary trustees, who are the parties of the second part. But the disposal of the share which belonged to her husband depends upon the construction to be placed upon the words which follow those I have just read. The share is to be disposed of by testament, but the disposition of it is not to take effect until the decease of the longest liver of the spouses. It is right to observe that there is just one point of time which in the contemplation of the parties has to do with the regulation of the disposition of the estate. The date of the death of either the one or the other is immaterial. It is the death of the longest liver only which is mentioned as the period when the disposition shall take effect. In this respect the present case resembles that of *Donaldson's Trustees* (22 D. 1527, H. of L., 4 Macq. 314), to which the key was at last found in the consideration that the testator had only one period of distribution in his mind, which was the death of the last survivor of the spouses. Here, too, the death of the last survivor is the regulating period. When that event happens "the said whole funds and estate settled by these presents shall . . . suffer division." That means that down to that period the estate is a joint estate in terms of the first clause of the contract under which the spouses disposed their whole estate jointly to one another to be enjoyed by them mutually during their joint lifetime and by the survivor afterwards. The estate is to suffer division only upon the death of the survivor in manner after mentioned, "that is to say, the whole funds and estate above mentioned belonging or which may belong to the said Dr William Gregory shall fall to and become the property of his own nearest of kin." It seems to me that the true construction of these words is that the death of the longest liver of the spouses is to be not only the period of distribution, but also the period of vesting, and that nothing could vest in the children or in any one else until the death of the longest liver.

The question therefore is, dealing with Dr Gregory's share, who is entitled, upon the occurrence of the period of vesting, to take under the circumstances which have occurred? The children all died before the period of vesting, and no one can take in right of them. But the deed provides that in that case Dr Gregory's "own nearest of kin" shall be preferred. I need hardly say that these words cannot be construed as meaning his heirs *in mobilibus*. That is well settled, and I need only refer in support of that construction to the case of *Young's Trustees* (8 R. 242). The term "nearest of kin," as here used, refers to a class of selected legatees, and the general rule is well settled that where a residuary or other fund falls by a deed to be divided among a class of persons at a time fixed by the deed, the period of vesting and distribution is to be looked at in order to see who answer the description at that date, and who then constitute the class who are called to the succession.

The result in this case is that the persons who are Dr Gregory's "nearest of kin" on the death of Mrs Gregory are the persons entitled to his succession, and we have been given to understand that the parties of the fifth part answer this description as being his "nearest of kin" in whichever of the two ways the term is construed,—that is, whether as the persons who would be Dr Gregory's next of kin as at the date of Mrs Gregory's death according to the common law rules of moveable succession, or whether as his nearest blood

relations as at the same date. The phrase "nearest of kin" covers both these classes, and if it were necessary to determine between the two—whether the term in the deed applies to Dr Gregory's nearest in blood or to his nearest descendants as being preferable to collaterals and ascendants—I think we should require to hear further argument. But as the fifth parties answer both descriptions, we are saved further trouble, and in this respect also the present case is similar to that of *Young's Trustees*, where the same thing occurred.

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I am therefore for preferring the fifth parties to the fund in question.

LORD MURE concurred.

LORD SHAND.—The question raised in this case is I feel attended with much difficulty. There are these important distinctions between this case and that of *Young's Trustees* (8 R. 242), that in the case of *Young's Trustees* (1) the estate had been conveyed to and was held by trustees; and (2) the provision in regard to residue was made expressly in favour of persons who should be alive at the death of the survivor of the two testators. The words of the provision were that one half should go "to the nearest in kin equally amongst them of me, the said Peter Young, and the other half to the nearest in kin equally amongst them of me, the said Maitland M'Culloch or Young, who shall be alive at the time of the death of the survivor of us two." In the contract of marriage of Dr and Mrs Gregory these important words, "who shall be alive at the time of the death of the survivor of us two," do not occur. Now, the difficulty I have in concurring with your Lordships is that the decision which your Lordships are about to pronounce seems to me to read into the deed after the words nearest of kin (referring to the nearest of kin of Dr Gregory) the words "who shall be alive at the death of the longest liver of the spouses," while no such terms are there. I have found myself unable to concur in this view, more especially in construing a deed which contains no conveyance to trustees to hold the fee of the estate till it should come to be distributed, but a conveyance only directly to the parties favoured. It is true that in prescribing the time of division of the residue it is said that the estate is to "suffer division after the decease of the longest liver of the said married parties." The estate of each of the spouses is then to be separated from that of the other, and is to be distributed as directed. But I am not prepared to hold that the period of division having been postponed as it was simply to protect the liferent of the surviving spouse, necessarily postponed vesting in the nearest of kin of both of the spouses till the death of the survivor.

Dr and Mrs Gregory had a son. Suppose there had been no child of the marriage, or that his son had predeceased him, and that (as was the fact) Dr Gregory left no special settlement affecting his separate estate, it would, I think, have been impossible to maintain successfully that his next of kin had no right vested on his death, but that because of his widow's liferent only those of his next of kin who survived her would take any right, or, in other words, that his next of kin were to be ascertained as at that date and not as at the testator's own death. The case would have been simply one of a liferent and fee without even a trust to suspend vesting, which, indeed, would not have been suspended even if there had been a trust.

If this view be sound,—and I confess I see no reason to doubt it,—the only consideration left which can be founded on as leading to an opposite result is the fact of the survival of Dr Gregory's son till 1863, and of his grandson till

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1881. The conveyance is to "his own nearest of kin," in the event of his dying without leaving children, or of the death of all such children during the lifetime of the survivor of the married parties. In my opinion the nearest of kin thus called to the succession are the persons having that character at his death, at which date vesting took place, subject to defeasance if Dr Gregory's son or grandson survived Mrs Gregory, the liferentrix, and thereby acquired an indefeasible right. The destination of the fee by Dr Gregory put shortly is in favour of his children, whom failing, by their predeceasing himself or predeceasing his widow, should she survive him, to his next of kin. The case is not one of suspension of vesting, because either (1) of a clause of destination to survivors of a class, as in the leading case of *Donaldson's Trustees* (4 Macq. 314); or (2) of a destination over; and the fee is given by conveyance to the next of kin directly without the intervention of a trust. These considerations are in my view sufficient to shew that the next of kin called are those at Dr Gregory's death, and not those who may happen to survive the liferentrix. Suppose that Dr Gregory's son had died without issue the year after his father died, can it be doubted that the next of kin then alive would have acquired right to the estate? The existence of the liferent was no good reason against vesting, and no other reason could be suggested to suspend vesting. It seems to me that the existence for a time of a son, and afterwards of a grandson, neither of whom took an indefeasible right, did not suspend vesting either in the next of kin of the testator at his death, or postpone vesting till the death of the liferenter.

In a question of this kind I do not think any sound distinction can be drawn between persons called as the testator's "nearest heirs," or as "nearest in kin." In the one case he refers to those nearest in the line of legal succession, in the other to those nearest in blood, but in both cases he means to call persons nearest to himself at the time of his death. So closely do the expressions resemble each other that the opinions in the case of *Young's Trustees* (8 R. 247) expressly reserved the question whether the words "nearest of kin" meant "nearest according to the precise relation of each individual to the testator, or according to the lines of succession in moveables by the common law of Scotland." The presumption is strong to the effect that a testator refers to his next of kin at his own death, and those who maintain a contrary intention—the intention to call next of kin as at the time of distribution of estate on the death of a liferenter—must be able to shew expressions or clear indications to this effect. There are, I think, no such expressions or indications in this deed. The case of *Wannop (Haldane's Trustees)* (9 R. 269) has been strongly founded on as shewing that even if the destination here were to the testator's nearest heirs these must be ascertained, not at the testator's death, but at the termination of the liferent. Unfortunately, as I think, that case was not appealed, for it has left the law in an unsettled and unsatisfactory condition. I remain of opinion, as your Lordships who took part in the decision I believe also do, that the case was not rightly decided, and it is not easy to reconcile Lord Deas' opinion with his judgment in the case of *Balderston v. Fulton*. In the absence of any trust and of any clause of survivorship or destination over, I think the destination in this case, even if it had been in favour of a class such as the testator's nephews, would still have operated vesting a *morte testatoris*, subject to defeasance if the child or grandchild of the testator survived the liferentrix, and that the estate would not have gone to nephews only who so survived. But even if this were not so, it seems

to me that "next of kin" in a question of this kind are no more to be regarded as a "class" than nearest heirs would be. In both cases the testator has in view persons nearest to himself, and to both cases I think the same rule should apply. That being so, I refer to the opinions of your Lordship, Lord Mure, and myself in the case of *Wannop* for the principle and the authorities which should, I think, determine the question in this case. The authorities there referred to (and particularly the case of *Balderston v. Fulton*), and cited also in my judgment in the case of *Snell's Trustees*, 4 R. 709, make it farther clear that if the next of kin called are those at the death of the testator, it is no good reason against holding the testator's son to be his next of kin, that he was called to the succession as the testator's child in the first instance with a title defeasible by death during the liferenter's life. The property in question here is heritage, and whether next of kin refers to nearest in blood entitled to moveables or to heritage is of no moment, for the only son was nearest in both senses. On the whole, I think the next of kin called were the testator's next of kin at his death, and that the property in question descended from Dr Gregory's son to his grandson, and was carried by his settlement to Mrs Scott or Gregory, and by her settlement to her trustees. In any view I can see no reason for holding that vesting could be suspended after the death of Dr Gregory's grandson in June 1881.

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LORD ADAM.—The event which has occurred here is the dissolution of the marriage by the predecease of one of the spouses, and the death of the only child of the marriage and of his only child during the lifetime of the survivor of the spouses. The husband died without exercising his reserved power of disposal of his portion of the joint estate, and accordingly the question comes to be who is entitled to that estate on the death of his widow, which is the period of distribution pointed out in the deed.

It is provided that after the decease of the longest liver of the said married parties, Dr Gregory's share of the estate "shall fall to and become the property of his own nearest of kin." I regard these words as implying a proper destination over in favour of a selected class. The term "nearest of kin" certainly does not designate or imply either heirs-at-law or heirs in *mobilibus*. "Nearest of kin" means a selected class, and I think the effect of a destination over in favour of such a class is to suspend the vesting until the period of distribution. That, I think, is the ordinary rule applicable to such cases.

The question accordingly is, who are the next of kin in the present case; and, in my opinion, the decision in the case of *Wannop* (9 R. 269) is directly in point. The opinions of the majority of the Court in that case proceeded upon the footing that there was a destination over to a selected class to be ascertained at the time when the distribution fell to be made. The period of vesting and of distribution were there held to be the same. I accordingly agree with your Lordship that the question here ought to be answered in favour of the fifth parties.

LORD PRESIDENT.—The ground of my opinion in the case of *Wannop* (9 R. 280) was "that the residue of Miss Haldane's estate vested at her death in her nearest heirs in *mobilibus*, who would have taken if she had died intestate *quoad* the residue." If I had been of opinion that the parties called to the succession were not the heirs in *mobilibus* of the testatrix, I should have con-

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LORD ADAM.—I should probably have been of a different opinion in the present case if the parties called to the succession had been the heirs *in mobilibus*.

THE COURT found and declared the fifth parties entitled to the price of the subjects in question.

TODS, MURRAY, & JAMIESON, W.S.—J. S. & J. W. FRASER TYTLER, W.S.—Agents.

No. 74. THE DUKE OF MONTROSE, Pursuer (Reclaimer).—*D.-F. Mackintosh—Murray—Dundas.*

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JAMES PROVAN AND ANOTHER (Provan's Trustees), Defenders (Respondents).—*Pearson—W. Campbell.*

Superior and Vassal—Entry—Taxed entry—Assignees.—By a feu-contract dated in 1631, the Earl of Montrose feued to three of his kindly tenants and their "aires whatsomever (or assignayes, wha shall not exceed three chalders victual in yeirlie standant rent)" a certain parcel of lands, the vassals binding themselves not only to pay the feu-duties, but to attend the Earl in time of war, and at frays and followings. The superior bound himself to receive the vassals and their heirs in and to the said lands, and also, "ony tennant that shall happin to buy the same frae the saids persons, or ony of them or yr fords (the buyers yrof not exceeding the rank above wryttine) . . . for payment of tenn pounds money for yr entrie to ilk five shilling land forsaid, and accepting ane new conquerer yrintill." In 1886, after the feu-right had been more than once sold, the superior demanded a year's rent of the subjects as composition from a singular successor in the feu, entered by implied entry under the Conveyancing Act, 1874. The vassal tendered £10 Scots, and maintained that he was entitled to the benefit of the taxed entry. The only other heritable property belonging to him was a subject in Glasgow, the agricultural value of which was trifling, although it was valuable in other ways.

Held (1) that although the superior had no longer an interest to exclude vassals above the rank of three chalders men, a vassal of that rank was yet entitled to claim the benefit of the taxation, and (2) that the defender was entitled to the benefit of the taxed entry, (a) because "assignayes" was intended to include any disponees of the real right after infeftment, and (b) because the agricultural value of their property was the only measure by which the "three chalders victual in annual rent" could be determined.

2D DIVISION. **THIS** was an action of declarator and for payment of a composition under the Conveyancing Act of 1874, raised by the Duke of Montrose, superior of the lands of Auchingilzian, against the trustees of Moses Provan, who were infeft in the lands. It was not disputed that a composition was due by the defenders in consequence of the deaths of the last entered vassals, the question between the parties being, whether, by the terms of the feu-right under which the lands were held, the composition was taxed to £10 Scots, or being untaxed was to be taken as a year's rent.

Lord Kinnear.
M.

By the original feu-right the whole of the twenty shilling land of Auchingilzian was given out; the parties to the contract, which was dated 25th August 1631, were James, Earl, afterwards Marquis of Montrose, who was then a minor, with the advice and consent of the Earl of Wigton, Archibald, Lord Napier of Merchistoun, Sir William Graham of Claverhouse and his other curators, of the one part, and John Wair, Archibald Buchanan, and George M'Indoe, of the other part. John Wair took a ten shilling land, and each of the other feuars a five shilling land. The pre-

sent action had reference to these two five shilling lands, in which Provan's trustees had come to be infeft. No. 74.

The present rent of the first of these two parcels was stated by his Grace to be £87 per annum, and the net composition, after making the proper deductions, £60, 18s. 10d. The rent of the second parcel was stated to be £13, and the net composition £8, 14s. 8d. Jan. 25, 1887.
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The defenders pleaded that they were liable only in the taxed composition mentioned in the feu-contract.

This contract set out with this recital:—"Forsuameikleas the saids Three persons possessors & kyndlie tenents of the forsaid Twentie shilling land of Auchingillian ilk ane for yr owne pairts yrof as is afterdivyded Hes actuallie contented payed & delyvered to the said Noble Earle James Earle of Montros in name of few entrie silver for fewing of the forsaid Twentie shilling land to ym as is after speit. certain great sowmes of money for performing of certain his Lo/ bussines & affairs Whairof his Lo/ with advyce & consent forsaid holds him weill contented and satisfied in numerat money And exoners and Discharges the saids John Wair, Archibald Buchanan, & George McIndoe, & ilk ane of ym yr aires exers. or assignayes of the samen soume for now & ever be their pnts."

The deed then proceeded to set forth that the Earle "hes sett & in few ferme and heretadge perpetuallie Dimitts as be thir pnts. setts & in few ferme & heretadge perpetuallie Dimitts to the said John Wair & his aires whatsoever (or assignayes wha shall not exceed Three Chalders victuall in yeirlie standant rent) heretable perpetuallie & Irredimable All & Hail that Ten shilling land of the said Town & Lands of Auchingilzean presentlie possess be the said John, To the said Archibald Buchanan his aires whatsoever (or assignayes wha shall not exceed the said quantitie of Three chalders Victuall in yeirlie standant rent) All & Hail that Fyve shilling land of the said toun and Lands of Auchingilzean presentlie possess be him To the said George Mcindow & his heirs whatsoever (or assignayes wha shall not exceed the forsaid quantitie of Three Chalders victuall in yeirlie standing rent) All & Hail that Fyve shilling land of the said town & lands of Auchingilzean presentlie possess be him."

After certain conditions and reservations the deed proceeded to set out that the vassals "The saids John Wair yer Archibald Buchanan & George McIndoe Binds & obleiss them their aires & successors In & to the samen lands To Thankfullie content pay & delyver to the said Noble Earle his aires male & successors or to yr factors & chamberlands in yr names the particular Dewtie afterspeit. for the said hail Twentie shilling land ilk ane for yr owne pairts yrof And also to doe & performe the conditiones services & others following." The feu-duty was stated to be £34, 10s. Scots, yearly proportionally among them, and a variety of feudal services were enumerated, *e.g.*,—"The saids persons fewars of the said Twentie shilling land *pro rata* According to the extent theirof shall help to cary my Lords household geir frae the place of Mugdock to Dundaff or Glasgow And Frae Glasgow or Dundaff to Mugdock the Fewars of the said Twentie shilling land furnishand three horse Tuiss in the yeir Togithir with three loads of sclaitt & three draughts of timber ance evrie yeir to be led be the fewars of the said twentie shilling land frae the touns of Glasgow or Dumbarton to the said place of Mugdock as they shall be Requyred" . . . as also to help "to leid my Lo/ hay yeirlie to the place of Mugdock as they shall be requyred. . . . Sicklyke The saids persons obleiss them & yr forsaid To compeir at the said noble Earle & his successors yr three head courts yeirlie to be holdine within the said Barronie of Mugdock And yr to give sute & presence And in caice of absence of any ane of them, frae ony of the saids Courts To pay the sowme of Tenn pounds

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money of penaltie and also to compeir in all other the said noble Earle's Courts To be holdine be his Lo/ or his Baillies within the said Barronie upon sex hours wairning There to be ansuerable for all actions of Blood wrang or ryot as shall happin to occur. . . . And In Lyke manner The saids persons obleiss^s them & yr forsaid^s upon yr owne charges & expenss^s to attend & awaitt upon the Earle of Montrose present & to come or yr deputs In tyme of the King's Majestie's weirs & In tyme of trouble & insurrection in the contrie & att Frayes & followings as also shall ryd & gang with his Lo/ & his deputs upon the said Noble Earle his charges for help & defence of his Lo/ and his Friends yr Honnor Lyfe Lands goods and geir.

Then followed the clause which was said by the defenders to tax the composition due by them. It was in these terms, viz. :—"Attour the said Noble Earle with consent forsaid Binds & obleiss^s him his aires & successors to accept and receive the air or aires of the saids John Wair Archibald Buchanan and George Meindow xerve and successive In & to yr particular pairts of the forsd twentie shilling Land with the pertinents as is above divyded And yt be precepts of Clare Constat in dew forme for payment of Fyve merks money for yr entrie for evrie kyndlie air to ilk fyve shilling Land above mentioned And also shall receive In & to the forsaid^s Lands ony tennent that shall happin to buy the same frae the saids persons or ony of them or yr forsd^s (the Buyers yrof not exceeding the Rank above wryttine) And yt be Resignatione Confirmacion or Charter of Alienacione conteneing precepts of seasine To be Holdine as the Resigner or annalzier held of befor For payment of Tenn pounds money for yr entrie to ilk Fyve shilling Land forsaid And accepting ane new conquiseir yrintill."

There then followed this clause,—“The saids persons Fewars Be thir pnts. obleiss^s ym yr aires & successors forsd^s To make good and thankfull payment to the said Noble Earle his aires or successors or yr forsd^s of the forsaid sowme of Threttie Four pounds yeirlie fewdewtie With this provisione & upon this speciall conditione That gif ane termes dewtie runn in ane other unpaid at the leist not reallie offered to the lawll receiver & factor haveing power for the tyme In that caice the failzier to offer & refuser to pay shall heirby Be obleist to pay the Duble of that qlk the fewar left unpaid of the preceeding terme of the said yeirlie dewtie And to this effect The said Noble Earle his aires & successors forsaid^s shall have full & Lawfull power Be themselves or yr factors to call follow & persue the possessors of the saids lands also weill for payment of the Double of the rest of the said yeirlie dewtie As also for the sd Entrie Silver of ilk laull air & new conquiseir in yr owne Courts To be holdine at the place of Mugdock And to obtaine sentances & decreits against ym yrfor and to cause put the samen to execution Be yr owne officers And Notwithstanding of the forsd Benefeit Granted for Entrie of the Laull air & new conquiseir of the forsd^s Lands with the pertinents It shall not be prejudiciall to the said Noble Earle nor his forsd^s But they to take the benefeit of the saids Lands frae ony Intrans who shall obtaine the same be Compryseing conforme to the act of parliat & common practiq of this Realme And the forsaid^s penalties to be exacted in caice forsd shall nae wayes be prejudiciall to the said Noble Earle nor his forsd^s To seek personall execution against the sd^s persons fewars & yr forsd^s Be vertew of this Contract for ony bygaine dewtie yt shall be restand owand at ony tyme heiraftir for the forsd Twentie Shilling Land with the pertinents."

His Grace maintained that the benefit of the taxation of the entry was only given to the heir and to the first singular successors after infirmment, and in any event could not be pleaded by persons who were possessed of

heritable subjects exceeding three chalders victual in annual rent. The defenders were proprietors, it was admitted, of a property in Coburg Street, Glasgow, the annual agricultural value of which was less than three chalders victual, although the actual rental was very much larger. No. 74.
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The defenders maintained that all assignees were entitled to the benefit of the taxation, if only they did not exceed three chalders victual in standing rental. This measure had reference to agricultural subjects exclusively. In the course of the case the defenders admitted, that, being infeft in the first parcel of lands, which were of more value than three chalders rent as agricultural subjects, they were liable in an untaxed composition for the second parcel of lands.

It was explained that there were a number of feus held of his Grace under contracts similar in their terms, and that there had been no entry since 1770 or thereby of a singular successor.

On 1st July 1886 the Lord Ordinary (Kinnear) pronounced this interlocutor:—"Finds (1) that in consequence of the death of James Provan, designed in the summons, a casualty became due and payable to the pursuer as superior of the lands first described in the summons, amounting to £10 Scots; . . . and (2) that in consequence of the death of Miss Anne Caldwell Holmes, designed in the summons, a casualty became due and payable to the pursuer as superior of the lands second described therein, amounting to £8, 14s 8d sterling, and decerns against the defenders for payment of these respective sums accordingly."*

* "NOTE.—. . . The feu-right is in favour not only of the original vassals and their heirs, but also in favour of their assignees, provided the rental of the assignee does not exceed the specified amount. And there can be no question that the word 'assignee,' contrary to the ordinary usage in charters of that date, is intended to include dispones of the real right, after the infeftment of the original vassal; because the superior, after binding himself to receive the vassals and their heirs respectively and successively, goes on to bind himself to receive also 'in and to the forsaid lands ony tennent that shall happen to buy the same frae the saids persons, or ony of them, or yr fords (the buyers yrof not exceeding the rank above wryttine); and yt be resignaⁿe, confirmaⁿe, or charter of alienaⁿe, contening precepts of seasine, to be holdine as the resigner or annalzier held of befor, for payment of tenn pounds money for yr entrie to ilk fyve shilling land forsaid, and accepting ane new conqueiser yrintill.'

"There can be no doubt as to the meaning of this obligation. The feu-right was created at a time when a vassal could not alienate voluntarily without the consent of the superior, and when no heir or singular successor could complete a title without the superior's interposition. The superior consents by anticipation to alienation on certain conditions, and undertakes to give an entry to the singular successors, either of his immediate vassals or their heirs, provided they satisfy these conditions, on payment of a taxed composition, just as he is bound to enter heirs on payment of relief-duty. But since his vassals are bound to ride with him in times of war, and 'at frays and followings,' he has an interest to secure that his lands shall not come into the hands of persons having larger holdings under other lords, and accordingly, while he obliges himself to receive purchasers not having more than three chalders of victual, he undertakes no obligation to recognise any voluntary alienation in favour of persons who do not answer that description; and he expressly reserves his right 'to take the benefit of the saids lands,' or, in other words, to demand the ordinary composition, 'frae ony intrans who shall obtain the same be compryseing, conforme to the Act of Parliat and common practiq of this realme.'

"The question, therefore, comes to be whether the defenders belong to the limited class of singular successors who are enfranchised by the feu-contract, so as to entitle them to an entry on payment of the taxed composition, or whether they are in the position of ordinary purchasers, who can come in only under the

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The pursuer reclaimed, and argued;—(First) The taxation was a benefit intended for the heir of the tenant and the first purchaser from him. That was a natural provision, for the feuars had been kindly tenants, and it was likely that their lord would wish to do them a favour, while there was no reason why he should not take a full composition from a second assignee.¹ Such a clause as this was to be read most strictly in favour of the superior,² the reason being that at this time the superior could not be compelled to receive any singular successors at all, unless comprisers. Comprisers were by the deed excluded from the benefit of the taxed entry. "Assignees" was generally read as meaning "assignees before infeftment," and it had been held that the entry of singular successors was not taxed, even where the charter conveyed the lands to heirs and assignees, with a provision that so often as the lands fell to the superior "by reason of life-rent, escheat, non-entry, or otherwise, for whatsoever occasion," they should be given out again to the vassal "and his foressaids" at a taxed entry.³ The principle of this decision had been recently affirmed.⁴ Here "assignees" meant the first assignee after infeftment only. So much must be conceded, but the concession by the superior should not be carried any further. [LORD YOUNG.—Is there any case in the books where "assignee" has been read in that sense?] No; but that was the result of construing this deed as strictly as its words would allow in favour of the superior. The taxation was only in favour of persons buying from the feuars "or yr forsaids," and the antecedent to "forsaids" was "air or aires." In other parts of the deed the feuars, "their aires and successors," were spoken of, an expression which made the words of the taxing-clause all the more significant.

(Second) No assignees who were not of the quality of "three chalders" could claim to take benefit by the taxation. That was a general measure of value, and included rental of any kind, not necessarily agricultural rent only. That fancied limitation had its origin in the fact that chalders were now only used as a measure in the case of stipends dependent on teinds,

statutes enabling singular successors to compel an entry, so that, prior to the Act of 1874, they could not have obtained a charter except on payment of a year's rent, and are now liable under that Act for a similar payment by reason of their implied entry.

"I am of opinion that, in so far as regards the parcel first described in the conclusions of the summons, they are liable only for the taxed composition, because I think they answer the description of buyers who 'do not exceed three chalders victual in yearly rent.' Victual rent is a term applicable only to the rent of agricultural subjects, and the defenders, although they have heritable property in Glasgow, have no property yielding an agricultural rental.

"It is true that the purpose of the stipulation has entirely failed, and that the superior has no interest in excluding vassals holding lands elsewhere, even if he had power to exclude them. But the obligation to accept a taxed composition from purchasers having a limited rental still remains an integral part of the contract constituting the relation of superior and vassal. It is an obligation which was plainly intended to follow the transmissions of the feu in perpetuity, and I see no reason to doubt that the defenders are entitled to enforce it.

"As to the second parcel, the defenders concede that they must pay the sum claimed by the superior, because by their infeftment in the first parcel they became proprietors of land exceeding the stipulated value."

¹ *On the nature of kindly tenancy*.—*Cf.* Ross' Lectures, 478-81; Erskine, ii. 6, 37-8; Bell's Dict.; Stair, ii. 9, 15; Craig, 275.

² Bankton, i. 4, 34.

³ *Brisbane v. Lord Sempill*, 1794, M. 15,061.

⁴ *Magistrates of Inverkeithing v. Ross*, Oct. 30, 1874, 2 R. 48, *cf.* Lord Deas, and authorities cited by him at pp. 54 *et seq.*

and limited to agricultural rent. The superior obviously desired to have as his vassals a class of *coloni* with no very great holdings, so that if one applied for an entry who was not of that class he could not claim the benefit, while, if the subject itself had increased in value, the whole meaning of the clause was lost, and it could avail no one. There had been an impression among kindly tenants that they had a right to assign to persons of their own rank,¹ and the provisions of this charter gave expression to that contention.

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Argued for the respondents;—It was conceded by his Grace that the term “assignees” could not in this deed be confined to assignees before infeftment—a limitation for which, no doubt, some authority might be found. For the use of “assignees” in the sense now contended for no authority could be cited, and the clauses of the deed did not bear it out. “Yr fords” was said to have reference to “air or aires,” but that term was used indiscriminately throughout the deed as equivalent to the other phrase “aires and successors.” It was remarkable, too, that the Earl was given power to pursue in his own Court for the taxed entry-money “of ilk laill air and new conqueischer,” an expression which pointed to a series of singular successors.

As regarded the quality of the vassal, the qualification of three chalders must be looked for not merely in agricultural rental, but in rental upon the Earl's estate, one of the objects being to prevent *latifundia*, or the accumulation of many feus in one hand. It was on that footing that the defenders had agreed to pay a full year's rent in the case of their second holding. It could not be that when a richer person came forward he was to pay more, for richer persons were excluded altogether, the explanation being that which the Lord Ordinary had adopted.

At advising,—

LORD CRAIGHILL.—This is an action for the payment of casualties under the Conveyancing Act, 1874. It is admitted that a casualty is due in respect of each of the parcels of land described in the conclusions of the summons, in consequence of the death of the last entered vassal; and the only question is, whether the composition payable by the defenders has been taxed, or whether they are liable for a year's rent of the lands.

The Lord Ordinary explains that as to the second parcel “the defenders concede that they must pay the sum claimed by the superior,—that is to say, a year's rent of the feu, because by their infeftment in the first parcel they became proprietors of land exceeding the stipulated value,—that is to say, three chalders victual in yearly standand rent.”

The controversy therefore relates to the liability of the defenders for a year's rent of the first of the subjects described in the conclusions of the summons, and the answer depends on the construction to be put on the second part of the obligation by which the superior binds and obliges himself, his heirs and successors, “to accept and receive the heir or heirs of the said John Wair, Archibald Buchanan, and George Macindoe, respective and successive, in and to their particular parts of the foresaid twenty shilling land, with the pertinents as above described, . . . and also shall receive in and to the foresaid lands ony tenant that shall happen to buy the same frae the saids persons, or ony of them, or their foreseids, the buyers thereof not exceeding the rank above written.”

This latter provision is that with which alone we are now concerned, though for its interpretation it is necessary to take into account the first part of the

¹ Lord Craigie v. His Tenants, 1623, M. 6432 and 7191.

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clause which has just been quoted. The pursuers contend that the true interpretation is that the obligation to receive "in and to the foresaid lands any tenant that shall happen to buy the same fra the saids persons, or ony of them, or their foresaids," is only to receive any buyer from these persons, or their heir or heirs.

The defenders, on the other hand, contend that the obligation extends not only to buyers from the original feuars, or their heir or heirs, but also to buyers from buyers, or their heir or heirs. The Lord Ordinary has adopted the latter view, and I concur in his judgment, the reasons for which are explained in his note. My view of the matter is short and simple. I think that by the words "from the said persons, or any of them, or their foresaids," we are referred back to the dispositive clause of the feu-contract, which bears that the superior has "set and in feu-ferm and heritage perpetually demitts, as he by thir presents sets and in feu-ferm and heritage perpetually demitts to the said John Wair, and his heirs whatsoever or assignees (wha shall not exceed three chalders victual in yearly standant rent), heritably, perpetually, and irredeemably, all and whole," &c. The assignees who are here mentioned are not merely those to whom assignation has been granted before infeftment on the feu-charter was exped, but "ony tenant that shall happen to buy the same from the saids persons, or ony of them, or their foresaids." These assignees are entitled to acquire the lands; they are entitled, for that is the clear implication, to convey the lands, and those to whom they convey, as much as the assignees themselves, are entitled to an entry on the terms which are specified in this clause of obligation.

This appears to me to be the true, and it is the natural, interpretation, for the idea that a buyer from an heir was to be received by payment of a taxed composition, and that a buyer from him was to be received only on payment of a year's rent, is a fanciful and unreasonable intention to ascribe to a superior. The view of the contract taken by the Lord Ordinary seems to me to be warranted by the terms of the feu-contract itself, and to be recommended by the considerations which influenced him in reaching his conclusion.

With reference to the other question, whether the defenders are not in the sense of the feu-charter "three chalder men," I think it unnecessary to say anything, as that subject is as good as exhausted by the explanation given by the Lord Ordinary.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

THE COURT adhered.

DUNDAS & WILSON, C.S.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

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Nicoll's Exe-
cutors v. Hill,
&c.

ROBERT NICOLL AND OTHERS (Mrs Nicoll's Executors), Pursuers
(Reclaimers).—*Darling—Dunsmore.*
JAMES HILL AND OTHERS, Defenders (Respondents).—*Balfour—*
W. Campbell.

Succession—Mutual Testament—Husband and Wife—Protected Succession.—

A husband and wife executed a mutual deed whereby, on the narrative of their affection to each other, and for other good causes, they each bequeathed to the other, if survivor, the whole moveable estate of which the predeceaser might die possessed, and severally constituted the survivor executor and universal legatory of the predeceaser, and, on the further narrative that they were desirous to settle

the succession to their moveable estate in the event of the decease of the longest liver of them, they jointly and severally, and each of them, whichever of them might be the survivor, bequeathed the whole moveable property of which the longest liver might die possessed to certain relatives of the husband, one of whom was appointed executor to the surviving spouse. A power of revocation was reserved to the spouses jointly, and to the husband if survivor.

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The husband died shortly after the execution of the deed, and the wife survived for over twenty years. She had no separate estate, and her only means of support were her husband's moveable property, which she took under the deed, amounting to about £300, and the liferent of her husband's heritage, about £75 a-year, which she enjoyed under another settlement by him. She was able to save considerable sums of money, which she, with the view of defeating the legacies to her husband's relatives in the mutual deed, placed in bank on deposit-receipt or on current account in the names of various persons to whom she wished to make donations, who on her death uplifted the money, and declined to account therefor to the general legatees, who had been appointed executors-dative to the widow. The latter accordingly brought an action of count, reckoning, and payment.

Held that the deed conveyed the moveable property of the predeceasing spouse to the survivor absolutely in fee, and that *quoad ultra* the deed was merely the testament of the surviving spouse and revocable by her, and that therefore the donations made by her, whether *inter vivos* or *mortis causa*, were effectual.

On 17th July 1863 David Nicoll, feuar in Dundee, and Isabella Key^{2d Division.} or Nicoll, his wife, executed a deed in the following terms:—"We, David^{Lord M'Laren.} Nicoll," &c., "from our affection to each other, and for other good causes, have agreed, with mutual advice and consent, to grant these presents in manner underwritten,—that is to say, I, the said David Nicoll, do hereby leave, legate, assign, and bequeath to and in favour of the said Isabella Key or Nicoll, in case she shall survive me," the whole moveables that might belong to him at the time of his death. Mrs Nicoll then made a similar bequest in favour of her husband, and they severally constituted the survivor to be sole executor and universal legatory of the predeceaser. The deed then proceeded:—"Moreover we, the said David Nicoll and Isabella Key or Nicoll, being desirous to settle the succession to our moveable and personal estate in the event of the death of the longest liver of us, therefore we do hereby jointly and severally, and each of us, whichever of us may be the survivor, leave, legate, assign, and bequeath in that event to and in favour of James Nicoll, basket and toy merchant in Dundee; Charles Nicoll, engineer, Victoria Docks, London; Robert Nicoll, seaman in Dundee; William Marshall Nicoll, mill overseer there; and Helen Nicoll or Cooper, widow of the deceased William Cooper, seaman in Dundee, and the survivors or survivor of them, equally among them, share and share alike, declaring that the lawful issue of any predeceaser or predeceasers leaving lawful issue shall nevertheless be entitled to such share as their deceased parent or parents would have been entitled to if alive. All and Sundry the whole goods, gear, debts, sums of money, household furniture and plenishing, books, bed and table linen, paraphernalia, and all other moveables whatsoever, including heirship moveables, that may pertain and belong or be resting owing to the longest liver of us at the time of his or her decease, with the whole vouchers and instructions thereof, and all that has followed or may be competent to follow thereon: And further, we do hereby severally nominate, constitute, and appoint the said William Marshall Nicoll, whom failing, the said James Nicoll, and whom failing, William Nicoll, son of the said James Nicoll, to be the executor of the longest liver of us respectively, with all the powers of the office: But these presents are granted always with and under the burden of all the just and lawful debts, sickbed and funeral charges, of the longest

No. 75. liver of us, and the legacy hereinafter appointed to be paid and delivered: And we ordain our said executor to pay and deliver the following legacy to the person after named and designed, viz., to Ann Nicoll Callender, presently residing with us, the sum of £30 sterling." They then revoked all former wills of moveable property, and reserved "full power to us at any time during our joint lives, and to me, the said David Nicoll, if I shall be the survivor, to alter, innovate, or revoke these presents, in whole or in part, as may be thought proper: But declaring always that these presents, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual, though undelivered, wherever found, the delivery thereof being hereby dispensed with."

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Mr Nicoll died in September 1863. His widow survived till January 1886. The spouses never exercised the joint power of revocation reserved in the deed.

The inventory of Mr Nicoll's estate amounted to £80 (including household furniture), and the pursuers of the action to be mentioned stated (what the defenders denied) that Mrs Nicoll also, shortly after her husband's death, received payment of a debt of £150 due to him. She had no separate estate of her own, and her only source of livelihood beyond what she took under the mutual deed was derived from the liferent of her husband's heritable property, amounting to about £75 per annum, which she took under a disposition and settlement by him, dated in 1862.

Being of very parsimonious habits, Mrs Nicoll was able during the twenty-three years which elapsed between her husband's death and her own to save considerable sums of money, which she placed on deposit-receipt or in bank current account in the names of various persons. In this way she placed in the British Linen Company Bank at Dundee, on deposit-receipt in the names of James Hill and herself and payable to either or the survivor, sums which at her death amounted to £186; she further deposited £300 on a receipt dated 16th July 1879 in the names of Mrs Meldrum and her daughters Isabella and Mary Anne Meldrum; a sum of £100 on a receipt dated 24th January 1883 in the names of Mrs Meldrum and another daughter; and another sum of £100 on a deposit-receipt, of the same date, in the names of James Hill and Mrs Andrews; and she also opened three current accounts with the Dundee Savings Bank—two in the joint names of Mrs Meldrum and herself, and one in the name of Mrs Meldrum alone. The sums deposited in these accounts amounted to about £75 in all.

Hill and the other persons named having after Mrs Nicoll's death uplifted the sums so banked, and having declined to account therefor, an action of count, reckoning, and payment was, on 24th May 1886, raised by Robert Nicoll and others, as executors-dative of Mrs Nicoll *qua* general legatees, against Hill, "as trustee or mandatary of the said Mrs Isabella Key or Nicoll, or otherwise as a vitious intromitter with the means and estate of the said deceased David Nicoll and Mrs Isabella Key or Nicoll, or either of them, and as an individual"; and against Mrs Meldrum and the other persons named in the deposit-receipts, including Charles Nicoll and Mrs Betsy Aitken or Nicoll aftermentioned, "as vitious intromitters with the means and estate of the said deceased David Nicoll and Mrs Isabella Key or Nicoll, or either of them, and as individuals."

The pursuers averred (Cond. 9) that Mrs Nicoll, after the death of her said husband, openly expressed a wish that his relations should not get any benefit under the mutual testament of any means she might leave; that in order to carry that wish into effect, she, by herself or in concert with the defender Hill, attempted, by making *mortis causa* donations of

her estate, to dispose thereof in such a way as to defeat the provisions of the mutual testament, and the rights of the legatees under the same; in particular, that she handed over to Hill certain monies and deposit-receipts belonging to her, and, *inter alia*, a deposit-receipt in her name and that of Hill for £186 sterling; and that "the said monies and deposit-receipts were so handed over to the defender, the said James Hill, and were received by him, in trust or otherwise, in order that he might carry out the *mortis causa* instructions of the said deceased Mrs Isabella Key or Nicoll" (Cond. 10) "In accordance with these instructions, and to defeat the rights of the legatees under the foresaid mutual testament, the defender, the said James Hill, out of the monies so received by him from the said Mrs Isabella Key or Nicoll, and after her death, paid, *inter alia*, to the other defenders Charles Nicoll, basketmaker, Dundee, and Mrs Betsy Aitken or Nicoll, his wife, sums amounting to £50 sterling and £10 sterling respectively. The sums so paid to the said Charles Nicoll and Mrs Betsy Aitken or Nicoll, and all other sums forming part of the estate of the said Mrs Isabella Key or Nicoll, paid by the defender James Hill, otherwise than in settlement of her just debts, were donations *mortis causa* by the said Mrs Isabella Key or Nicoll to the recipients thereof" (Cond. 12) "The pursuers have further discovered that the said Mrs Isabella Key or Nicoll has, in order to defeat the rights of the legatees under said mutual testament, made other *mortis causa* gifts to" the other defenders. "These various *mortis causa* gifts have been made by the said Mrs Isabella Key or Nicoll by taking deposit-receipts in favour of herself and the defenders intended to be benefited, or the defender the said James Hill, or the parties themselves, but the same were not delivered to the parties prior to her death. At all events, she and the said James Hill had the control thereof, and the interest thereon was accounted for to her."

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The defenders (Ans. 9) "Admitted that Mrs Nicoll openly expressed her determination that her husband's relatives, by whom she has been subjected to serious insults and annoyances, should not benefit by the said mutual testament. She was advised by her law-agent that while a question might be raised as to her power to make a new will, she could dispose of her property as she liked during her lifetime. In accordance with this advice, Mrs Nicoll from time to time" took the deposit-receipts and opened the current accounts already mentioned "with the object of thereby constituting, in favour of the said parties respectively, a donation *inter vivos*, or, alternatively, *mortis causa*." In answer to cond. 10 the defenders gave this explanation,—“Explained that shortly before Mrs Nicoll's death she asked James Hill if he would consent to 'part' with £50 to Charles Nicoll and £10 to his wife, as they had been kind to her during her illness. He consented to do so *ex gratia*. She afterwards told Charles Nicoll and his wife that she had given away all her money, but that she had asked James Hill to give up £60 to them, and that he had agreed to do so. James Hill then, with Mrs Nicoll's knowledge and approval, wrote out and delivered to Charles Nicoll a memorandum to that effect, which was afterwards destroyed when the money was paid to them. The said sums were voluntary payments made by James Hill in deference to Mrs Nicoll's wishes, or, alternatively, were donations *mortis causa* from her to Charles Nicoll and his wife."

The pursuers pleaded;—(1) In the circumstances condescended on, the defenders, having severally intromitted with the moveable estate of the said Mrs Isabella Key or Nicoll, are severally bound to count and reckon with the pursuers, as executors foresaid, for their respective intromissions therewith, and to pay-over to the pursuers the sums of money belonging to the estate in their hands, as concluded for.

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The defenders pleaded;—(3) Upon a sound construction of the said mutual testament, the provisions with reference to the succession to the survivor of the spouses were testamentary, gratuitous, and revocable, and were *pro tanto* revoked by the donations libelled on. (4) *Separatim*, Mrs Nicoll had full power, notwithstanding the said mutual testament, to dispose of the savings from her alimentary liferent by gift *inter vivos* or *mortis causa*. (5) The said sums having been received by the defenders from Mrs Nicoll as gifts *inter vivos*, or alternatively *mortis causa*, they are not bound to account therefor to the pursuers.

On 10th July 1886 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that by their mutual testament David and Isabella Nicoll conveyed to trustees the estate of the survivor for the purposes there mentioned: Finds that Isabella Nicoll, the surviving spouse, was barred by implied contract from revoking, altering, or defeating the provisions of this trust, in so far as these dispose of her predeceasing husband's estate; but finds that the said Isabella Nicoll was entitled to dispose of her separate estate or savings effected from her income after her husband's death, and that either by will or donation, the mutual will being to that extent defeasible by her acts: Further, allows a proof, on a day to be afterwards fixed, on the question whether the deposits libelled were or were not the husband's estate, and grants leave to reclaim."*

The pursuers reclaimed, and argued;—The Lord Ordinary's third finding was erroneous. Mrs Nicoll had bound herself not to alienate her own property by any gratuitous deed, and had nevertheless done so. *Craich's Trustees*¹ was almost exactly the present case, and was supported by other authorities.² The wife had no estate of her own; the whole property came from the husband; it was his relatives who were to be benefited; it was reasonable, therefore, that a power to revoke should be reserved to him. The rule *expressio unius est exclusio alterius* applied to the clause reserving power to revoke. The Lord Ordinary's third finding

* "OPINION.—I am of opinion in this case that as regards the reciprocal destination by the one spouse to the other the settlement was onerous, and as regards the provision made for the succession of the survivor, that must be taken to be a testamentary destination by each spouse, revocable by each spouse as regards the particular estate which he or she conveyed. As regards the wife's money, I have really no doubt that she was perfectly entitled, being the survivor, to make a new will, or a *mortis causa* gift of any part of it. The mere circumstance that no power is reserved will not prevent her from doing so. But then as regards the husband's estate I think the case is different, because while undoubtedly he gives his wife the fee, so that she might have spent the whole of the money, yet in so far as the money remained unexpended at her death, I think we must look to the words of reserved power of alteration. We find that the power of alteration is only given to the husband in the event of his being the survivor, and not to his wife. He has the power of alteration in regard to his own estate. It would follow from my opinion that there must be a separation of the estates, and on the question whether the husband's money was all spent in paying his debts and funeral expenses, or whether any part of it remains, I think that may be dealt with more satisfactorily by both parties putting in all documents in their possession than by a parole proof."

¹ *Craich's Trustees v. Mackie*, June 24, 1870, 8 Macph. 898, 42 Scot. Jur. 597.

² *Hepburn v. Brown*, June 6, 1814, 2 Dow, 342; *Wood v. Miller*, Dec. 4, 1823, F. C.; *Gentles v. Aitken*, June 23, 1826, 4 S. 749; *Anderson v. Garro-way*, Jan. 27, 1837, 15 S. 435, 9 Scot. Jur. 233; *Kidd v. Kidd*, Dec. 10, 1863, 2 Macph. 227, 36 Scot. Jur. 112; *Arthur v. Lamb*, June 30, 1870, 8 Macph. 909, 42 Scot. Jur. 512.

ought to be recalled, and a proof allowed as to the delivery of the deposit-receipts. No. 75.

Argued for the defenders;—The deed here, if it expressed a contract at all, did so only in so far as it provided for the spouses themselves; <sup>Jan. 25, 1887. Nicoll's Ex-
cutora v. Hill,
&c.</sup> quoad *ultra* it was testamentary merely, and revocable by either spouse after the death of the other. Its narrative was that of a testamentary instrument—of two testamentary instruments, but the putting together of two testaments would not make a contract. There were no words of obligation; there was no express exclusion of Mrs Nicoll's power to revoke; the deed was not a marriage-contract; there was nothing in it to shew that the relation of the legatees to Mr Nicoll was such as to constitute an inductive cause of granting it on his part; and Mrs Nicoll took nothing more under the deed than her legal right to aliment from his estate. These elements distinguished the present case from those founded on by the pursuers, and brought it within the undernoted cases.¹ In *Craich's Trustees*, which of those cited by the pursuers most closely resembled the present, there was a clause of absolute warrandice, which, as Lord Cowan observed, never occurred in a deed intended to be revocable.²

At advising,—

LORD JUSTICE-CLERK.—The pursuers in this action found their demand against the defenders on the alleged terms of a mutual settlement executed by a husband and wife in 1863. The pursuers are the nephews and a niece of the husband. The defenders are certain persons who are said to have received sundry payments from the wife, who survived her husband. It is maintained that these payments were in fraud of the mutual settlement, which it was out of the power of the widow to disappoint, and the pursuers call for an accounting.

The Lord Ordinary has sustained the pursuers' demand for an accounting. While holding that the wife was not precluded by the terms of the mutual settlement from testing on property which belonged to her apart from the settlement, and that while she was uncontrolled fiar of any personal funds left by her husband, and was entitled to spend them as she pleased, he holds that her executors are yet bound to account to the legatees for such portion of these funds as remained in her hands at the date of her death, or which had been gratuitously transferred *mortis causa* to third parties.

I differ from the Lord Ordinary on the last point. It appears to me very doubtful if this settlement contains anything of the nature of what is now called a protected succession in favour of the pursuers. I think, further, that even if it did it would not support the demand now made.

The settlement here consists of two parts. By the first the spouses mutually convey to the survivor all the personal property of which the predeceaser may die possessed, and each nominates the other executor. To this extent the instrument constituted an onerous contract. The second part commences

¹ *Lang v. Brown*, May 24, 1867, 5 Macph. 789, 39 Scot. Jur. 407; *Davidson v. Moesman*, May 27, 1870, 8 Macph. 807, 42 Scot. Jur. 458; *Traquair v. Martin*, Nov. 1, 1872, 11 Macph. 22, 45 Scot. Jur. 28; *Mitchell v. Mitchell's Trustees*, June 5, 1877, 4 R. 800; *Melville v. Melville's Trustees*, July 15, 1879, 6 R. 1286.

² *Craich's Trustees v. Mackie*, June 24, 1870, 8 Macph. 898, 42 Scot. Jur. 597.

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with the word "Moreover," and proceeds as follows,—“we, the said David Nicoll and Isabella Key or Nicoll, being desirous to settle the succession to our moveable and personal estate in the event of the death of the longest liver of us, therefore we do hereby, jointly and severally and each of us, whichever of us may be the survivor, leave, &c., in that event to and in favour of” certain persons named, “and the survivors or survivor of them equally, share and share alike, the goods and gear of the longest liver at his or her decease,” appointing the persons named to be executors in succession of the longest liver. The clause as to revocation is as follows,—“And we do hereby further reserve full power to us at any time during our joint lives, and to me, the said David Nicoll, if I shall be the survivor, to alter, innovate, or revoke these presents, in whole or in part, as may be thought proper, but declaring always that these presents, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual, though undelivered, wherever found, the delivery thereof being hereby dispensed with.”

I am of opinion that the second part of this deed was purely testamentary, and conferred, and could confer, no right on the pursuers which can sustain the present action. There is no reason for assuming that the *mortis causa* conveyance contained in the first part of the settlement was the consideration for or conditional on the testamentary provisions contained in the second. These last possess no element of onerosity, as there was no blood relationship between the wife and her husband's nephews, and as the husband reserved a right to revoke; whatever other effect this might imply, it shews there was no intention of creating a *jus crediti* in the pursuers, and perhaps of itself indicates an absence of mutuality or reciprocity in these testamentary provisions.

This doctrine of protected succession in moveables rests on a series of decisions not altogether consistent, and I sympathise with the remarks on this head which I find in the last edition of Fraser on Husband and Wife, ii. 1507. But the present case does not give rise to any difficulty. My view of it is well and shortly expressed in two passages, one from an opinion of Lord Benholme and one from Lord Neaves in the case of *Lang v. Brown*, 5 Macph. 789. The settlement in that case was conceived in terms nearly identical with the present. It was between husband and wife, and professed to provide not only for the event of survivance, but also for the decease of both, in which case the property was conveyed to the daughter of the wife by a previous marriage. The wife survived, and left the property to her sister. In an action by the daughter Lord Benholme said,—“It is important to observe that the only contracting parties were Mr and Mrs Marshall. So far as they were concerned the deed was an onerous one. It was intended to provide for the survivor of the two spouses, but it was never intended to do anything against the survivor. The whole onerosity of the deed ended, in my opinion, with Mr Marshall's death.” Lord Neaves said,—“The deed before us seems to have two objects. The first is to make provision for the survivor of the spouses, and this provision, which is material, is clearly onerous. The second object seems to be thus indicated,—‘Considering the propriety of making arrangements to prevent disputes as to our respective successions at the death of either or both of us.’ Such arrangements are naturally introduced into the deed, but they are incidental only to its chief purpose, and I see no mutuality or onerosity in them.” So I think here.

But if I thought otherwise on the general construction of the settlement I

could not have applied the doctrine of protected succession to such a case. No. 75.
 There was in truth no succession to protect. The husband died in 1863; the wife in 1886. He had in 1862 conveyed the only heritage he possessed to his wife in liferent for her alimentary use, and to his brother in fee. At his death he left her no other means of subsistence but this liferent, which yielded some £70 a-year, a sum of £150, a debt which was paid to her by her brother-in-law, and the value of the household furniture. It does seem, however, that by dint of much pinching and privation this old woman contrived, during the twenty-three years which elapsed since her husband's death, to amass some hundreds, which she gave as gifts to sundry friends, as explained in the record. I think she fairly earned these savings by her thrift and self-denial, and that they do not fall under any obligation in the mutual settlement. The £150 is not said to be extant in any specific form, and I think we must assume it to have been spent.

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LORD YOUNG.—By the mutual will the whole moveable estate of the predeceasing husband passed to the surviving wife, and became her absolute property in fee-simple, and although the language of the instrument shews that he contemplated that at her death her moveable estate (not his) would pass to the legatees therein named, yet this could not possibly be by his will or by any other will than hers. His will was completely executed on his death in 1863 by the passing of his whole estate to his widow in fee-simple. But the mutual instrument expresses her will also, and we need not consider whether she was at liberty to revoke it, for she did not revoke it, and it may be taken, so far as my opinion is concerned, that it will carry to the persons named the whole moveable estate belonging to her at her death in 1886, which, however, seems to have consisted only of furniture and the proportion of the rents of some liferented heritage from Martinmas 1885 till her death in January 1886.

This action, which is a count and reckoning, regards mainly certain sums of money which she had gifted to various persons and at various times during a period of seven years prior to her death, by depositing it in bank on deposit-receipts taken in their name, and in such manner that without any further act on her part, and without any aid from the Court, they have received payment of the money, and have it now in actual possession. To take the case of the earliest of these deposit-receipts—that dated 16th July 1879 (seven years before the widow's death), for £300, in name of Mrs Meldrum and of her daughters Isabella and Mary Ann Meldrum, and which they have in fact uplifted on no other right and title than the terms of the receipt gave them—I must hold that this was a complete gift of the money, and so irrevocable by the donor, as every complete gift is. There may indeed have been facts as between the donor and the donees which implied a trust in the latter, but none such are averred, and the pursuers, so far from alleging a trust in the donees or a right to revoke in the donor, aver distinctly that the donor's intention was that the donees should have the money so that the pursuers might not get it under the will. But this was a lawful intention with respect to money which was her property to spend or gift as she pleased, and all that can be said is that it has been accomplished. Had she changed her mind it is clear that she could not have revoked the gift without the consent and aid of the donees, who had the written obligation of the bank in their favour, or without appealing to the Court and invoking its

No. 75. aid on an averment and proof of facts entitling her to have it. The same remarks apply to all the deposit-receipts, which one and all of them import complete gifts, the parties named in them receiving the money on the right and title which these receipts conferred on them from their respective dates.

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I am therefore unable to hold that these donees, or any of them, are liable to account for the money, which they have so drawn, as money pertaining and belonging or resting owing to Mrs Nicoll at the time of her death.

For substantially the same reasons, I am of opinion that there is no obligation to account for the money deposited by the deceased in the Dundee Savings Bank in name of certain persons. She intended them to draw it and to keep it as their own, and they have drawn it accordingly on the right and title which the deceased gave them, and, as the pursuers aver, intended to give them by the terms of the deposits. It is an undoubtedly lawful and effectual way of gifting money to put it into the donee's bank account, or into an account opened with a bank in his name, and with the intention of gifting it. Any attempt to take a fraudulent benefit from an account opened, or money lodged for another purpose than gift, would of course be frustrated on proper averments and evidence, but no case of that kind is here presented, and, indeed, it is the pursuers' case, as I have already remarked, that gift was intended by the acts which *ex facie* import it, although they contend that it ought to be held unavailing to the donee because of the motive for it, viz., to defeat the mutual will. To this objection I would not assent, even on the assumption, which I have been making, that the surviving widow was not at liberty to revoke that part of that will. I have, however, to say, though I think it unnecessary to the decision of the actual case, that in my opinion Mrs Nicoll was entitled to revoke her will as expressed in the mutual settlement, and that with respect to her whole moveable estate without distinction, for if the estate was hers I can see no good ground for distinguishing between that part of it which came to her from her husband and the rest which came from any other source. If there were ground for such distinction, which I think there is not, the part that came from the husband would require to be traced and identified as extant at the period of her death, for otherwise it would be impossible to act on the distinction. It is stated that the inventory of his estate, including furniture, amounted to £80. The furniture may no doubt be identified so far as extant. But with respect to money I do not see how identification is possible. The pursuers aver that the widow received payment of a debt for borrowed money to the amount of £150 due to her deceased husband. But, assuming this to be so, how is the money so paid twenty years ago to be identified, and shewn to have been extant at the widow's death? It was her own absolute property, so that she might spend it on her maintenance or otherwise as she saw fit, and to allow a proof in order to trace money—the currency of the realm—in the hands of the absolute owner during a period approaching a quarter of a century seems rather extravagant. The furniture which the widow died possessed of is left to pass by the will. The Lord Ordinary has allowed a proof “whether the deposits libelled were or were not the husband's estate.” I do not understand this to mean that there shall be a proof of the mere amount of money which came to the widow under her husband's will, which I should hardly have thought a fitting subject for a proof at large. I rather understand it to mean the tracing of the actual bank-notes or coin which came to her from him, and shewing that these were deposited in bank on the receipts libelled, and to the propriety or practicability of such a

proof I could not assent. That to the extent of the value of the estate left by the husband the beneficiaries named in the mutual will shall not be prejudiced by any act of the surviving wife, or at least not by her donations, is a simple (although I think an erroneous) idea, but beyond this I must own my inability to follow the Lord Ordinary's views. To trace money as having come from him and having been left intact by his widow, the owner, during her survivance of twenty-three years, is, I think, impossible. I should at least, before allowing a proof for such a purpose, require some distinct special averments regarding the tracing of the money, and the identification of it as unspent and extant.

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LORD CRAIGHILL.—(After explaining the provisions of the mutual deed)—Mr Nicoll died in September 1863 survived by his wife, who died in 1886. The testators did not during their joint lives exercise the reserved power of revocation. Mrs Nicoll, however, it is said, gave *mortis causa* donations in order to defeat the legacies in the joint settlement by her and her husband. And the purpose of the present action is to counteract those donations on the ground that they were *ultra vires*, and bring back to the legatees under the joint settlement the money which, in the way mentioned, she attempted to put away.

That Mrs Nicoll was vested with the full right of the property which was the subject of mutual settlement between her and her husband is not in controversy. That she was entitled to spend it to the last farthing, if she thought fit, is also a matter on which parties are agreed, but what is said is, that what she might leave, however acquired, was beyond her power of disposal, because, though in the form of a will, it was in reality a contract betwixt the spouses that what she left should pass to the legatees, who are represented by the pursuers, subject, of course, to the legacy that was bequeathed to Mrs Ann Nicoll Callender or Mel-drum. My opinion is that the contention of the pursuers cannot be maintained. The settlement, according to my reading of it, is a will, and nothing but a will, so far as regards the property that was the subject of bequest to the legatees by whom her succession is now claimed. The bequest by the one spouse to the other spouse, for anything appearing in the will, was not the cause for which the legacy in question was granted, but simply their desire to settle the succession to their moveable and personal estate in the event of the death of the longest liver of them. This is set forth in the narrative to that part of the settlement by which the bequest in question is prefaced. There is no presumption in favour of the view that this part of the settlement was a contract. The contrary is the natural conclusion. Mrs Nicoll could spend it. She could gift it in her lifetime. What was bequeathed to her by her husband, and what moveable property she had inherited from her husband—what of her own she had before his death, and what she acquired afterwards—were all absolutely at her own disposal so long as she lived. This being the case, the reasonable inference is that, as the legacy could be defeated in this way, it might also be revoked. The exercise of such a power would, I think, require to be expressly, or at anyrate unambiguously, excluded. But there is no such exclusion. On the contrary, the legacy stands upon what is merely the will of the survivor, and as Mrs Nicoll was the survivor she might by revocation, as well as by spending or by gifting the money in her lifetime, put an end to the bequest, the benefit of which is claimed by the pursuers of the present action.

The Lord Ordinary so far shares these views, but he thinks the revocation could not take effect upon that portion of the moveable property belonging to

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the wife which she had acquired from her husband by the joint settlement. I think no reason for this limitation is supplied by the settlement. The words upon which this depends are,—“All and Sundry the whole goods and gear . . . that may pertain or belong, or be resting owing, to the longest liver of the said David Nicoll or the said Mrs Isabella Key or Nicoll, at the time of his or her decease.” Whatever therefore the survivor left was included in this bequest, and my opinion is that the widow was entitled to revoke it, as well as regards the portion of her moveable property which she acquired from her husband as that which was her own previous to the making of the joint settlement or which she acquired during her viduity.

For these reasons I think that the interlocutor should be recalled.

LORD RUTHERFURD CLARK.—I concur with your Lordship.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the defences, and assoilzied the defenders from the conclusions of the action.

DAVID MILNE, S.S.C.—J. & J. GALLETT, S.S.C.—Agents.

No. 76.

Jan. 27, 1887.
Arrol v.
Inches, &c.

ARCHIBALD ARROL, Petitioner (Appellant).—*Pearson—Napier.*

ROBERT KIRK INCHES, Respondent.—*Asher—Murray.*

TRUSTEES OF THE NEW CLUB, Respondents.—*Asher—Murray.*

Property—Burgh—Conveyance of front area to lower proprietor in tenement—Right of upper proprietor in the tenement.—The proprietor of a dwelling-house with an area fronting the street disposed the two upper stories and attics of the house, with a declaration that the disponee should have no right to the area. Subsequently the proprietor of the lower floors and area built over the area to the height of his part of the house. The proprietor of the upper floors having proposed to erect a new building and rest it upon this addition, *held* that he was not entitled to do so.

Question, whether he was entitled to extend his house over the area provided he did not rest upon the lower proprietor's extension.

1st Division.
Dean of Guild
Court, Edin-
burgh.
M.

ON 15th July 1886 Mr Robert Kirk Inches, jeweller, proprietor of the two shops, Nos. 87 and 88 Princes Street, Edinburgh, and of the sunk area in front, obtained from the Dean of Guild a warrant entitling him to build out his premises on the ground storey of the tenement to the limit of the area in front of his house towards Princes Street, which operation he subsequently carried out.

On 9th July 1886 Mr Arroll, the proprietor of the upper floors of the same tenement, had presented a petition to the Dean of Guild, in which he called Mr Inches and the trustees of the New Club* (the next house on the east) as respondents. He prayed the Court to grant warrant to him to erect a new front and oriel window resting upon the extended portion of the shop below, which Mr Inches proposed to build.

The petitioner pleaded ;—(1) The petitioner's property being bounded on the south by Princes Street, and the proprietor of the under part

* A question was raised in the case as to whether the petitioner, if entitled to build, was entitled to encroach on the moulding of the front balcony of the New Club, but the Court of Session, in view of their decision on the whole question, were not required to decide the point.

of the tenement having brought forward, or being about to bring forward, the south front of his shops, the petitioner is entitled to improve his property by the alteration now proposed. (2) The proprietor of the dining-room and sunk storeys of a tenement having obtained authority to project his frontage, the proprietor of the upper storeys of the same tenement is entitled to obtain authority to make a similar alteration.

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Mr Inches opposed the application, on the ground that the operations proposed by Mr Arrol were not confined to his own property, and encroached on the respondent's property rights. The New Club also lodged answers.

It appeared from the titles that prior to 1823 the whole tenement was possessed as one subject by the proprietor, Mr Henry Johnston, who in that year disposed the upper floors to Mr George Mylne. An instrument of sasine in favour of Mylne, recorded on 17th May 1823, proceeded upon the disposition in favour of Johnston and the disposition by Johnston in favour of Mylne. It narrated the disposition in favour of Johnston, as disposing to him the whole tenement, which was thus described,—“All and Whole that lodging or dwelling-house, consisting of a sunk storey, three other storeys, and garrets, erected by Alexander Reid, mason in Edinburgh, upon the westmost half of the area or piece of ground feued by him from the Magistrates and Town-Council of the city of Edinburgh, measuring 55 feet 8 inches in front of lot letter E, situated upon the north side of Princes Street, and lying within the new extended royalty of the city of Edinburgh, with the area whereon the said house is built, which house and area thereby disposed measure 27 feet 10 inches in front from east to west, as also the back area or ground belonging to the said dwelling-house, enclosed with a stone wall, and the stable and coach-house built upon the said back area or ground, and situated behind the said dwelling-house; together with the sunk area, cellars, and pavement above the same in front of the said house.” Then followed a description of the boundaries, that on the south being Princes Street.

The instrument then narrated the disposition by Johnston in favour of Mylne, as conveying “All and Whole the two upper storeys and garrets, being the drawing-room, bedroom, and attic storeys of the lodging or dwelling-house particularly before described; together with all right, title, and interest, claim of right, property, and possession which the said Henry Johnston, his predecessors and authors, heirs and successors, had, have, or might anyways claim or pretend to the said two upper storeys or garrets thereby disposed, in all time coming; but declaring that the said George Mylne should have no right to the dining-room storey and sunk storey of the said house, or to the area and cellars in front thereof, or to the area behind the same, or stables and other buildings erected or to be erected thereon.”

In May 1860 the trustees of the New Club, Edinburgh, who had become proprietors of the drawing-room, bedroom, and attic storeys of the tenement, conveyed them to Mr Archibald Arrol. The description of the subjects conveyed in the disposition was in these terms:—“All and Whole the two upper storeys and garrets, being the drawing-room, and attic storeys of that lodging or dwelling-house, consisting of a sunk storey, three other storeys, and garrets, erected by Alexander Reid, mason in Edinburgh, upon the westmost half of the area or piece of ground feued by him from the Magistrates and Town-Council of the city of Edinburgh, measuring 55 feet 8 inches in front of the lot letter E, situated upon the north side of Princes Street.” It further declared that Mr Arrol should have “no right whatever to the dining-room storey and

No. 76. sunk storey of the said house or to the area and cellars in front thereof, or to the area behind the same. . . .
 Jan. 27, 1887. *Arrol v. Inches, &c.* In May 1880 Mr Inches obtained a disposition to the sunk flat and street storey of the tenement and front and back areas from David Croall and others, who had become proprietors of the same. The disposition conveyed the whole tenement, as described in the disposition to Johnston, excepting the portion disposed to Mylne, thus,—

“All and Whole that lodging or dwelling-house, consisting of a sunk storey and three other storeys and garrets, erected by Alexander Reid, mason in Edinburgh, upon the westmost half of the area or piece of ground feued by him from the Lord Provost and Magistrates of the city of Edinburgh, measuring 55 feet 8 inches in front of lot letter E, situated on the north side of Princes Street, and lying within the new extended royalty of the city of Edinburgh, with the area whereon the said house is built, which house and area hereby disposed measure 27 feet 10 inches in front from east to west; also the back area or ground belonging to the said dwelling-house, enclosed with a stone wall, and the stable and coach-house built upon the said back area or ground, and situated behind the said dwelling-house; together with the sunk area, cellars, and pavement above the same in front of the said house, which dwelling-house, back ground, stable, and coach-house, sunk area, cellars, and pertinents are bounded as follows, namely:—on the east . . . on the south by Princes Street,” &c., “but excepting always from the dwelling-house above described the two upper storeys and garrets.”

On 21st October 1886 the Dean of Guild pronounced this interlocutor:—“Finds that the operations in question are not confined to the petitioner's own property: Finds that the proposed alterations would entail interference with the mouldings in front of the New Club buildings, and would infringe a condition of the petitioner's title: Therefore refuses the warrant craved.”*

The petitioner appealed to the Court of Session, and argued;—On a fair interpretation of his title the boundary of his property to the south was Princes Street. He had not indeed any title to the *solum* of the area, but the space of air out to the boundary and above Mr Inches' extension belonged to him. An upper proprietor had a right to project his building outwards as far as the lower proprietor,¹ where the nature of the extension from the lower storey was such as to render it necessary for him to rest his proposed building on it.² He was willing to pay Mr Inches for any

* “NOTE.— . . . There are two series of titles of the subjects in question, and these shew clearly the law of tenement which must be followed in this case. Under these the ownership was admitted to be as follows:—The petitioner is particularly restricted to the upper flats and attics of the tenement, and the respondent Inches possesses the whole of the area with the buildings on it, except the portions of the tenement possessed by the petitioner. As mentioned above, the respondent Inches has obtained warrant to project an extension of his property over the space originally occupied by this area, which by his titles belongs exclusively to him, and it is on this extension that the petitioner claims a right to rest his proposed new front and oriel window.

“The Dean of Guild cannot admit this claim. It might have been otherwise if he had merely proposed to make certain operations on his own property. But he does not propose only to erect a new front and oriel window for his property. He proposes further to rest these on the respondent Inches' proposed projection, and it appears to the Dean of Guild that this would impose a burden on the lower projector to which he is not bound to submit.”

¹ *Urquhart v. Melville*, Dec. 22, 1853, 16 D. 307, 26 Scot. Jur. 137; *Stair*, ii. 7, 6; *Calder v. Merchant Co. of Edinburgh*, Feb. 26, 1886, 13 R. 623.

² *Taylor v. Dunlop*, Nov. 1, 1872, 11 Macph. 25, 45 Scot. Jur. 24.

increased expense incurred by this additional weight being put on his building. If the Court were of opinion that he was not entitled to rest his building on Mr Inches', he was willing to alter the prayer of his petition, to the effect of asking to be found entitled to project an oriel window from the present front of his house above, but not resting on Mr Inches' extension. No. 76.
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Argued for Mr Inches;—The titles did not give Princes Street as the boundary of the petitioner's property; that was the boundary of the whole tenement before it was divided, but was not continued through the titles of the upper storeys after the separation took place. The petitioner's proposed alteration increased the burden on the lower proprietor's property, which he was not entitled to do.¹ The petitioner had no right whatever in the particular space on which he wished to build, whereas the respondent had. The area was conveyed to him in his titles, and his right extended *usque ad cælum*, subject only to the common interest in the tenement.² A proprietor of the lower storey of a tenement in a town always had that qualified right, even where the titles reserved a right in common to the *solum* on which the house was built to all the proprietors in the tenement. He could build over the area in front of the house so long as he did not injure the lights, &c., of the upper proprietor.³ If this petition were granted the proprietor of a back green could not build over his back green even up to the level of the ceiling of his property, at least he could not light any such building from the top, which amounted to a prohibition against building. But it had been decided that a proprietor of a subject in the same position as Mr Inches could not only build over his back green, and light the building from the top, but could build above the level of the ceiling of his subject so long as he did not interfere with the lights of the upper proprietor.⁴ In short, an upper proprietor, such as the petitioner, had no right of property in the stratum of air extending out laterally from his property. There was no room for distinction between Mr Inches' extension and the saloon in *Boswell's* case, from the point of view of property, though there might be as regarded common interest.⁵ Here, however, there was no question of shutting up the lights of the petitioner.

LORD PRESIDENT.—In this case it appears that Mr Inches is the proprietor of the area and shop floor of the tenement Nos. 87 and 88 Princes Street. He has obtained warrant from the Dean of Guild to extend the shop front towards the street to the limit of his property,—that is, to the limit of the area of the house as it was originally built. The proposal of the petitioner is that, that operation having been carried out by Mr Inches, he, the petitioner, should be allowed to raise a new front to his property, which consists of the upper flats of the tenement in question, to build out an oriel window, and to rest his proposed addition on the new building put up by Mr Inches. The Dean of Guild has refused to grant warrant in terms of the petition.

Now, to decide the question between the petitioner and Mr Inches, it is necessary to understand the state of the titles, but when once that is understood it seems to me that the whole case is free from doubt.

¹ *Gallatly v. Arrol*, March 13, 1863, 1 Macph. 592, 35 Scot. Jur. 360.

² *Graham v. Duke of Hamilton*, July 28, 1871, 9 Macph. (H. L.) 98, 43 Scot. Jur. 491.

³ *Johnston v. Whyte*, May 18, 1877, 4 R. 721.

⁴ *Boswell v. Magistrates of Edinburgh*, July 19, 1881, 8 R. 986.

⁵ *Heron v. Gray*, Nov. 27, 1880, 8 R. 155.

No. 76. The whole house or tenement originally belonged to one proprietor, who, in May 1823, disposed the upper floors to George Mylne. The instrument of sasine in Mylne's favour narrates the disposition in favour of his author of the whole subjects, which are described as "All and Whole that lodging or dwelling-house, consisting of a sunk storey, three other storeys, and garrets . . . situated upon the north side of Princes Street, . . . with the area whereon the said house is built, . . . as also the back area or ground, and the stable and coach-house built upon the said back area or ground, together with the sunk area, cellars, and pavement above the same in front of the said house. . . ." There is a description of the entire subject by boundaries, and the boundary on the south side is Princes Street. The instrument then narrates the disposition in favour of Mylne himself of "All and Whole the two upper storeys and garrets, being the drawing-room, bedroom, and attic storeys of the lodging or dwelling-house, particularly before described, situated upon the north side of Princes Street." So far, the description is quite simple, only the two upper storeys and the garrets are conveyed; but there follows a very distinct declaration that the disponent "shall have no right whatever to the dining-room storey and sunk storey of the said house, or to the area and cellars in front thereof, or to the area behind the same." The right to these remained in the disponent and his successors. Mr Inches is now the person standing in that position, and he is accordingly proprietor of the areas of the house, behind and before.

The result of the titles is therefore that Mr Inches has a right of property in these areas, and that the petitioner has no right of property whatever in either. Now, the effect of that is, of course, that Mr Inches is entitled to build over the front area, and he has obtained a warrant to do so up to the limit of Princes Street, and that right of property in him extends *a celo ad centrum*.

Whether, notwithstanding that right of property in the proprietor of the lower storeys, it might be in the power of the proprietor of the upper storeys to project any building from his own property over the area, but without resting on Mr Inches' property, with a view to beautifying his property or preserving the view from his own windows, is a different affair. If the right to build up from the area to any height he chose belonged to Mr Inches, of course the Court would interfere; but that right does not belong to him, for by so doing he would shut up the lights of the upper proprietor, and it is the law of the tenement (as it has been well termed) that the windows he would thus shut up shall be the light of the upper part of the house. That question, however, is not before us, and if it were it would require a report founded on the knowledge of the Dean of Guild to enable us to decide it. The only question before us is whether the petitioner is entitled to rest his proposed building on the top of Mr Inches' extension, and I can see no ground for enabling him to do so. If the petitioner has no title to the *solum* of the area on which Mr Inches builds, how he can have a right to rest his buildings on Mr Inches' I cannot see. That is the ground on which the Dean of Guild has decided, and I think rightly decided the case, and therefore, I think, we ought to adhere.

LORD MURK.—The petitioner is proprietor of the three upper storeys of the tenement in question, and the respondent, Mr Inches, is absolute proprietor of the street and sunk storeys and of the area. In these circumstances, and the respondent having obtained leave to extend his front shop as far as the boundary of Princes Street, the petitioner has made this application for leave to extend

his frontage to Princes Street also, and to rest his extended front and windows on the respondent's new building. Now, I know of no authority for holding that, when the proprietor of the ground floor and area extends his buildings over his own area, the upper proprietor is entitled to build out also to the same extent, and to rest his extension on the new building below. Whether the petitioner would be entitled to throw out oriel windows over, but not resting on, the respondent's extension I give no opinion, as that question has not been brought before us for decision. And I agree that, as matters stand, we should simply adhere to the judgment of the Dean of Guild.

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LORD SHAND.—There is no doubt that the titles dealing with this tenement are quite distinct, and that whatever Mr Arrol's rights may be with regard to building out from his own part of the building, they must be asserted and maintained on the footing that the *solum* of the area facing Princes Street is exclusively the property of Mr Inches. That is distinctly the effect of the titles. I am clearly of opinion in these circumstances with your Lordships and the Dean of Guild, whose judgment is very clearly expressed, that the petitioner's proposal cannot be entertained, there being no ground in law for the view that Mr Inches has, by putting up the building which he has done, given his neighbour any right to build over it, and to rest his new building on Mr Inches' extension. As the Dean of Guild says, it might have been different if the petitioner "had merely proposed to make certain operations on his own property," but as I have said he proposes to rest his new building on that of Mr Inches. I wish to reserve my opinion as to what would be Mr Arrol's right if his proposal were to build out from his own property without resting on the building below. I am not satisfied that the right of property which Mr Inches has would be exclusive of such a right, but on that point I now indicate no opinion.

LORD ADAM concurred.

THE COURT refused the appeal.

J. A. CAMPBELL & LAMOND, C.S.—DAVIDSON & SYME, W.S.—RUSSELL
& DUNLOP, C.S.—Agents.

THOMAS OGILVIE & SON, Pursuers (Respondents).—*J. C. Thomson—Harvey.*

No. 77.

JAMES TAYLOR (Buchanan & Johnson's Trustee), Defender (Appellant).
—*D.-F. Mackintosh—Ure.*

Jan. 27, 1887.
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v. Taylor.

Bankruptcy—Title to sue—Trust for creditors—Stipulation for discharge—Right of non-acceding creditor to sue trustee for share.—Where a debtor executed a trust-deed for behoof of acceding creditors, with the condition that all creditors acceding or receiving a dividend should be held to have discharged their claims in full, *held* (1) that a creditor who did not accede to the trust was entitled to a share of the estate in proportion to his debt unconditionally, and (2) that he was entitled to recover his share by direct action against the trustee.

ON 11th March 1885 John Johnson, a tailor, carrying on business in 2^D Division. Paisley and Glasgow under the firm of Buchanan & Johnson, granted a trust-deed in favour of Mr James Taylor, C.A. in Glasgow, "as trustee for behoof of my whole lawful creditors at the date hereof, and who shall accede hereto," for the purpose, *inter alia*, "of paying the whole debts due by me to the creditors acceding hereto." The deed contained this clause,—“De-

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claring always, as it is hereby specially provided and declared, that this trust-disposition is granted by me on the condition that the creditors who accede hereto or who shall take a dividend out of my said estate shall be held to have thereby discharged me of the whole debts due by me to them, without the necessity for any formal deed of accession or discharge being granted; declaring that the acceptance by any creditor of a first dividend from this trust-estate shall import a discharge to the said trustee."

Thomas Ogilvie & Son were creditors of the firm of Buchanan & Johnson to the amount of £273, 5s. They did not accede to the deed. The estate in June 1886 was estimated by the trustee as likely to yield 5s. 6d. per pound. Thomas Ogilvie & Son accordingly demanded payment of the sum of £75, 1s. 6d., being the amount of the dividend of 5s. 6d. per pound on their debt. They offered a receipt for that sum, but declined to grant a discharge. The trustee refused to pay unless there was a discharge of the debt by Thomas Ogilvie & Son.

Thereupon Thomas Ogilvie & Son raised this action, on 19th June 1886, concluding for the sum of £75, 1s. 6d.

The pursuers pleaded;—(1) In respect the defender is trustee in trust under the said conveyance or trust-deed for behoof of the creditors of the said Buchanan & Johnson, and having accepted office and being in possession of the means, estate, and proceeds of said insolvent, he is bound, in virtue of his office, to distribute the same among the creditors in proportion to their respective debts.

The defender pleaded;—(2) The pursuers having declined to accede to said trust-deed, they are not entitled to any benefit therefrom. (3) The defender having all along been willing to pay pursuers said dividend, subject to said condition, he should be assoilzied, with expenses.

The Sheriff-substitute (Erskine Murray), on 4th August 1886, pronounced this interlocutor:—(After findings in fact)—"Finds on the whole case, and in law, (1) that the condition as to discharge is one which cannot legally in the circumstances be enforced, and must be held *pro non scripto*, (2) that therefore pursuers are entitled to receive a dividend on the debt due to them by Buchanan & Johnson without granting the latter a full discharge," &c.

The defender appealed, and argued;—The trustee was a mandatary and he must administer the trust according to his mandate; if creditors were not satisfied with the course of administration they might sequestrate.¹ Deeds for behoof of creditors had been set aside altogether, but this was the first time it had been sought to leave the deed standing and to hold the conditions *pro non scriptis*. That a condition of this kind would not invalidate the deed was certain. A trust-deed with a clause in these terms would exclude even a non-acceding creditor from doing diligence by arrestment, and would secure equality.² The principle of equality would be violated if acceding creditors discharged their debts in obedience to the deed, while non-acceding creditors merely took the dividend as an instalment.

Argued for the pursuers;—A trust-deed should be sustained in so far as it was legal, and *quoad ultra* disregarded. One creditor non-acceding had as much right to challenge it as twenty.³ Such a condition as that in question it was *ultra vires* of the debtor to impose. The trustee held for the creditors, and for the whole body of creditors, whether they acceded or not, for no man could put his estate beyond the reach of creditors.

¹ Kyd v. Waterson, June 5, 1880, 7 R. 884.

² Henderson v. Henderson's Trustee, Nov. 22, 1882, 10 R. 185.

³ Cf. Lord Fraser's opinion in Lamb's Trustee v. Reid, Nov. 9, 1883, 11 R. 76.

The trustee was merely "a name to hold the subject for the creditors,"¹ No. 77.
and held adversely to the debtor.²

At advising,—

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LORD YOUNG.—From the first I own I have considered this a very clear case. It is quite a commendable thing for an embarrassed debtor to employ an agent or an accountant or to get a friend to make his estate available to his creditors as far as it will go. That is perfectly legal. Further, where he and all his creditors agree that it will be satisfactory and economical to realise and divide the estate in that way on condition of the creditors discharging their debtor on getting such a dividend as the estate will afford, there is no objection to that. The debtor and the creditors agree that there is no alternative between that and sequestration, and that that will be the most satisfactory and economical method.

But that is all done by agreement, and sometimes a recalcitrant creditor frustrates that course which the great body of creditors think best. There is no help for that, for it is a matter of voluntary agreement, and a sequestration may always be substituted for the agreement so frustrated.

To realise his estate and to make it go as far as possible is the duty of every debtor. But it is quite certain that no debtor is entitled to put his estate beyond the reach of his creditors or to prescribe conditions on which alone they are to be entitled to participate. Any proposition to the contrary is extravagant. But that is what the debtor has done here when he placed the estate in the hands of his trustee. He, forsooth, has prescribed as a condition on which alone the creditors are to be entitled to participate in the estate, that they shall give a discharge.

Now, a trust-deed honestly granted, although without the accession of all creditors, has been held effectual by the Court to this extent, but to this extent only, that individual creditors should not be at liberty by arresting in the hands of the trustee to interfere with equality of distribution. I am not aware of a trust-deed being recognised to any other effect than that individual creditors should be restrained from using diligence. An individual creditor shall not disturb the provisions for equality of distribution in respect of which the trust-deed is regarded with favour. But if he cannot use diligence at all, if he cannot use it to secure his own legitimate share, then it is put beyond his reach altogether.

This deed provides that creditors shall discharge their debts for any dividend they may receive. That dividend turns out to be 5s. 6d. in the pound. Just fancy the proposition that no creditor shall interfere with the estate unless he will discharge his whole debt for 5s. 6d. in the pound! A more extraordinary proposition I never heard. The Dean of Faculty says, "Let him resort to sequestration." But a creditor cannot be obliged to resort to sequestration. There is no obligation on any creditor to make his debtor notour bankrupt, and sequester him. He may say, "The debtor can pay me 5s. 6d. now, and I'll wait for the rest." The debtor himself may apply for sequestration if he is in a position to do so according to law. I do not know whether he is in that position or not. The creditor here does not and cannot interfere with that right; he only says, "I'll take what the estate will afford, and wait for the rest." A discharge, as we know, is not a matter of course even in a sequestration. By a recent statute (44 and 45 Vict. c. 22) the debtor in certain cases must shew that

¹ M'Kell v. M'Lurg's Trustees, 1766, M. 894.

² Bell's Comm. ii. 383, or 487 in 5th edn.

No. 77. his inability to pay arose from innocent misfortune. Further, this discharge is to apply to *acquirenda*, so that if the debtor succeeds to a fortune within six months the creditor shall get no share of it, and all that just because the debtor says so.

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The only difficulty I have felt is this—Shall the creditor have a direct action against the trustee? But I readily overcame that difficulty. If a debtor puts his whole estate into the hands of a trustee or a friend, I think we should sustain the title of the creditors to sue that person, and we should do that to avoid circuitry of actions. If not, the creditor would bring an action against the debtor, and would then use diligence against the estate in the hands of the trustee; that would secure equality of distribution. He may not use an arrestment that will interfere with equality, but upon such an arrestment as I have indicated being used, the trustee must make forthcoming to him the share of the estate belonging to him, and that is all he asks here.

I think, then, that the condition so attempted to be imposed is absolutely illegal, and I have no difficulty on the matter except on the technical ground of the direct action against the trustee. I have overcome that, and the result is that I agree with the Sheriff-substitute. The pursuer is entitled to decree for that proportion of his debt; it is his legal right, and he is entitled to have it. But I do not agree with the last part of the Sheriff-substitute's judgment, in which he finds no expenses due to the pursuer. This is the case of a just claim being resisted on untenable grounds, and I have no hesitation in holding the pursuer entitled to expenses.

LORD CRAIGHILL.—I agree with the judgment proposed, and concur in the reasons given by Lord Young for that judgment. I cannot conceive how any honest debtor has any interest in resisting such a demand as is made on the grounds on which it is resisted here.

LORD RUTHERFURD CLARK.—I agree. The only difficulty I have had is the difficulty of form which Lord Young has mentioned. I had some doubt whether the pursuer is entitled to a direct action against the trustee for his dividend. The proper and obvious course was to raise an action against the debtor and arrest in the hands of the trustee; of course he would limit his arrestment to the amount of his dividend. I do not know that he could arrest the dividend; he would arrest so much of the estate as remained in the hands of the trustee.

But, after all, this action only brings about the same result, and therefore I think we are bound to sustain this action, which can do the debtor no harm. I do not see how it can in any way prejudice him. It has been said that it will in some way prejudice his right to obtain sequestration, but that has not been made clear.

I think, then, that we may sustain a direct action against the trustee, which gives the creditor no more than he would obtain by an action against the debtor.

LORD JUSTICE-CLERK.—I agree. A private trust-deed for behoof of creditors as a piece of machinery in the law of bankruptcy is often very useful and very economical, but I imagine it to lie at the foundation of the law on that subject that the deed is granted for rateable distribution among all the creditors. But questions have arisen whether, when there are conditions in the deed which may be thought to lead to inequality, the trust-deed is entitled to stand at all. In that connection Professor Bell uses the expression that they may be held *pro non scriptis*. I do not think that that is a very felicitous expression, but,

however that may be, I agree with the judgment proposed, because I am of opinion that every creditor is entitled to a dividend on the principle that his just right is to an equal distribution of the estate.

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THE COURT recalled the interlocutor of the Sheriff-substitute, decreed against the defender in terms of the prayer of the petition, and found the pursuer entitled to expenses in both Courts.

MITCHELL & BAXTER, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

JOHN GOURLAY (John Millen & Company's Trustee), Pursuer
(Reclaiming).—*C. S. Dickson—W. G. Miller.*

No. 78.

RICHARD MACKIE, Defender (Respondent).—*Pearson—Goudy.*

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Bankruptcy—Illegal preference—Act 1696, c. 5.—Where money is advanced on the faith of a specific security to be immediately granted, it will not vitiate the security that it is not formally completed till within sixty days of the grantor's bankruptcy; but when the stipulation is that the debtor shall give security, whether general or over a specific subject, whenever the creditor shall desire it, the granting of the security within sixty days of the grantor's bankruptcy is reducible under the Act 1696, cap. 5.

A firm, within sixty days of bankruptcy, obtained a loan from another firm, to whom they granted a promissory-note and this letter:—"On consideration of you having this day discounted, for our sole benefit, our acceptance at four mo' from date, for £462, 10s., and handed us proceeds of same, we hereby hand over to you, as security for same, 100 shares for £6 paid in Holmes Oil Coy., and bind ourselves to transfer same to you at any time during the currency of the bill if you desire it." The certificate of the shares was at the same time delivered to the lenders. A transfer was executed three weeks thereafter, and fourteen days before the sequestration of the granters.

Held (rev. judgment of Lord Kinnear), following Moncreiff v. Union Bank, Dec. 16, 1851, 14 D. 200, that the transfer was reducible under the Act 1696, c. 5.

ON 23d December 1885 Messrs John Millen & Company, coalmasters, Glasgow, applied to Messrs Richard Mackie & Company, steamship owners, Leith, for a loan or advance of £450, which was given by the latter. In exchange therefor, Messrs Millen & Company granted to Messrs Mackie & Company their promissory-note of said date for £462, 10s., and payable four months after date. They also granted a letter in the following terms:—"On consideration of you having this day discounted, for our sole benefit, our acceptance at four mo' from date, for £462, 10s., and handed us proceeds of same, we hereby hand over to you, as security for same, 100 shares for £6 paid in Holmes Oil Coy., and bind ourselves to transfer same to you at any time during the currency of the bill if you desire it."

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The scrip or share-certificate was delivered at the same time, but no transfer was then executed. The transaction was carried through by Mr John Millen on the one side, and by Mr Richard Mackie on the other on behalf of their respective firms.

The affairs of Messrs Millen having become embarrassed, were, on 14th January 1886, placed in the hands of Messrs Thomson, Jackson, Gourlay, & Taylor, chartered accountants, Glasgow, and a circular intimating this fact was issued to the creditors. On the following day (15th January) Mr Richard Mackie procured from Mr John Millen a transfer of the said shares, which was at once intimated to the company on the same day, and in respect of the said transfer new scrip or share-certificates were issued to Mr Richard Mackie in his own name.

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The transfer was dated 23d December 1885 by the secretary, to correspond with the above-mentioned letter of that date.

The estates of John Millen & Company, and of the individual partners, were sequestrated on 28th January 1886.

On 9th March 1886 John Gourlay, C.A., Glasgow, the trustee in the sequestration, raised an action in the Court of Session against Mr Richard Mackie, concluding for reduction of the transfer, and also concluding for delivery of the certificates of the said 100 shares issued in favour of the defender, dated 15th January 1886.

The pursuer averred;—"The said transfer or assignation was signed and delivered voluntarily and without consideration by the bankrupt John Millen as an individual to the defender, in satisfaction of and as security for a prior debt of his firm, due to said Richard Mackie & Company, on the eve of sequestration, and within sixty days of bankruptcy, contrary to the terms of the Statute 1696, chap. 5."

The pursuer pleaded;—(1) The transfer or assignation described in the summons, having been given in security or satisfaction of a prior debt within sixty days of bankruptcy, contrary to the terms of the Statute 1696, chap. 5, the pursuer is entitled to have the same reduced and set aside, as concluded for. (2) The pretended sale of the said shares described in the said transfer or assignation by the bankrupt John Millen to the defender not having been a *bona fide* sale, and the same having been an illegal and fraudulent transaction between the parties, it is void, or at least reducible at common law, and the pursuer and the creditors of the said bankrupts are entitled to be reponed thereagainst.

The defender pleaded;—(1) The said shares having been transferred to the defender in implement of a prior obligation by the said John Millen & Company to do so, the action, so far as based on fraud at common law, is unfounded. (2) The said shares having been transferred in respect of a *novum debitum*, and in specific implement of a prior specific obligation, the action, as based on the Act 1696, cap. 5, is unfounded.

On 10th July 1886 the Lord Ordinary (Kinnear) sustained the pleas in law for the defender, and assoilzied him from the conclusions of the summons.*

* "OPINION.—The only question in this case is whether the security which the pursuer seeks to reduce is struck at by the Act 1696, c. 5; for, apart from the statute, I think it clear that there is no relevant averment of fraud. The general rule of law by which the question must be determined cannot be better stated than in two propositions laid down by Professor Bell in his Commentaries, and cited with approval by the Lord President in *Stiven v. Scott*, 9 Macph. 930. The first is, that 'wherever money is paid or advanced, or property made over, in consideration of a general promise of security not over a specific subject, the distinction is sanctioned between the debt and the security subsequently granted; and in its true intent and meaning the rule of the statute is understood to apply to the security, when it comes to be granted, as being truly a security for a previous debt.' The second proposition is, that 'wherever there is stipulated a specific security over a particular subject, in consideration and on the faith of which an advance of money or transfer of goods is made, the completion of that security, although after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the Act.' The question is, under which of these two categories the disputed security falls, and I am of opinion that it falls under the second.

"The transaction between the defender and the bankrupts was a very simple one, and there is no dispute as to its terms. On the 23d December 1885 the defender made a loan to the bankrupts of £450 by discounting their acceptance; and on the same day they delivered to him the scrip or share-certificate of

The pursuer reclaimed, and argued;—The case was ruled by *Moncreiff* No. 78.
v. Union Bank,¹ which was regarded in *Stiven v. Scott & Simson*² as a

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certain shares in the Holmes Oil Company, and a letter addressed to him, in which they say,—‘On consideration of you having this day discounted, for our sole benefit, our acceptance at four mo^t from date for (£462, 10s.) four hundred and sixty-two pounds, ten shillings st^d, and handed us proceeds of same, we hereby hand over to you, as security for same, 100 shares for £6 paid in Holmes Oil Co^r, and bind ourselves to transfer same to you at any time during the currency of the bill, if you desire it.’ It is true that the delivery of the certificate did not of itself operate as a transfer of the shares; but the letter shews that the transaction was, in intention and in substance, a loan on the specific security of the shares, and the obligation to execute a formal transfer was instantly prestable. The advance and the security were part of the same transaction, and it is a transaction which appears to me to satisfy the requirements of the law, as these are explained by the Lord President in the case of *Stiven*, where his Lordship says,—‘If the party come under an obligation to do something immediately and unconditionally, it shall have the effect of creating a good security; and when I say come under an obligation, I mean nothing short of this, that he subjects himself to an obligation instantly and absolutely enforceable. When he comes under such an obligation as that, then the fulfilment of that obligation, although within sixty days, will not make a case under the statute, because then the security is substantially granted before the sixty days, and at the same time that the debt is contracted. It is a security contemporaneous in that point of view with the contraction of the debt.’ It is true that the security was not in this case granted before the sixty days, but that is because the debt was contracted within that period. It was a new debt contracted within sixty days of bankruptcy; and if I am right in thinking that it was contracted on the security of the shares, the completion of the transaction cannot be considered as the voluntary granting of a further security for a prior debt.

“I do not think this view inconsistent with *Moncreiff v. The Union Bank*. There is no doubt a certain resemblance between the facts of that case and those of the present; but I think the two cases distinguishable in a very material point. The Union Bank made an advance to the bankrupts more than sixty days before their bankruptcy on the security of a promissory-note, and took from them at the same time a missive addressed to the manager, binding themselves at any time required to assign a heritable bond and certain policies of insurance, which were immediately deposited with the bank. The assignation was not required till the promissory-note fell due, six months after the date of the loan, and within six days of the bankruptcy of the borrowers. It appears to me that the only question of difficulty in that case was a question as to the construction of the contract upon which the advance was made; and the ground of judgment, as explained by Lord Fullerton, was ‘that the missive taken by the defenders shewed that the instant granting of the security was not the consideration of the advance. There was no absolute stipulation for the security at the time of the advance.’ And accordingly the Court distinguished the case from those in which, although the security was not actually given prior to, or simultaneously with, the advance of the money, the granting of the security really formed, by the terms of the original contract, the consideration for such advance. In the present case, on the other hand, I think the missive shews that the security upon which the defender made the advance was not the personal obligation contained in the bankrupts’ promissory-note, but the specific security of the shares in question. It is said that the obligation to transfer the shares is qualified by the words ‘if you desire it,’ and that this must mean just what was meant by the words ‘if re-

¹ *Moncreiff v. Union Bank*, Dec. 16, 1851, 14 D. 200, 24 Scot. Jur. 87.

² *Stiven v. Scott & Simson*, June 30, 1871, 9 Macph. 923 (*per* Lord President Inglis, p. 932), 43 Scot. Jur. 511 (Lord President, p. 514).

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leading authority, and in no degree shaken by intermediate cases. The parties here did not intend an out-and-out transference of the shares, but a transference depending on the condition "if you desire it." That desire might never have arisen. The transference also must be "during the currency of the bill." The granting of the transfer was a separable matter from the obligation in the promissory-note. The defender had been willing to advance the money on the personal credit of the bankrupts, and had altered his position to his own benefit, and to the loss of the creditors, within sixty days of bankruptcy. It would have been a different question if the parties had intended an immediate transference of the shares, and the delay had merely arisen from some time being required to complete the formal transfer. The question whether or not the bankrupts could have been compelled to grant this transfer was not the test, otherwise *Moncreiff v. Union Bank* would be bad law, for undoubtedly there the bankrupt could have been compelled to grant the assignation. To the same effect was the judgment in *Mansfield v. Walker's Trustees*,¹ which recognised that deeds granted in implement of a previous obligation might be "voluntary" in the sense of the statute. To escape the statute the obligation must be "instantly and absolutely enforceable."² An obligation to assign went for nothing, unless "prestale independently of after requirement."² The transactions of 23d December 1885 settled the rights of the parties, and the transfer of 15th January 1886 was in "further

quired' in the case of *Moncreiff v. The Union Bank*, so that, on the authority of that decision, it must be held that the obligation to transfer was not absolute and unconditional, but dependent upon after requirement. But the whole letter must be read to ascertain the terms of the contract, and if it be clear, as I think it is, from the previous words that the advance was made on the specific security of the shares in the Holmes Oil Company, it is impossible to infer from the words in question that the security was not an absolute term of the bargain, but that it was left open for after consideration whether any such security should be required or not. It appears to me that the words 'if you desire it' take nothing from the force of the absolute and unconditional obligation to transfer, provided it be clear that the contract between the parties was an advance on the specific security of the shares. The case of *Moncreiff v. The Union Bank* is an authority for the rule of law which may be extracted from it, but it is no authority for the construction of a different contract from that which was then in question.

"If I am right in the construction I put upon the present contract, the case falls within the rule, which must now be taken as firmly established, that 'wherever, on an advance of cash, a simultaneous engagement is made to give a specific security for the specific advance, such security may be validly completed within sixty days of bankruptcy, and is not struck at by the Act of 1696.' The rule is settled by a series of decisions, but *Taylor v. Farrie* is probably the most important, since it was a judgment of the whole Court.

"I do not think the rule displaced by the consideration (if that can be gathered from the contract) that the parties may have been uncertain as to the form which might be necessary for making the security effectual. The important matter is that the advance was made substantially on the security of the shares, and that the obligation to transfer the shares on demand, for the purpose of making the security effectual, was absolute and unconditional. There was no new transaction between the parties, and no voluntary transference by the bankrupts."

¹ *Mansfield v. Walker's Trustees*, June 28, 1833, 11 S. 813, 5 Scot. Jur. 569, H. L. as *Inglis v. Mansfield*, April 10, 1835, 1 S. and M'L. 203, 7 Scot. Jur. 472; *Gibson v. Forbes*, July 9, 1833, 11 S. 916 (Lord Mackenzie, p. 928), 5 Scot. Jur. 542 (Lord Mackenzie, p. 547).

² *Stiven v. Scott & Simson*, *supra*, Lord President, 9 Macph. p. 933, Lord Kinloch, p. 936, 43 Scot. Jur. pp. 515, 516.

security" in the sense of the statute. [LORD YOUNG.—The whole transactions here were within sixty days of bankruptcy. Is there any similar case?] *Hotchkiss* (Bell's Com. ii. 219, note 4) was similar in this respect. No. 78.
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Further, the pursuer was prepared to aver and prove that John Millen was chairman of Holmes Oil Company, and therefore it was not likely to have been in contemplation of the parties that he should be divested of the shares held by him. Admittedly the transfer was not made of the date it bore, and therefore the defender must shew *bona fides* in the transaction.

Argued for the defender;—The Act 1696 only struck at voluntary deeds granted to a creditor in satisfaction or further security of his debt. A deed was not voluntary, in the sense of the Act, which a party was bound to execute.¹ Here the parties considered the security sufficiently constituted by delivery of the certificate for the shares, but if found to be necessary a formal transfer was to be granted. There was an absolute obligation to grant this transfer, which could have been instantly enforced. It was *pars contractus*, and was granted "on consideration" of the defenders' firm discounting the promissory-note. It would have been a fraud for the bankrupt to transfer these shares to anyone else. "If you desire it" did not necessarily mean "if bankruptcy supervene." It might quite well mean "if you are advised that a transfer is necessary, I bind myself to complete your title." If the transfer here had actually been procured, and parties had merely agreed not to register it, that would not be bad under the Act. There was no contravention of the statute when a specific security is stipulated for, and when what is afterwards done is simply in implement of the stipulation. That was settled in *Miller's Trustee v. Shield*,² which also settled that it was immaterial whether the transaction was a sale or a loan. That principle was precisely applicable here. The Legislature did not intend to disable parties from fairly and strictly performing their obligations *ad factum prestandum*.³ *Moncreiff v. Union Bank* was distinguishable from the present case. The obligation there was contracted beyond sixty days from bankruptcy, while the security was taken within that period; the time for requiring security was quite indefinite, while here it was limited to the currency of the bill; the security was to be granted "at any time required," words which were not susceptible of the same construction as those here used; and the obligation to grant the security was not part of the contract, as here, but dependent on after requirement. In *Stiven v. Scott & Simson* the borrowers were intended under the contract to retain power to deal with the goods forming the security at their pleasure, and it would have been no fraud to give them over to a third party, which was a very different case. A *novum debitum* was sustained because the bankrupt estate got the counterpart of what the bankrupt gave, and the whole transactions here being within sixty days, the estate presumably would not lose.

At advising,—

LORD JUSTICE-CLERK.—The question raised in this case is, whether a transfer of certain shares in the Holmes Oil Company, executed on the 15th of January

¹ *Cranstoun v. Bontine*, July 6, 1832, 6 W. & S. 79, *per* Lord Wynford, p. 93, 5 Scot. Jur. 10.

² *Miller's Trustee v. Shield*, March 19, 1862, 24 D. 821, *per* Lord Curriehill, p. 827, 34 Scot. Jur. 416.

³ *Taylor v. Farrie*, March 8, 1855, 17 D. 639, 27 Scot. Jur. 266; *Lindsay v. Adamson & Ronaldson*, July 2, 1880, 7 R. 1036.

No. 78. 1886 in favour of the defender, is reducible under the Act 1696 as a voluntary preference granted in favour of a prior creditor within sixty days of the bankruptcy of the debtor.

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The debtor John Millen was sequestrated on the 28th January 1886, and the pursuer is the trustee on his estates. The circumstances under which this transaction took place were the following: On 23d December 1885 the bankrupts, John Millen & Company, applied to the defender's firm for a loan of £450, which was given by the latter. In exchange therefor the bankrupts' firm granted to the defender's firm their promissory-note of the same date for £462, 10s., payable four months after date. They also granted a letter in the following terms:—"On consideration of you having this day discounted, for our sole benefit, our acceptance at four months from date for £462, 10s., and handed us proceeds of same, we hereby hand over to you as security for same 100 shares for £6 paid in Holmes Oil Company, and bind ourselves to transfer same to you at any time during the currency of the bill if you desire it." It is really on the terms of that obligation that the whole question turns. In point of fact that letter was granted on 23d December, and it was on 15th January following that the transfer of the shares was executed by the bankrupt. It turns out that the date affixed to the transfer was 23d December, but that, it is explained, was done by the secretary of the company without the knowledge of the defender, in order to make the transfer conform to the letter of 23d December. These facts are not disputed, but it is alleged that the advance was made solely on the faith of the security being granted. I do not think that allegation in any way whatever alters the question.

The Lord Ordinary has assoilzied the defender, but I cannot concur in his judgment. I do not doubt that where money is advanced on the faith of a specific security, stipulated for as part of a present transaction, it will not vitiate the security that it is formally completed within sixty days of the granter's bankruptcy. The security is in that case truly granted in fulfilment of a prior obligation. But this case, in my opinion, belongs to an opposite category. The money here was not advanced on the faith of a present or instant security. It was advanced without security and in the knowledge that there was none, but under a promise from the debtor that if and when the creditor desired it the shares in question should be transferred to him. The meaning of this is quite plain. It was a transaction separate from the advance, and was not absolute but conditional. So far as the parties were concerned, neither desired that any present or instant security should be then given. The debtor wished to avoid the notoriety the transfer would imply. The creditor was willing to forego it as long as he thought he could so with safety. The position was precisely that described by Lord Ivory in his note in the case of *Moncreiff v. Union Bank*,¹ which I think well decided, and from which I cannot distinguish the present. In that case the debtors, Messrs Tod & Hill, had applied for and obtained an additional cash-credit for £3000 from the bank, and by a relative letter Mr Tod agreed to convey to the bank at any time required certain securities therein specified. The bank demanded the assignation of these securities within six days of the debtors' bankruptcy. In this state of matters Lord Ivory reduced the security, and the Court adhered. Lord Ivory says in his note,—“The agreement neither constituted any present security

¹ *Moncreiff v. Union Bank*, Dec. 16, 1851, 14 D. 200, 24 Scot. Jur. 87.

for the debt, nor was it in any just sense contemplated or intended as one which should operate in that manner. It was in truth a mere device, and that of the most dangerous description, looking to the interests of the general creditors, to evade the operation of the statute." "What was intended was not a present but a future, or, in the words of the statute, a further security." This being so, I am at a loss to understand the ground on which the Lord Ordinary hesitated to follow a precedent so plainly applicable. It is true Lord Gifford in the case of *Stiven*¹ expressed a doubt whether the case of *Taylor v. Farrie*,² decided three years afterwards by the whole Court, did not shake its authority. But the Lord President in the case of *Stiven*³ expressed a clear opinion that nothing had occurred to overrule the case of the *Union Bank*, and that the case of *Taylor* proceeded on facts entirely dissimilar. The latter case was a contract of sale of a going business with the premises in which it was carried on, which were under lease, and the assignation to the lease was delayed for some weeks, in course of which the seller became bankrupt. But that is a clear case of a completed contract beyond the sixty days, and the obligation to grant the assignation was not conditional but *simul et semel* with the contract of sale.

I think the interlocutor should be altered, and decree of reduction pronounced in terms of the conclusions of the summons.

LORD YOUNG.—I am of the same opinion as your Lordship, and on the same ground. I think the case of *Moncreiff* is in point exactly, and therefore is conclusive, unless we can disregard it as an authority, which I am not prepared to do. After reading the report of *Moncreiff* I was somewhat surprised that the Lord Ordinary did not think it in point, and I read more than once the observations made by his Lordship to shew that it was not in point, but I cannot find his reasons distinctly stated. His Lordship says,—“The case of *Moncreiff v. The Union Bank* is an authority for the rule of law which may be extracted from it, but it is no authority for the construction of a different contract from that which was then in question.” I rather think that, being interpreted, means what I have heard was sometimes said in England where the Court thought a case relied on was ill decided, that the case is an authority for itself and must be followed where everything is just exactly the same. The Act of 1696 has given occasion for a great diversity of opinions. It seems fated to be so. In short, as Lord Fullerton says, it is impossible to reconcile the conflicting decisions,⁴ but I think we have some propositions firmly established. It does not apply to a sale—that is, to implement of a contract of sale by the bankrupt delivering the goods after bankruptcy or within sixty days of it. That has been provided for since the case of *Gibson v. Forbes*⁵ by Act of Parliament, for by the Mercantile Law Amendment Act, where a seller of goods has received payment of the price, these no longer pass to his creditors, but the buyer is entitled

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¹ *Stiven v. Scott & Simson*, June 30, 1871, 9 Macph. 923, Lord Gifford, p. 928, 43 Scot. Jur. 512.

² *Taylor v. Farrie*, March 8, 1855, 17 D. 639, 27 Scot. Jur. 266.

³ *Stiven v. Scott & Simson*, *supra*, Lord President, 9 Macph. pp. 932, 933, 43 Scot. Jur. p. 514.

⁴ *Moncreiff v. Union Bank*, Dec. 16, 1851, 14 D. 200, Lord Fullerton, p. 203, 24 Scot. Jur. 87.

⁵ *Gibson v. Forbes*, July 9, 1833, 11 S. 916, 5 Scot. Jur. 542.

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to delivery. No question under the Act 1696 can occur again such as arose in *Gibson v. Forbes*, but the case is useful as establishing the principle that where a buyer pays the price of goods bought and received, or a seller delivers the goods that he has sold and has been paid for, that is not a case of satisfying or securing a debt. It is a case of exactly satisfying an obligation, but there is no debt secured or unsecured, satisfied or unsatisfied, therefore there is no satisfying a debt or giving security for it. It is also on that principle that *Taylor v. Farrie* was decided. It was a purchase and sale, and all that was done was implement by the seller. There was no security or satisfaction by way of inducing the purchaser to be content.

But here there is a security given—a security given for a prior debt. That admittedly is struck at by the Act 1696 unless there is a contract binding and efficacious in law to the contrary. Now, I quite agree with the doctrine that is stated by Professor Bell, that where it is stipulated that a specific security shall be given over a particular subject, in consideration and on the faith of which a transfer of goods or an advance of money is made, the completion of that security, although after an interval of time and after the term of constructive bankruptcy has begun, is not within the meaning of the Act.¹ But I assent to it only as meaning this, which I understand it to mean, that the security bargained for is to be simultaneous and contemporaneous with the debt, and if it is given as soon as may be—as soon as the formalities can be gone through—though bankruptcy has come, or it be within sixty days of it, it will nevertheless be considered simultaneous and contemporaneous with the debt. Just as in the case of a sale for ready-money. It is none the less so where a party asks for an article across the counter and the article has been delivered to him before he has taken the money out of his purse, or gone to the bank or to his house to bring it. It is a ready-money transaction, and though the purchaser may have walked off with the goods it would still be regarded as a ready-money transaction. It is not a sale on credit. And so where there is an advance on security stipulated for to be instantaneous, it will be esteemed so notwithstanding that some minutes or hours, or even a few days, may elapse before the formalities are completed. But where the stipulation is not for a simultaneous security, but that the debtor shall give security, (and I do not care whether it is general or over a particular subject,) whenever the creditor sees it is his interest to demand it, that is a different thing. That was the stipulation in the case of *Moncreiff*, and Lord Ivory there says that it is a device to evade the operation of the statute. But for that device the Act would have applied in terms to a security granted within sixty days of sequestration, and if the security is bad by the Act it is bad notwithstanding any device to frustrate the operation of the Act. The creditor says,—“You shall give it at any time when I demand it, and if that should happen to be on the eve of bankruptcy the Act 1696 shall not apply.” That is the parties contracting themselves out of the Act. I think it clear that parties cannot contract themselves out of the Act 1696. It shall apply whenever circumstances make it applicable, notwithstanding any contract between parties to the contrary. Here the contract was, “Go on and act as the owner of the shares, sit as chairman of the company, and whenever I desire it you are to give a transfer; and it is also the contract between us that the Act 1696 shall not apply.” That is a device to evade the operation of the

¹ Bell's Com. li. 226.

statute, and an attempt by parties to contract themselves out of the statute. The result is that I agree with your Lordship that decree should be pronounced in terms of the conclusions of the action.

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LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

THE COURT recalled the interlocutor, and decerned in terms of the conclusions of the summons.

W. & J. BURNES, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

SCOTTISH PROVIDENT INSTITUTION, Pursuers (Nominal Raisers).
JAMES MARTIN (Jarvie's Trustee), Real Raiser and Claimant (Reclamer).
—Asher—G. W. Burnet.

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ALEXANDER FLEMING AND OTHERS (Jarvie's Trustees), Claimants
(Respondents).—Gloag—Fleming.

Writ—Delivery—Trust—Policy of insurance in favour of wife and children.
—Held (rev. judgment of Lord M'Laren) that a policy of insurance taken by a husband in favour of trustees for behoof of his wife and the children of the marriage did not confer a vested right in the beneficiaries without delivery, actual or constructive, of the policy.

—Circumstances which were held not to amount to delivery of a policy of insurance taken by a husband in favour of trustees for behoof of his wife and children.

By policy of assurance, dated 6th September 1870, the Scottish Provident Institution, on a narrative that Nedrick Jarvie, manufacturer, Glasgow, had complied with certain conditions and had paid the first year's premium, certified that Jarvie had "been duly admitted a member" of the institution, and that Alexander Fleming, merchant, Glasgow, and others, "in trust, as directed by writing under the hand of the said Nedrick Jarvie for behoof of Mrs Eliza Miller or Jarvie, his wife, and the children of their marriage, whom failing, the heirs and assignees of the said Nedrick Jarvie, shall be entitled to receive, out of the funds of the said institution, at the end of six months after the decease of the said Nedrick Jarvie, the sum of £1000: . . . But always with and under this condition, that the said Nedrick Jarvie shall duly pay, or cause to be paid, to the said institution, on the receipt of the manager for the time being, the future annual contribution of £35, 14s. 2d. sterling, on or before the 6th day of September in every succeeding year during his life, or within one calendar month thereafter"; but always under certain specified conditions.

1st DIVISION.
Lord M'Laren.
M.

By assignation dated 6th and 7th April 1885 Mr Fleming and the other trustees, with consent of Mrs Jarvie, the three children of Mr Jarvie who had reached majority, and the three minor children of Mr Jarvie, acting with consent of their father "as their administrator-in-law," assigned in favour of Mr Jarvie their interest in the above-mentioned policy of assurance. The assignation proceeded on the narrative that, "considering that the premiums on said certificate or policy of assurance have all along been paid by the said Nedrick Jarvie, and that the said policy of assurance has never been delivered to us, or any of us, as the trustees named in it, and the fact of its existence was only recently communicated to us, which communication was made to us in connection with a request by the said Nedrick Jarvie that we should grant these presents, and that we have never acted as trustees under the said policy in any manner of way. And further, considering that the said Nedrick Jarvie recently represented to us that the said certificate or policy had

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all along been and remained in his possession undelivered, and under his control, and that he has given no direction by writing under his hand or otherwise as to the disposal of the said policy or the sums thereby assured, and that the donation or provision which he contemplated making by the said certificate or policy, and by a writing under his hand which he contemplated granting in terms of said certificate or policy, has never been completed, but that the said certificate or policy and the sums thereby assured remained his individual property, and at his free disposal, and that he has requested us in these circumstances to convey the same to him in manner under written."

On 14th April 1885 Mr Jarvie, in terms of a bond and assignation of that date, granted by him in favour of the Scottish Provident Institution, obtained from them on loan on the security of the above policy the sum of £230.

By trust-deed, dated 8th February 1886, Mr Jarvie conveyed his whole estates to Mr Martin, accountant, Glasgow, in trust for his creditors.

Mr Jarvie died on 21st March 1886. On 12th April 1886 Mr Martin, in name of the Scottish Provident Institution (as nominal raisers), raised an action of multiplepounding.

The fund *in medio* was stated as the sum of £1000 (the amount of the policy), under deduction of the loan of £230.

Mr Martin and the trustees under the policy both claimed the fund *in medio*; and in their condescendence admitted the facts as stated in the narrative of the assignation above set forth.

Mr Martin pleaded;—(1) The said policy of assurance being the property of the said deceased Nedrick Jarvie, and forming part of his estate, the claimant as trustee for behoof of his creditors is entitled to be ranked and preferred in terms of his claim.

The trustees pleaded, *inter alia*;—(1) The said policy created an irrevocable provision for Mr Jarvie's wife and children. (2) The consent of the wife and minor children being of no avail, the said assignation is null or reducible, and should be set aside or reduced. (5) The said assignation and what followed thereon being of no effect, the claimants should be ranked and preferred in terms of their claim.

On 3d November 1886 the Lord Ordinary (M'Laren) ranked and preferred the claimants Alexander Fleming and others upon the fund *in medio* in terms of their claim.*

* "OPINION.—This is an action instituted for the purpose of determining the right to the proceeds of a policy of life assurance for £1000, effected by Nedrick Jarvie, deceased, with the Scottish Provident Institution, less the sum of £230 advanced upon it by the insurers. The competition is between Mr Jarvie's creditors and his wife and children.

"The policy bears that Mr Jarvie had been admitted a member of the society, and that certain persons named as trustees, 'in trust, as directed by writing under the hand of the said Nedrick Jarvie, for behoof of Mrs Eliza Miller or Jarvie, his wife, and the children of their marriage, whom failing, the heirs and assignees of the said Nedrick Jarvie,' should be entitled to receive the said sum of £1000 six months after his death, provided that Mr Jarvie should regularly pay or cause to be paid the stipulated annual premiums.

"Thereafter Mr Jarvie's wife and family, on the narrative stated in the record, assigned the policy to him, and thereupon he obtained an advance of £230 from the society. The children are said to have been in minority at the time, and to have acted under the advice of their father.

"The first question is, what is the meaning of the obligation to pay to Mr Jarvie's wife and children? It was contended by one of the parties that 'and' is to be construed here as a word of destination, and that the gift is to Mrs

Mr Martin reclaimed, and argued;—The first and most important question raised in this case was whether a policy of assurance was an “irrevocable transfer” in the sense in which the Lord Ordinary used the words—viz., that when once taken out in name of a certain party, the person taking it out could not change the name of the donee under it. He submitted that it was not. There was nothing peculiar in the nature of a policy of assurance, and taking a policy out in the name of a third party was in all respects analogous to taking a security for a debt in the name of another. The creditor in such a debt could undoubtedly go to the debtor and make him change the name of the party to whom the money was payable. The language of the note of the Lord Ordinary would apply not only to a policy of assurance, but to any analogous document taken in favour of a third party. As regarded policies of assurance it required a statute—Married Women’s Property Act, 1886 (43 and 44 Vict. c. 26), sec. 2—to make policies irrevocable as provisions to wives, and even under the statute the trustee on a policy, with consent of the wife, obtained leave from the Court to surrender the policy.¹ That case went to this, that there was no indefeasible right in the beneficiary merely because her name was in the policy. This policy would have acted as a good testamentary provision, if it had been found in Jarvie’s repositories, or had been delivered, and so put out of his power of alteration.² The right of the wife here was to depend on some writing to be afterwards executed, but which was not executed. The act was incomplete, and all the circumstances shewed that his mind was not made up whether he should revoke the gift or not. A beneficiary could not be vested with an indefeasible right by a deed which he never heard of, and which was

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Jarvie in liferent (or possibly in fee), and to the children after her death. I have not been able to adopt this reading. The gift is to the wife and children in trust, as may be directed by Mr Jarvie. As Mr Jarvie left no deed of directions, I think that all the donees must share equally, unless they are displaced by the other claimants, the mother sharing with the children. This is an unusual arrangement, but I think it is the legal meaning of the words used.

“The next question is, who are the creditors in the obligation of the Scottish Provident Institution to pay £1000 after death? I think that the trustees for the wife and children are the creditors, although these gentlemen did not in fact know of the existence of the deed until after Mr Jarvie’s death. On behalf of Mr Jarvie’s creditors it is urged that the gift was not completed by delivery of the policy to the trustees. In my opinion, this is not a case where delivery by Mr Jarvie was necessary to vest the right in the donee, because, under this policy, Mr Jarvie was never instituted creditor in the obligation, and the obligation in its inception was in favour of the trustees for wife and children.

“It is as in the case of a person who pays money into the account of another. The payment of the premiums to the society was, in my opinion, an irrevocable transfer of funds into the hands of a third party for the benefit of the wife and children. The trust was sufficient for the protection of the interest of unborn or unnamed children, and when the time of payment arrived it would be the duty of the society to apprise the trustees of this irrevocable investment in their names.

“The next point is, whether there is a good assignment of the policy by Mr Jarvie’s wife and children to Mr Jarvie himself. I think not, because the husband and father, being the administrator-in-law for his wife and children, could not legally take from them a deed in favour of himself.

“From these considerations I come to the conclusion that the assignation is ineffectual, and that Mr Jarvie’s creditors are not entitled to be preferred to the fund *in medio*.”

¹ Schumann v. Scottish Widow’s Fund Society, March 5, 1886, 13 R. 678.

² Connell’s Trustees v. Connell’s Trustees, July 16, 1886, 13 R. 1175.

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undelivered.¹ Delivery or publication was essential. Intimation of an assignation or the recording of an heritable security were by law equivalent to delivery, but there was nothing of that kind here. The case was distinguishable from *Craig v. Galloway*.² There there was no question as to whether delivery had taken place. It was assumed all through the case. Here the whole question was delivery. It could not be said that the father here was holding as the proper custodian for his children. The trustees were the proper custodians. To read the gift in the policy as a fee to the wife, you must read in the words "in fee" between the words "wife" and "children" in the policy. There was no authority for doing that, and no indication that such was the father's intention. The assignation was not good except with regard to the major children.

Argued for the respondents;—The intention of Mr Jarvie was clearly to make an irrevocable provision for his wife and children, and therefore he appointed trustees to hold the fund. The provision was in favour of a class, and he could not disappoint the class; all that he could do was to reserve a power of apportionment to himself. Jarvie by taking the policy in his own name, and then assigning it to trustees and intimating the assignation, could have divested himself. An intimated assignation, though the deed was not actually delivered, was effectual.³ All that was required was intimation to the debtor; that was supplied here by the narrative contained in the deed of April 1885, which disclosed to the company the rights of parties. All the facts here were in favour of delivery. Mr Jarvie had no interest in the fund, it was not payable till his death, and the trustees were creditors in the policy. The case was distinguishable from *Hill's case*,⁴ for there the fund never left the grantor's hands. Here, Jarvie did his best to put the fund out of his own reach and that of his creditors by nominating trustees. The case was ruled by *Craig v. Galloway*, which proceeded on the assumption that the policy, the premiums of which were paid as here out of the husband's funds, was intended as a provision for the wife. The provision ought to be read as a fee to the wife.⁵ Mr Jarvie here was the proper custodian of the policy for his wife and children, and therefore there was an equivalent to the delivery as in *Craig's case*. The trustees were only appointed to pay, not to hold the fund. Up to the death of Mr Jarvie they had no duties to perform, and therefore that point of distinction between this case and *Craig v. Galloway* was displaced. There was no indication that any new writing was required to complete this act. The words "as directed" were in the past tense, and alluded to the proposal for the policy. Were it not for the assignation which followed, that would certainly have been the meaning assigned to those words. The assignation was really out of the case altogether, because the father had no power to act for his children or his wife in such a matter.⁶

LORD PRESIDENT.—There is a competition here between the creditors of Mr Jarvie and his wife and children, the subject of the competition being the pro-

¹ *Hill v. Hill*, July 2, 1755, M. 11,580; *Miller v. Miller*, June 27, 1874, 1 R. 1107; *Walker's Exec. v. Walker*, June 19, 1878, 5 R. 965; *Buchan v. Porteous*, Nov. 13, 1879, 7 R. 211.

² *Craig v. Galloway*, July 17, 1861, 4 Macq. 267.

³ *M'Lurg v. Blackwood*, 1680, M. 845; *Bell's Prin. sec.* 1462.

⁴ *Hill v. Hill*, M. 11,580.

⁵ *Bell's Lectures*, ii. 999; *M'Laren on Trusts*, i. 142 and 145; *Fergusson's Trustees v. Hamilton*, July 18, 1862, 4 Macq. 397; *Beveridge v. Beveridge's Trustees*, July 20, 1878, 5 R. 1116.

⁶ *Menzies v. Murray*, March 5, 1875, 2 R. 507; *Smith Cunningham v. Anstruther's Trustees*, April 25, 1872, 10 Macph. (H. L.) 39.

ceeds of a policy of insurance on his life to the extent of £1000, subject to a deduction of £230 advanced to Mr Jarvie by the insurers. There is no question whether that deduction should be allowed, as the fund *in medio* is stated to be £1000 less £230.

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The policy was taken by Mr Jarvie himself in 1870. He applied then to be admitted a member of the Scottish Provident Institution, and to become a contributor to its funds. He made payment of the first premium when he obtained the policy, and the insurers in consideration of that payment certified that he had been "duly admitted a member," and that certain trustees therein named "as directed by writing under the hand of the said Nedrick Jarvie for behoof of Mrs Eliza Miller or Jarvie, his wife, and the children of their marriage, whom failing, the heirs and assignees of the said Nedrick Jarvie, shall be entitled to receive, out of the funds of the said institution, at the end of six months after the decease of the said Nedrick Jarvie, the sum of £1000: But always with and under this condition, that the said Nedrick Jarvie shall duly pay, or cause to be paid, to the said institution, on the receipt of the manager for the time being, the future annual contribution of £35, 14s. 2d. sterling, on or before the 6th day of September in every succeeding year during his life, or within one calendar month thereafter."

This policy was delivered to Mr Jarvie, and remained in his custody and possession till fifteen years after, during the whole of which period the existence of the trust affecting the contents of the policy was unknown to the trustees named therein, or so far as we know to the beneficiaries under the policy, viz., Mr Jarvie's wife and children. In short the trust was in every sense latent, and the deed creating it remained in Mr Jarvie's possession.

The question then comes to be, whether upon the facts of the case, combined with the terms of the policy, the contents of the policy on his death become the property of the trustees under the policy (or rather, whether they are entitled to draw the proceeds and apply them in terms of the policy), or whether the proceeds do not form part of the estate of Mr Jarvie, and so fall to the trustee for his creditors. The question is, whether there has been anything equivalent to delivery of the policy for the benefit of the beneficiaries. The Lord Ordinary has not considered that question, because he is of opinion that the policy did not require delivery to make it an "irrevocable transfer of funds" in their favour. In that ground of judgment I cannot concur. If such a deed remains undelivered in the hands of the person who causes it to be made in favour of another person, it remains entirely in his power. To hold otherwise would be to go back on a long series of cases of which I will only mention *Hill v. Hill*, M. 11,580, and *Walker's Executor v. Walker*, 5 R. 965.

No doubt in those cases the deed in question was not a policy of insurance but a bond for money. The creditor in the bond made it payable to another person than himself—in the case of *Hill* to his son, in the case of *Walker* to himself and his wife—but in both cases the deed, though so payable, remained in the custody and power of the party who actually made it; and the doctrine of those cases is that, so long as that is the state of matters, there can be no equivalent to delivery. The circumstance that the deed here in question is a policy of insurance does not bear on the question. The obligation of the insurers is to pay a sum in certain events to a certain person just the same as if they had been debtors in a bond, and in truth a policy of insurance is just a bond by the insurers to pay a certain sum to a person named. It appears to me that here, if

No. 79. there had been no trust, and the policy had been taken to the wife and children without the intervention of trustees, and the husband had kept the deed in his possession, the result must have been the same. The deed remained within his power. In the cases I have mentioned the only party who could demand payment was the son or the wife, but still the Court held that the money was the property of the father in the one case, and of the husband in the other, and that on the grounds which I have stated.

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The question, then, comes to this: Is there anything like an equivalent to delivery here? I think all the circumstances are very unfavourable to that view. In the first place, we are bound, I think, to look at the terms of the policy itself to see what was the intention of Mr Jarvie. He creates a trust by the policy, and gives the trustees the right to receive payment of £1000 soon after his death, and he gives them power to receive it "as directed by writing" under his hand. That suggests at once a good reason for keeping the deed in his own hands; he keeps the trust entirely latent, for he has not made up his mind exactly what to do with the money. He means to make another writing to declare his final purpose as to the proportions in which the money shall be paid. That obviously means that he does not intend to deliver the deed, or make its purposes known, until his mind is finally made up on the matter. There is another consideration which shews he had not made up his mind,—that is, that he uses the words "for behoof of his wife and the children of the marriage." That is a curious phrase, and one unknown in practice. I have never had occasion (and I do not suppose any of your Lordships have had) to construe such a phrase, and I think that suggests that Mr Jarvie never intended those words to be a final expression of his intention; on the contrary, knowing it to be obscure, he did not intend that anything should be done under the trust until he had done something further under another writing. So the deed itself affords evidence that he did not intend it to be in any sense a delivered evident available to anyone but himself.

Now, what was done in 1885 does not, I think, affect the question. He took this assignation on the footing that there was a vested interest in the beneficiaries, but the narrative in that deed, though available in argument, does not touch the question. An ingenious argument was submitted that the society being aware of the trust and the purposes for which it was created, they had therefore intimation of the rights of parties interested in the policy, and that that is, in effect, the same thing as if the policy had been taken in his own name, and had been assigned to trustees and intimated. The case referred to on that point is the case of *M'Lurg*, M. 845. No doubt that case is somewhat near this on the facts, but it is very far from it in legal effect. Taking the policy to himself and assigning it, is like taking it direct to another person, but there is a legal doctrine in the one case which is wanting in the other. If you execute an assignation, that is made effectual by intimation without delivery, just as a conveyance of land is effectual without delivery if you take infestment in favour of a third party. The infestment and the intimation complete the right, and afford a complete publication or equivalent to delivery. The two questions therefore involve totally different propositions in law.

On the whole matter, I am of opinion that this policy forms part of Mr Jarvie's estate, and therefore passes to the trustee under his trust-deed for creditors.

LORD MURE.—The case of *Craig v. Galloway* has been strongly pressed upon

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us in support of the claim of Mr Jarvie's widow and children, and, if the facts of this case had been substantially the same as those which there occurred, I should have been very glad to have given effect to the claim for the trustees under the policy. But I do not think that the facts of this case come up to those of *Craig v. Galloway*. There the policy had been delivered, and the receipts for the premiums were also in the possession of the wife; and the broad ground on which the House of Lords decided that case was that, in these circumstances, the policy of insurance was to be looked upon as a provision for the wife, there having been no marriage-contract, and the husband being solvent at the time the policy was effected. It was there held that the fact of the receipts being in the custody of the wife shewed that it was intended to be a provision for her. But in this case neither the wife nor the trustees ever had possession either of the policy or of the receipts for the premiums. The policy remained in the possession of the husband, and the trust remained inoperative and unknown until 1886, when the assignation of the policy was granted. Up to that time the trustees knew nothing of the trust or of the existence of the policy. In those circumstances, I am of opinion that there was here no delivery of the deed or anything equivalent to delivery, and I agree with your Lordship in thinking that the contents of the policy must be held to form part of Mr Jarvie's estate, and that the claim of his trustee should be sustained.

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LORD SHAND.—I have come with reluctance to the same conclusion as your Lordships. I think with Lord Mure that had it been possible we should gladly have sustained this claim for Mr Jarvie's widow and children, especially as there is enough to shew that he intended that the policy should at all events ultimately form a provision for them.

I concur in thinking that the Lord Ordinary's view of the case cannot be maintained. His Lordship says in reference to the payments of premiums following on the policy taken in the names of the trustees,—“It is as in the case of a person who pays money into the account of another.” Now, that is an unambiguous act which means that the money is there and then given over to another party, but I do not think that the mere taking out of this policy and payment of premiums can be assimilated to that. The Lord Ordinary goes on to say,—“The payment of the premiums to the society was, in my opinion, an irrevocable transfer of funds into the hands of a third party, for the benefit of the wife and children.” A complete answer to that is, that it has been held in the stronger case of money being lent to one person and the obligation taken for repayment by the lender to another, that this alone does not create a right in the third party. The reason is, that so long as the lender retains the custody of the document, it is in his power to alter the destination or have it altered, and therefore there is no “irrevocable transfer.” So here the circumstances of the policy being taken in the name of trustees followed by the payment of premiums, cannot by itself operate an irrevocable transfer. I think that, as well on reason as on authority (particularly the authority of the case of *Hill v. Hill*), in a case where the person taking out the policy is still in life retaining his power over it, the view stated by the Lord Ordinary cannot be sustained.

The question therefore comes to be one of fact. Was the policy delivered? On that question, I am disposed to take the view that the terms of the policy

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create a destination in favour of the wife. It has been held that where there is a destination to a wife in life and to children in fee, the fee is in the wife, and I think there is much to be said for the view that we should read this as a destination in these terms. But taking it that the policy contains a destination to trustees to hold the policy and pay the proceeds to the wife; it appears to me that looking at all the circumstances delivery has not been made out. If the destination had been simply to the wife, and it appeared that the husband had held the policy simply as the proper custodian for her deed, then the case could not have been distinguished from *Craig v. Galloway*. But in *Craig's* case, as your Lordship has said, delivery was assumed. Here the elements against delivery are very strong. In the first place, the destination is not directly in favour of the wife, but to trustees, and I think that shews that if Mr Jarvie intended the deed to be looked on as delivered, it should have been given into the custody of the trustees; they were the proper custodians. He was not a custodian for them, as he might be for his wife. Again, these trustees were to hold the money as directed by a writing under Mr Jarvie's hand. Mr Gloag has argued that this must refer to some writing already executed, but it is agreed that no such writing was ever executed, and I do not think the words can be so read. They evidently refer to some contemplated writing, and it is reasonable to assume that he deferred giving delivery till the writing was executed. Taking then the fact that the policy was in favour of trustees for the wife, that Mr Jarvie never parted with the custody of it, and that it contained the clauses just referred to, I am of opinion that it was not delivered, and that being so, I think that it forms part of the husband's estate, and must go to the trustee for his creditors.

LORD ADAM.—The Lord Ordinary in his note says,—“In my opinion this is not a case where delivery by Mr Jarvie was necessary to vest the right in the donee, because under this policy Mr Jarvie was never instituted creditor in the obligation, and the obligation in its inception was in favour of the trustees for wife and children.” If the Lord Ordinary means that as an expression of the law as regards all documents where an obligation is conceived in favour of a third party, it is quite unsound. It is directly at variance with *Hill v. Hill*, and the well-known principle that merely taking a document in name of an individual will not *per se* establish donation, proof *aliunde* of actual donation being necessary. The Lord Ordinary does not attempt to draw any distinction between this and any other bond, and, if that is so, it is decisive against his view of the case. If the policy required to be delivered, or to be held for behoof of the donee by someone else, then that is not proved, because in this case Mr Jarvie was not the proper custodian for the donees; the trustees were. I concur in thinking further that the clause in the policy which points to the execution of some future deed shews why he retained the control of the policy. He kept it till he made up his mind how the money was to be apportioned.

We cannot go on the statements made in the assignment of 1886, for obviously that statement was made when the circumstances had changed. It would have been different if the statements there as to the policy having remained in his individual possession had been made *unico contextu* with the policy, so I prefer not to rest on the statements there made at all. I concur in the result at which your Lordship has arrived.

THE COURT recalled the interlocutor of the Lord Ordinary, and ranked and preferred the claimant James Martin to the fund *in medio*, in terms of his claim.

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FODD, SIMPSON, & MARWICK, W.S.—MACANDREW, WRIGHT, ELLIS, & BLYTH, W.S.—Agents.

EARL OF GLASGOW AND OTHERS, First Parties.—*D.-F. Mackintosh—D. Dundas.*

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DAVID BOYLE AND OTHERS, Second Parties.—*Pearson—Murray.*

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Earl of Glasgow v. Boyle.

Prescription—Entail—Limited and unlimited title—Consolidation.—An entail, dated in 1715, comprised, *inter alia*, certain lands the *dominium utile* of which had been disposed by the entailor or his predecessors prior to the date of the entail, so that the entail only carried the superiority thereof. The *dominium utile* was acquired in 1721 by the next succeeding heir of entail, who took a disposition in favour of himself and his heirs and assignees whomsoever, being a different destination from that contained in the entail. He was not infeft either under the entail or under the disposition. In 1765 the next heir was infeft upon the unexecuted precept in the conveyance of 1721, having previously served heir in general to the last heir. The next heir in 1780 made up a title under the entail, but no separate title to the said lands, which he possessed along with the entailed estate down to 1843, when he died.

Held that consolidation had not operated so as to bring the *dominium utile* of the said lands within the entail, and that a subsequent heir was therefore proprietor thereof in fee-simple.

Elidauk v. Campbell, 12 S. 74, distinguished.

UNDER a deed of entail, dated 2d and recorded 30th July 1715, granted by David, first Earl of Glasgow, the lands of Kelburne and others, in the counties of Ayr and Bute, were entailed upon his son and the other heirs of entail therein mentioned. Prior to the entail part of the lands (Bellichevan and Culoch) had been disposed by the Earl or his predecessors, to be holden of the granter and his successors as superiors thereof, so that the conveyance in the deed of entail carried only the *dominium directum* of these lands. The *dominium utile* of these lands was acquired by Lord Boyle, the entailor's eldest son, afterwards second Earl of Glasgow, by disposition, dated 31st March 1721, and recorded in the Books of Council and Session 11th January 1751, from James Boyle of Bellichevan, who then possessed the lands on apparenay. The disposition was in favour of Lord Boyle and his heirs and assignees whomsoever, not of the series of heirs set forth in the entail. Lord Boyle was never infeft on the disposition, but possessed the lands down to his death in 1741. In 1733 he had succeeded his father, David, under the deed of entail, but never took infeftment thereunder. In 1742 John, third Earl of Glasgow, son of the second Earl, exped a general service to his father, and he afterwards exped an instrument of sasine, dated 19th September and recorded 30th October 1765, following on the precept contained in the disposition of 1721 by James Boyle in favour of his father, and on the retour of his service as heir in general to his father.

The third Earl was succeeded in 1775 by his son George, the fourth Earl, who completed no separate title to Bellichevan and Culoch, but made up a title to the entailed lands by instrument of sasine, recorded 30th May 1780, and possessed the former lands along with the entailed estate down to his death in 1843. George, fourth Earl, was succeeded in 1843 by his son James, the fifth Earl. In 1853 the law-agent of Earl James, duly authorised by a commission granted in his favour by the Earl, executed a combined charter of confirmation of the disposition of 1721 and precept of *clare constat*, dated 5th May 1853. The charter of con-

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firmation confirmed the lands and the disposition granted in 1721 by James Boyle in favour of John, Lord Boyle, and his heirs and assignees whomsoever, the retour of the service of John, the third Earl, as heir in general to his father John, Lord Boyle, and the infeftment following thereon in 1765, to be holden the said lands and others immediately of the said James, Earl of Glasgow, and his successors, superiors thereof, in free blench farm for ever. The precept of *clare constat* stated that it appeared that the said John, third Earl of Glasgow, died last vest and seized in the said lands under the titles above narrated; and that James, then Earl of Glasgow, was nearest and lawful heir of his grandfather, the said Earl John, in the said lands and others. Upon this precept James, Earl of Glasgow, was infeft, conform to instrument of sasine in his favour, recorded 10th May 1853. He possessed the lands from 1843 until his death in 1869.

In 1869 James, the fifth Earl, was succeeded by his brother George, the sixth Earl. He did not succeed to the fee-simple lands left by his brother, but subsequently purchased them from his brother's trustees. In June 1869 he served heir of tailzie and provision to his brother.

A question having arisen as to whether the lands of Bellichevan and Culoch were included in the entail or not, a special case was presented to the Court by (1) Lord Glasgow and the trustees under a trust-disposition and conveyance executed by him, and (2) the next heirs of entail, the question put being,—“Does the entail of Kelburne include the superiority only of the lands of Bellichevan and Culoch, or has the *dominium utile* of these lands come by consolidation to be embraced in the entail?”

The second parties maintained “that in virtue of the prescriptive possession upon the superiority title by Earl George from 1775 to 1843, the base feudal right was extinguished and consolidated as effectually as if resignation *ad remanentiam* had taken place, and that the property of the said lands was therefore included in the entail as well as the mere superiority.” The first parties maintained “that there was no such consolidation as is contended for by the second party—the property of the said lands having been held on a different destination from the superiority, and the possession by Earl George having been of the superiority only under his entailed title.”

Argued for the first parties;—The present question was not solved by any previous decision, but the case of *Bruce v. Bruce*, *infra*, was the exact converse of it. Where a person had two absolute titles to one estate, prescription was not applicable, as he was presumed to possess upon both even although he had made up his title on the one and had ignored the other.¹ But an exception was introduced where there was an interest to sopite one of the titles, or where something was to be gained by setting one of them up as against the other. Where the heir made up his title in such a way as to involve a challenge, the result of unchallenged possession might be to fortify one of his titles as against the other.² Where possession was on apparency, and neither title completed, it was held that both titles subsisted.³ The above cases were all cases of proper double

¹ *Smith and Bogle v. Gray*, June 30, 1752, M. 10,803; *Durham v. Durham*, Nov. 24, 1802, M. 11,220; *Zuille (Buchanan's Trustee) v. Morrison*, March 4, 1813, F. C. 251.

² *Macdougall v. Macdougall (Mackerstoun case)*, 1739, M. 10,947; *Bruce v. Bruce*, Dec. 6, 1770, M. 10,805, aff. April 7, 1772, 2 Pat. Appa. 258; *Ross' Leading Cases (Land Rights)*, iii. 510.

³ *Welsh Maxwell v. Welsh Maxwell*, June 21, 1808, M. *Voss Prescription*, App. No. 8.

title. The present case was not, for there were here not only two titles, —one limited, the other unlimited,—but also two subjects, the *dominium directum* and the *dominium utile* of the lands in question.¹ The doctrine of consolidation was thus said to be applicable. But consolidation did not operate *ipso jure*,² but only by resignation *ad remanentiam*, which had not here been resorted to, or by prescriptive possession. The second party relied on Earl George's possession, and the fact that he had made up no separate title to the *dominium utile* of the said lands. But that fact alone was not enough, unless Earl George's intention was shewn, to merge the fee-simple title in the entail. It was impossible to presume such an intention, for (1) there was no obligation to possess under the entail only, as in *Lord Elibank's* case, *infra*, and (2) the interest was of course in favour of possessing on the unlimited title. Where there were two titles to either of which possession might be ascribed *in dubio*, the law ascribed it to the more beneficial, and the presumption was in favour of freedom.³ It was settled law that apparenacy was a good basis for prescription.⁴ As to the case of *Lord Elibank*,⁵ which was founded on by the other side, there were distinctions between it and the present case which were of great importance. In that case there could hardly be said to be two competing titles; there was the clearest intention on the part of the entailer to include the fee-simple lands within the entail, and further, the series of heirs under both titles were the same in that case, while here they were different—(see *per* Lord Mackenzie in *Wilson v. Pollok*, *supra*).

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The second parties argued;—From 1773 to 1853 the lands in question had been possessed on one infeftment only, viz., upon the superiority title, and the case was not one of double title. Accordingly, the authorities cited by the first parties were not in point. Consolidation operated after the forty years' possession on one infeftment had run, which in this case was prior to 1853.⁶ Possession upon a superiority title necessarily wiped out all other infeftments.⁶ It was important to observe in this case that there had been an unbroken descent from father to son until the present Earl succeeded. Accordingly the line of succession, whether under the entail or under the fee-simple title, had not been split. The only feudally complete title was to the superiority, which was habile to import possession of the *dominium utile*. It might be that there was a presumption in favour of freedom, but where there were two titles the possession was referable to the more eminent of the two, viz., in this case the superiority title.⁷ There was no authority for the view that a personal title, or one on apparenacy, could prevail against

¹ *Bontine v. Graham*, March 2, 1837, 15 S. 711, aff. Aug. 6, 1840, 1 Robinson's Appa. 347; *Wilson v. Pollok*, Nov. 29, 1839, 2 D. 159.

² *Bald v. Buchanan*, 1786, M. 15,084.

³ *Bell's Principles*, 2020; *Murray v. Ramsay*, Jan. 17, 1811, F. C. (Lord President Blair's opinion); *Maule v. Maule*, March 4, 1829, F. C., octavo series (Lord President Hope, p. 699); *Dalrymple v. Lord Stair*, March 10, 1841, 3 D. 837 (Lord Cuninghame, p. 851).

⁴ *Hamilton v. Westenra*, Nov. 14, 1827, 6 S. 44.

⁵ *Lord Elibank v. Campbell*, Nov. 21, 1833, 12 S. 74.

⁶ *Earl of Dunmore*, 1774, M. 10,944, 5 B. Supp. 614; *Campbell*, 1765, 5 B. Supp. 915; *Menzies' Conveyancing*, 633; *Bell's Lectures on Conveyancing*, 3d ed. 786; *Ross' Leading Cases, Land Rights*, iii. 534; *Lord Elibank v. Campbell*, Nov. 21, 1833, 12 S. 74 (Lord Balgray, p. 92); *Bontine v. Graham*, March 2, 1837, 15 S. 711, affd. Aug. 6, 1840, 1 Robinson's Appa. 347; *Bell's Principles*, 689, 821, 2009.

⁷ *Lord President Hope in Elibank v. Campbell*, 12 S. 104.

No. 80. an infeftment. It was said that, in order to operate consolidation, the destination of the two fees must be to the same series of heirs throughout. The only authority for that proposition was to be found in the case of *Wilson*.¹ But Mr Ross had stated that his opinion did not accord with Lord Mackenzie's *dictum* in that case.² Lord Mackenzie was there dealing with the question of proper double title. Prescription could never follow upon an apparenry title.

At advising,—

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LORD PRESIDENT.—The material facts of this case are as follows :—The Kelburne entail is dated 2d July 1715, and was made by David, first Earl of Glasgow. It contains among other parcels of lands the lands of Bellichevan and Culoch. But prior to the date of the entail these lands had been feued out to be held of the entailer or his ancestors as immediate lawful superiors. The *dominium utile* therefore was not and could not be comprehended in the entail, and the conveyance of Bellichevan and Culoch to the heirs of entail carried the *dominium directum* only.

The second Earl of Glasgow before he succeeded to the title and estates acquired the *dominium utile*, and in 1721 took a disposition in favour of himself and his heirs and assignees whomsoever. He was not infest, but in 1742 his son, the third Earl, exped a general service to his father, thereby acquiring right to the unexecuted precept in the disposition of 1721, and completed his title to the *dominium utile* by infestment on that precept in 1765. The third Earl had thus one title to the *dominium directum* under the entail, and a separate title to the *dominium utile* in favour of himself and his heirs-general under the infestment of 1765.

From that date and down to 1853, the Earls of Glasgow have possessed the lands, both property and superiority, of Bellichevan and Culoch, being all of them not only heirs of entail under the entail of 1715, but also heirs-general under the disposition of 1721 and infestment of 1765. No consolidation of the property and superiority has taken place by resignation or otherwise, unless consolidation has been operated by prescription as contended for by the second party. The last investiture of the *dominium utile* prior to 1853 is the infestment taken by the third Earl, while on the other hand each succeeding Earl has made up a title to the entailed estate. In this state of the facts, the second party contends, that the heir of entail having possessed on the superiority title of the entail for more than forty years, the base fee has been extinguished and consolidation has been effected as completely as if there had been resignation *ad remanentiam* followed by forty years' possession. And this position would be impregnable if the heirs of the entail had during the prescriptive period only one title to which their possession could be ascribed. But possession of the *dominium utile* began in 1765 upon the infestment of the third Earl which was a fee-simple title, and although neither the fourth nor the fifth Earls were infest in the *dominium utile* till the years of prescription had run, they had a title of possession quite as good as heirs-general, viz, the title of apparenry, and there are no acts of possession alleged of such a nature as to be ascribable to one of

¹ *Wilson v. Pollok*, Nov. 29, 1839, 2 D. 159 (Lord Mackenzie, p. 163).

² Ross' *Leading Cases, Land Rights*, ii. 577; cf. also Bell's *Conveyancing*, 3d ed. 778; *Walker v. Grieve*, Feb. 27, 1827, 5 S. 469; Sandford on *Entails*, 480; Sandford on *Heritable Succession*, ii. 146; Napier on *Prescription*, 237.

these titles more than to the other. When, therefore, in 1853, the fifth Earl, **No. 80.** by his commissioner, executed a charter of confirmation and precept of *clare* in Jan. 23, 1887. his own favour, confirming the disposition of 1721 in favour of the second Earl, Earl of Glas- the retour of service of the third Earl as heir-general to his father, and his in- gow v. Boyle. feftment of 1765, the first parties contend that he had a good prescriptive fee-simple title to the base fee by virtue of this same forty years' possession which is founded on by the second parties in favour of the heir of entail. I am of opinion that the contention of the first parties must be sustained, because it is founded on two well-established principles or rules of law.

1. The first of these two rules is, that possession for forty years, following upon a disposition and sasine, will make a good prescriptive title, although part of the forty years' possession has been by an apparent heir or heirs uninfest.

For some time in the course of the last century the judgments of the Court on this question fluctuated, but in the case of *Caitcheon* in 1791, M. 10,810, the question arose purely for decision, and resulted in the establishment of the rule I have stated. The rule there settled has not since been departed from, but, on the contrary, is confirmed by subsequent authorities, of which *Neilson v. Erskine*, 2 Shaw, 216, and *Hamilton v. Westenra*, 6 Shaw, 44, may be taken as examples.

2. The second rule to which I refer is that when a person has two titles to the same lands, to either of which his prescriptive possession may be ascribed, the one title being unlimited and the other limited (as by an entail), the presumption is in favour of freedom, and he is entitled to ascribe the possession to the fee-simple title, and to hold the lands in fee-simple accordingly, unless the nature of the possession is not consistent with the title to which he seeks to ascribe it. The principle on which this rule is founded is very clearly expounded by Lord Kilkerran in reporting the case of *Smith and Bogle v. Gray* in 1752, M. 10,803. After explaining that while the heir in both titles is the same no question can arise, he proceeds to say, that where the succession "comes to split," the question "is resolved by a distinction that if by both rights the possessor is unlimited far then prescription cannot run by possession on the one title against the other; but if one of the titles be an unlimited right and the other be a limited right, e.g., by a tailzie or a clause of return, then, if the possession has been for forty years upon the unlimited title, the limitation in the other title will be wrought out by prescription."

Again, in the case of *Bruce v. Carstairs* in 1770, M. 10,805, the rule is thus applied by the Court,—"In the present case there were two titles in the same person, the one limited, the other not. The parties were in these circumstances entitled to ascribe their possession to, and to plead upon, the unlimited title. Their creditors would have been entitled to carry off the lands as an unlimited fee by adjudication, and upon the same principle must they, i.e., the lands, as a fee-simple, descend to the heir of line." This judgment was appealed, and affirmed by the House of Lords.

It is only necessary in conclusion to notice the case of *Elibank v. Campbell*, 12 S. 74, on which in the argument the second parties mainly relied. In that case, no doubt, the operation of the positive prescription following on the entail was held to have effected a consolidation of the *dominium utile* of the lands of Stantalane (which had been feued out for a temporary purpose by the entailer to his law-agent prior to the date of the entail) with the *dominium directum* of

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the same lands which was within the entail. But the circumstances afford a complete contrast to those of the present case. The entail's law-agent had within a few weeks of the creation of the base fee reconveyed to the entailor by disposition, with procuratory and precept, on which, however, no title was ever made up by the entailor or any of the heirs of entail. But for the reconveyance there can be no doubt that the prescriptive possession of the *dominium utile* of Stantalane must have been ascribed to the tailzied title, for the heirs who possessed had and could have no other; and the Judges seem to have been all of opinion that the execution of the reconveyance by the law-agent with nothing following on it gave them no separate title to the lands. But even supposing that the reconveyance gave them a separate title on which prescriptive possession might follow, they were taken bound by the conditions of the entail to use any separate rights they might happen to acquire or possess for strengthening and supporting the entail, and for no other purpose whatsoever. In these essential particulars the case of Lord Elibank differs from the present, and has therefore, in my opinion, no application as an authority here.

LORD MURR concurred.

LORD ADAM.—In 1853 Earl James made up a fee-simple title to the lands in question, which had been originally conveyed by the disposition of 1721. The question is whether the title so made up is a good title, or, in other words, whether Earl James was entitled to hold these lands in fee-simple. It is quite obvious that in 1853 Earl James was possessing upon two titles, either of which might have furnished him with a complete feudal right to the subjects. If he had the superiority title only, possession upon that would have given him a complete feudal title. So, if he had had only the property title, possession upon that would equally have given him a complete feudal title.

The question is, To which of these titles is his possession to be ascribed? There are no acts stated in the case as being applicable rather to the one title than to the other. That being so, to which is the possession to be ascribed? The presumption, in my opinion, is in favour of freedom, and, that being so, I think the possession must be ascribable to the property and not to the superiority title.

As to the bearing and effect of *Lord Elibank's* case, I have nothing to add to what has been said by your Lordship in the chair.

LORD SHAND was absent.

THE COURT pronounced this interlocutor:—"Find and declare that the entail of Kelburne includes the superiority only of the lands Bellichevan and Culoch, and not the *dominium utile*, and decern."

J. & F. ANDERSON, W.S.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

JAMES CHARLES HOPE VERE AND OTHERS, Pursuers (Reclaimers).—

*D. F. Mackintosh—C. S. Dickson—J. G. Horn.*DANIEL YOUNG AND OTHERS, Defenders (Respondents).—*Jameson—
Craigie.*

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Road—Statute Labour Road—Footpath—Effect of closing road under statutory authority—Negative prescription.—Held that a road over which the public had acquired a right of way for all purposes became thereby a statute labour road, whether the Statute Labour Trustees had allocated statute labour money to its maintenance or not.

Where a public road which is not shewn to have originated as a footpath is shut up as superfluous by the statutory authority, it is shut up for all purposes, and not merely as a cart and carriage road; but question whether the same result would follow if it were shewn that the road was one over which the public had acquired a right of footpath before it became a cart and carriage road.

An action was brought in 1885 for declarator that there existed no public right of way over a piece of ground belonging to the pursuers, and that any public right of way which formerly existed was validly shut up as superfluous in 1869 by the Statute Labour Road Trustees under the authority of their local Act. The defence was a public right of footpath founded on immemorial possession, the defenders further maintaining (1) that the order of the trustees in 1869 was an invalid order, in respect that there was at that date no cart-road over the ground which the trustees could competently shut up, either because the road had never been used by carts, or at least had ceased to be so used for over forty years prior to 1869, or because the trustees had never taken the road under their jurisdiction by the expenditure of statute labour money on it; and (2) that even if the road was validly closed as a cart-road, the public right of footpath over it was unaffected thereby. The following was the import of the proof:—There was no evidence as to the origin of the road in question, but from the earliest point to which the proof extended down to 1820 it was used as a cart-road as well as for foot-passengers. In 1820, owing to the opening of a new turnpike-road, its use as a through road almost entirely disappeared, and from that time onwards such cart traffic as passed over it was almost wholly between the neighbouring farms or connected with two coal pits on the road, but this traffic continued till 1829, and probably till 1835, when the road was partly planted over with trees. From that time it became impassable to wheeled traffic. Foot-passengers still made use of it, though they consisted rather of persons resorting to the road itself to gather sticks and the like than of through-going passengers, and this sort of use continued down to the raising of the action. The evidence as to whether the trustees had allocated any statute labour money to the maintenance of the road was inconclusive, but, at the most, they expended three or four sums of £2 or £3 at irregular intervals from 1807 to 1820, and nothing after 1820. *Held (diss. Lord Justice-Clerk, rev. judgment of Lord Kinnear)* that the road in question was a statute labour road under the jurisdiction of the trustees in 1869 when they pronounced the order shutting it up, and that the effect of that order was to close the road as a footpath as well as a cart-road. Decree of declarator granted accordingly.

On 4th November 1885, James C. Hope Vere, Esq. of Blackwood, and the trustees of the late William Tod, Esq. of Logan, brought this action against Daniel Young, tailor, and certain other inhabitants of the village of Kirkmuirhill, in the parish of Lesmahagow and county of Lanark, concluding for declarator;—"That there is no public right of way or servitude of road or passage between the points A and B shewn on the plan herewith produced, and leading from or near the point A on what was formerly the turnpike road from Carlisle to Glasgow, and is now the road from the village of Lesmahagow to Kirkmuirhill, to or near the point B on the new and existing public road from Glasgow to Carlisle, and that

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No. 81. any public road or right of way which formerly existed along or near said line A B was duly and validly shut up by the Statute Labour Road Trustees, in terms of the Act 47 Geo. III., c. 45, on or about 19th January 1869, and that the pursuers are entitled to erect such walls or fences as they think proper . . . so as to prevent any passage between the said two roads along or near the said line A B, and to use, possess, and enjoy the subjects belonging respectively to the pursuer James Charles Hope Vere, and to the pursuers the trustees of William Tod, along or beside the said line A B [which followed the line of the march between the properties of Blackwood and Birkwood belonging to the pursuers respectively], free of any right of way or passage, or servitude of road or passage along or near the said line A B," also for declarator that the pursuers were entitled to prevent the defenders and all others from passing along the said line A B, and for interdict.

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The case turned upon the validity and effect of the order of the Statute Labour Road Trustees referred to in the summons, which was pronounced on the petition of the present pursuers, presented on 8th October 1868.

The pursuers averred;—(Cond. 4) "For some time down to the early part of the present century, there existed a public road or right of way along or near the said line A B over the pursuers' property; but the same had been for many years prior to 1868 discontinued and abandoned by the public. The said road was a statute labour road, and was under the care and management of the Statute Labour Trustees, who maintained the same as a statute labour road out of the funds under their care. The road in question was a road in the sense of the said 36th section * which had become superfluous and useless for many years prior to 1869, and had remained so down to that date."

The defenders answered;—(Ans. 4) "Explained that there exists a public footpath or right of passage along the said line A B. For more than forty years prior to 1868, and ever since, the public, especially the inhabitants

* The Act 47 Geo. III., c. xlv., entitled "An Act for amending an Act of the twelfth year of his present Majesty, for repairing and widening several roads through the county of Lanark, and for building a bridge over the River Clyde, at or near a place called The Howford, in the said county; and for making more effectual and converting the statute labour within the said county; and for repairing and regulating the roads within the same," by its 36th section enacted "That it shall be lawful for the trustees in any parish, or for any heritor or other person within the said county, conceiving themselves interested therein, to apply by petition to the annual ward meeting of trustees to have the direction of difficult or inconvenient roads altered and superfluous or useless roads shut up; and the said ward meeting shall thereupon name a committee of at least three trustees, one of whom shall be a Justice of the Peace for the said county, to inspect such roads, and report their opinion of what is proposed to a subsequent ward meeting; and the committee shall order the said petition to be intimated one calendar month before the meeting of such committee, for inspection of the proprietors of the grounds through which the roads are proposed to be carried, either personally or at their dwelling-places, if they reside within the said county, or otherwise to the possessors of the said grounds, and by advertisement upon the church doors of the parishes in which the said grounds lie, upon a Sunday, ten days at least before such meeting; and upon report made by the committee to the ward meeting they shall hear all parties interested and are empowered to order the direction of such roads to be altered and changed, and such superfluous roads to be shut up, providing that nothing herein contained shall be construed to confer on the said trustees a power to alter the course, or shut up any turnpike road . . . Provided always, that any person thinking himself aggrieved by the stopping up of such superfluous roads shall and may appeal against the same in the manner hereinafter mentioned."

of Kirkmuirhill, have had access to and used the said public footpath or right of passage. The said public footpath or right of passage, which is of considerable width, never was a turnpike or statute labour road, and the said road trustees never exercised any superintendence over it prior to 1868, and they never expended money or labour on its maintenance." No. 81.
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The pursuers pleaded;—(1) In respect of the procedure by the said road trustees, the pursuers are entitled to decree as concluded for. (2) The said road having been under the management of the road trustees, and having been duly closed, as condescended on, the pursuers are entitled to decree as concluded for. (3) The road in question having been maintained out of the funds under the hands of the road trustees, they were entitled to shut up the same. (6) The defenders not having right to use the road in question, interdict should be granted as craved.

The defenders pleaded;—(1) The road in question not having been within the jurisdiction or under the administration of said road trustees and justices, the proceedings founded on are *ultra vires* of said bodies. (2) The road in question being a public footpath upon which no public money had been expended, and which had not been under the management of the road trustees, the said road trustees and justices had no power to shut it up, and the proceedings founded on are *ultra vires* of said bodies. (3) In any case the road in question being a public footpath, the said road trustees and justices had no power to shut it up, and the proceedings founded on are *ultra vires* of said bodies.

A proof was allowed. The evidence was to the following effect:—The origin of the road was unknown; there was no trace of its ever having been a footpath only. Before 1820 there was a continuation road from the point B to a place called Lochanbank (where there was a mill) on the Lanark and Strathaven Road, and the road in question with this continuation at that time was the most direct route from Lesmahagow to Lochanbank. A large part of the wheeled traffic using it consisted of carts passing between adjoining farms or connected with two coal-pits on the road, but there was evidence of its use for through traffic also. Mrs Peat, an old woman of 83, who had lived all her life in the neighbourhood, gave this evidence;—"I remember the funeral of Walter M'Ghie from the farm of Lochanbank. I think I was then about 7 years old. I saw the funeral start to go to Lesmahagow. I saw it go by the peat road. There was a hearse drawn by one horse, and it was a big funeral. The funeral party would all walk, as there were no coaches. (Q.) There were no gigs in those days? (A.) No, there were not many. I remember the wedding of my cousin, Mrs Donaldson of Netherhouse. I was best-maid on that occasion. I would be 13 or 14 years old at the time. The wedding party walked round by the peat road. I also remember the bride's flitting being taken that road in a cart. It was the regular road to Lesmahagow." There was other evidence to the same effect, though less specific.

The construction of the New Glasgow and Carlisle Road in 1820 opened a more direct route between Lesmahagow and Lochanbank, and from that time the utility of the road in question for purposes of through traffic almost entirely disappeared. The continuation portion from the point B to Lochanbank ceased to be used as a cart-road, and was ploughed up, with the exception of a footpath (over which the pursuers admitted that the public had acquired a right of way). The rest of the road (being that here in question) remained fit for wheeled traffic until 1835, and there was evidence of its occasional use by carts down, at all events, to 1829, and probably to 1835. In 1835 it was partly planted over with trees, and it thereafter ceased to be a thoroughfare for wheeled traffic, although one or two witnesses spoke to having seen carts on it at a later date. It

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was probably less affected as a footpath by the opening of the new road. The defenders adduced several witnesses who deponed that they were in the habit of using it as a short-cut between the two Glasgow and Carlisle roads, but, on the other hand, there was (after 1820) no centre of population, and few houses which were not better served by one or other of the regular turnpikes—Kirkmuirhill, to which the defenders belonged, being particularly so,—and there was a good deal of evidence which shewed that the road was much resorted to by children as a place of amusement, by persons who went to gather sticks, and by poachers.

The books of the Statute Labour Trustees shewed that on four or five occasions, between 1807 and 1820, small sums of £2 or £3 had been allocated to a road or roads called “Dr Tod’s Road” and the “Lochanbank Road.” Witnesses from the office of the clerk to the trustees deponed, that from the terms of the entries in the books, and from old maps and plans in the office, they were of opinion that the road in question was the only road in the district to which these names could apply. On the other hand, a number of witnesses for the defence, persons from the locality, and also some of the pursuers’ witnesses, deponed that the road in question was always called the “Peat Road” (a name which did not occur in the statute labour books), and that the “Lochanbank Road” and “Dr Tod’s Road” were other roads, which they specified. In any case the road, which was from 24 to 28 feet wide, and enclosed along either side partly by a hedge and partly by a feal dyke, shewed no signs of ever having been properly metalled. At the best it had been repaired by rough stones from the fields, or by coal refuse, and was in parts very soft and muddy in wet weather. The footpath was distinctly marked at the date of the proof, but, according to some of the pursuers’ witnesses it was of recent origin. Andrew Barr, aged 74, at one time tenant of a farm adjoining the road, gave this description of the road :—“It was just like any other kind of rough road. It was used at one time for toom carts that were going to Lochanbank, but not often for a full cart. It was a gey rough road. Everybody used it that was going that airt. It was kind of half-metalled, but gey rough. There were better roads and worse roads in the parish.”

In 1830 a similar petition to that of 1868 was presented to the Statute Labour Road Trustees, setting forth that the petitioners (the authors of the pursuers), “were desirous that an old road, leading from the old Glasgow and Carlisle Road, through the lands of Lochinbank and Birkwood to the Strathaven Road at Lochinbank in the parish of Lesmahagow, should be shut up, the road having become in such a state of disrepair that renders it of little or no use.” It did not appear that any proceedings were taken on this petition, for what reason the evidence did not disclose.

The procedure required by the Act duly followed on the petition of 1868. No objector appeared. The committee appointed to inspect reported,—“Inspected the road mentioned in the petition, and were satisfied that it has been discontinued as a public road for many years, and, indeed, has been abandoned by the public, there being a more convenient road running parallel to it a short distance to the north of it, and this road is now the one used by the public. No person appeared to object, and the committee beg to report that, in their opinion, the road mentioned in the petition should be shut up as useless, and discontinued as a public road.”

On 25th June 1886 the Lord Ordinary (Kinnear) pronounced this interlocutor :—“Finds that there is a public footpath or road for foot-passengers along the line of road described in the conclusions of the summons ;

that the Road Trustees have no power under or by virtue of the Act of Parliament libelled to shut up the said footpath; and that the defenders and all others are entitled to the free use of the said footpath or road for foot-passengers: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable in expenses," &c.*

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* "OPINION.—The only difficulty in this case arises from the order of the Road Trustees for shutting up the road in question in 1868. There can be no doubt as to the actual use of the road by the public, either before or since that date. Prior to 1821, although it does not appear for how long a time, it had been used as a public road for carts and carriages. But in that year the new road from Carlisle to Glasgow was opened, and a portion of this new road which passed through the same district served the purposes of a public highway more conveniently than the road in question. Accordingly, since 1821 the public have abandoned all use of the latter road for any purpose except that of a public footpath. But they have continued to use it as a footpath, although for that purpose only, down to the present time. There is no real conflict of evidence as to this point—those of the pursuers' witnesses, who had the best opportunities for observation, being quite as emphatic in asserting the public use of a footpath as the witnesses for the defenders. If the only question, therefore, were whether the public had established a right of way for foot-passengers by continuous use for forty years and upwards, there can be no doubt that the defenders would be entitled to a verdict upon that issue.

"But it is said that the road was a statute labour road under the management of the Road Trustees, by whom it was shut up as superfluous in 1868, and that its use by foot-passengers is to be ascribed not to any separate or independent right in the public to a footpath, but to the more extensive public right which was extinguished by the order of the Road Trustees that the road should be shut up. It is true that people have still continued to use the road as a footpath notwithstanding the order of the trustees. But no amount of use since 1868 would either establish a new right in the public or keep alive any right which the trustees had power to determine. On the other hand, it is certain that the trustees had no power to shut up a footpath if the public had no higher right at the date of their order. This was decided in the cases of *Pollock v. Thomson* and *Lord Blantyre v. Dickson*, and the local Act relied upon by the pursuers gives no higher powers than the Acts which were in question in these cases.

"The question, therefore, comes to be, whether the road was in 1868 a public road for general purposes under the management of the trustees, which they had power to close. And I think the pursuers have failed to shew that at that date it was a public road in any sense, except that it was a road over which the public had a right of footpath. There is some evidence, although it is very scanty, that before 1820 the trustees treated it as a road under their management. The most material piece of evidence is that on one or two occasions before that year the Statute Labour Trustees expended certain small sums of money upon a road which may probably, although not certainly, be identified with the road in question. But assuming the identification to be complete, it does not follow that it was still a public road in 1868. There is nothing either in the Act of Parliament or in the minutes of trustees to shew how it came under their management, or what was the nature of the public right, if any, which justified their spending public money upon it. There is nothing to shew that it was made public by the operation of any Act of Parliament, or that the public had any right in it which was not dependent upon continued possession. But whatever may have been the previous use, it is admitted that for more than forty years before 1868 the public had not used the road for any purpose except as a public footpath only. If in that year, therefore, an action had been brought against the pursuers to declare a public right of way, they must have obtained a verdict except in so far as regards the footpath. And it appears to me that if the Road Trustees, instead of interposing to shut up the road on the application of the pursuers, had interfered adversely to the pursuers on the allegation of a

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The pursuers reclaimed, and argued;—There could be no reasonable doubt that the road here was at one time used for public cart traffic—the precise date at which it ceased to be so used was another matter. Being a road of this character, it was a road within the jurisdiction of the Road Trustees whether they expended statute labour money on it or not. It was the character of the road, not the expenditure of statute labour money, which gave them jurisdiction. The fair result of the evidence, however, was that they did expend money on this road—not much, but still some. Having thus jurisdiction over the road at one time, had they lost it in 1868 when they pronounced the order to shut it up? It was said that it had ceased to be a cart-road by disuse as such for forty years prior to 1868. But there was evidence of its use by carts down to 1835, which, if it was accepted, was conclusive against that argument; and the circumstance that no proceedings followed on the petition of 1830 probably shewed that at that date it was still used by the public for all purposes. Even if the cart traffic had ceased at a date beyond the prescriptive period, the pursuers' legal position was unimpaired. The use of the road as a footpath only (on which the defenders founded) was sufficient to maintain the right of the public *quoad omnia*—at all events if the road remained capable of all the uses of a road, and here the road did not cease to be fit for cart and carriage traffic until 1835, when it was partly planted with trees. The proposition on the other side came to this, that while the public were losing *non utendo* the right of cart-road, and with that right the accessory and subordinate right of footpath, they were at the same time and by the same course of action acquiring an independent right of footpath with (as the present case well illustrated) totally different legal characteristics from the subordinate right. Such a position was entirely anomalous, for if challenged in the exercise of the right of footpath within the forty years, they could successfully plead the right of cart-road which they had not yet lost, and consequently (on the assumption of the other side) they would at the end of the forty years have acquired a right by prescriptive acts which it was absolutely out of the power of the person against whom the prescription was running to prevent. In short, the negative prescription had no application to the partial non-use of a road which had become public—it was not clear that it applied even to the total non-use. It might indeed be that if the road ceased to be fit for cart and carriage traffic, the public would lose their right to use it for such purposes after the lapse of forty years—if, for instance, in the present case, the road had been partially planted with trees in 1825 instead of 1835; but that would be by the operation, not of the negative, but of the positive prescription in favour of the proprietor of the *solum*. Even in that case it was doubtful whether the jurisdiction of the Road Trustees ceased merely because the road had become both *de facto* and *de jure* a footpath only. It might well be that once a road came within the jurisdiction of the trustees, it could not cease to be so as long as the road remained a public road for any purpose. The Lord Ordinary cited *Pollock v. Thomson*¹ and *Lord Blantyre v. Dick-*

public right, and endeavoured to sell the ground under their statutory powers, or to have the road repaired or widened so as to afford accommodation for carts or carriages, the pursuers would have had no difficulty in resisting any such interference with their property. It is in vain, therefore, to ascribe the public use and enjoyment of the footpath to any higher right which the trustees had power to determine, because whatever may have been the earlier history of the road, and as to that we have very imperfect information, there has been no such right for more than forty years."

¹ *Pollock v. Thomson*, Dec. 18, 1858, 21 D. 173, 31 Scot. Jur. 101.

THE COURT recalled the interlocutor of the Lord Ordinary, and ranked No. 79.
and preferred the claimant James Martin to the fund *in medio*, in
terms of his claim.

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tee v. Jarvis's
Trustees.

FODD, SIMPSON, & MARWICK, W.S.—MACANDREW, WRIGHT, ELLIS, & BLYTH, W.S.—Agents.

EARL OF GLASGOW AND OTHERS, First Parties.—*D.-F. Mackintosh—
D. Dundas.*

No. 80.

DAVID BOYLE AND OTHERS, Second Parties.—*Pearson—Murray.*

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gow v. Boyle.

Prescription—Entail—Limited and unlimited title—Consolidation.—An entail, dated in 1715, comprised, *inter alia*, certain lands the *dominium utile* of which had been disposed by the entailer or his predecessors prior to the date of the entail, so that the entail only carried the superiority thereof. The *dominium utile* was acquired in 1721 by the next succeeding heir of entail, who took a disposition in favour of himself and his heirs and assignees whomsoever, being a different destination from that contained in the entail. He was not infeft either under the entail or under the disposition. In 1765 the next heir was infeft upon the unexecuted precept in the conveyance of 1721, having previously served heir in general to the last heir. The next heir in 1780 made up a title under the entail, but no separate title to the said lands, which he possessed along with the entailed estate down to 1843, when he died.

Held that consolidation had not operated so as to bring the *dominium utile* of the said lands within the entail, and that a subsequent heir was therefore proprietor thereof in fee-simple.

Elibank v. Campbell, 12 S. 74, distinguished.

UNDER a deed of entail, dated 2d and recorded 30th July 1715, granted by David, first Earl of Glasgow, the lands of Kelburne and others, in the counties of Ayr and Bute, were entailed upon his son and the other heirs of entail therein mentioned. Prior to the entail part of the lands (Bellichevan and Culoch) had been disposed by the Earl or his predecessors, to be holden of the granter and his successors as superiors thereof, so that the conveyance in the deed of entail carried only the *dominium directum* of these lands. The *dominium utile* of these lands was acquired by Lord Boyle, the entailer's eldest son, afterwards second Earl of Glasgow, by disposition, dated 31st March 1721, and recorded in the Books of Council and Session 11th January 1751, from James Boyle of Bellichevan, who then possessed the lands on apparenay. The disposition was in favour of Lord Boyle and his heirs and assignees whomsoever, not of the series of heirs set forth in the entail. Lord Boyle was never infeft on the disposition, but possessed the lands down to his death in 1741. In 1733 he had succeeded his father, David, under the deed of entail, but never took infeftment thereunder. In 1742 John, third Earl of Glasgow, son of the second Earl, exped a general service to his father, and he afterwards exped an instrument of sasine, dated 19th September and recorded 30th October 1765, following on the precept contained in the disposition of 1721 by James Boyle in favour of his father, and on the retour of his service as heir in general to his father.

The third Earl was succeeded in 1775 by his son George, the fourth Earl, who completed no separate title to Bellichevan and Culoch, but made up a title to the entailed lands by instrument of sasine, recorded 30th May 1780, and possessed the former lands along with the entailed estate down to his death in 1843. George, fourth Earl, was succeeded in 1843 by his son James, the fifth Earl. In 1853 the law-agent of Earl James, duly authorised by a commission granted in his favour by the Earl, executed a combined charter of confirmation of the disposition of 1721 and precept of *clare constat*, dated 5th May 1853. The charter of con-

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could not close a footpath, certainly not a road over which there was a right of footpath only,¹ nor, it was contended, did they, in closing a cart-road, close the footpath also; the policy of the road extended to cart-roads only, and in the only authority cited to the contrary—*Shearer's*² case—the title of the trustees was a right of property in the *solum* of the road; here their title (if they had any) was the use of the road by the public.

At advising,—

LORD CRAIGHILL.—The pursuers of the present action seek to have it found that the road described in the conclusions of the summons is one over which there has been since 1869 no right of way either for carriage or for foot-passengers. The Lord Ordinary has found that so far as regards cart or carriage traffic the pursuers are entitled to prevail, but that as regards foot-passengers the decision must be in favour of the defenders, because for more than forty years prior to 1869 the road had been used for foot traffic, and consequently was not affected by the deliverance of the Justices by whom in 1869 the road was closed.

I have come to a different conclusion. I agree with the Lord Ordinary in thinking that the road in question was a public road under the administration of the Justices for an unknown period prior to 1820. The proof by which this is brought out is not very abundant, but it seems to me to be enough to lead to this conclusion. The minutes of 1808 shew that the attention of the Justices was directed to roads in the parish, and subsequent entries, as interpreted by the evidence, shew that there were sums which were spent by the Justices upon this road, though its identification is less easily made out than might have been expected. There are also the proceedings of 1830, which were originated for the purpose of shutting up the road as one which, even at that time, was superfluous or useless. Putting all things together which are to be found in the proof, I have no hesitation in concurring with the views of the Lord Ordinary on this part of the case.

In 1820 there was opened a new portion of the Glasgow and Carlisle road which had for some time been in the course of formation, and from that time forward the traffic on the road in question, which previously had been a part of the Carlisle road, was very much diminished. But cart and carriage traffic continued to be upon this road, at anyrate, till 1835. Carts and carriages may have used this road even later, but that seems to be uncertain. They, however, were certainly there after 1829, and that is enough to prove that the road was an open road—a road in use—and therefore a road which remained under the administration of the Justices within forty years prior to 1869, when it was closed. All are agreed that the road was used by foot-passengers till 1869, but it was a road for carts and carriages as much as it was for foot-passengers, so far as right of use was concerned, and when the Justices in 1869 came to consider the application which was made to them under the local Act 47 Geo. III. c. 45, sec. 36, the only question they had to determine was whether the road in question, as a cart or carriage as well as a road for foot-passengers, was or was not superfluous or useless in the district! A petition by the heritors was presented to them. They appointed a committee; there was a report returned. Advertisements were made as directed by the statute, but none to

¹ *Pollock v. Thomson*, Dec. 18, 1858, 21 D. 173, 31 Scot. Jur. 101; *Lord Blantyre v. Dickson*, Nov. 3, 1885, 13 R. 116.

² *Shearer v. Hamilton*, Jan. 24, 1871, 9 Macph. 457, 43 Scot. Jur. 218.

oppose appeared, and the result was that the Justices being satisfied that the grounds of the application had been established, the road was closed. If the Justices had jurisdiction, then the defenders admit that their deliverance cannot be upset, and the facts being as has just been explained, it must, I think, be held that there was jurisdiction, and therefore that the present pursuers are entitled to prevail in this action. No. 81.
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Three decisions, not referred to at the debate, were brought under my notice by your Lordship in the chair while the case was under our consideration. One is *The Glasgow and Carlisle Road Trustees v. Tennent*, February 9, 1854, 16 D. 521. Another is *Murray, &c. v. Arbuthnott*, November 29, 1870, 9 Macph. 198; and the third *M'Gavin v. M'Intyre & Company*, June 12, 1874, 1 R. 1016. The question in those cases comes very near that which has to be decided here, but they do not actually touch it, and our judgment here is not to any extent fettered by anything that was said or done by the Court in those cases.

The first of the three cases was one in which a local Act authorised the trustees, when any part of the road was altered, to shut up such part as should be no longer of use, or where a toll might be evaded, but did not prescribe any form of procedure, and directed any parties aggrieved by shutting up the road to apply to the Quarter Sessions. In an application for interdict at the instance of the trustees against certain persons who persisted in using the road which had been shut up under the statute, and removing the obstructions placed by the trustees, the respondents pleaded immemorial possession, and that there was no written minute or resolution of the trustees against which an appeal could be taken; interdict was granted—the Court holding, upon the construction of the statute, that the road had been duly shut up by the trustees in the exercise of their statutory powers, and that the respondents were not entitled to found on their own illegal acts as constituting possession. This case, so far as it goes, is in favour rather of the pursuers than of the defenders. The road was shut up, but a part of it was subsequently used by the public, and what was decided was, that the trustees having jurisdiction, and the provisions of the statute having been observed, such use as there was could not, and did not, preserve the right of public way which had previously existed. In the present case there was no use taken of the road, which had been shut up after the deliverance of the Justices by which it was closed, but even if there had been, the decision just cited shews that such use would have been without avail. The trustees were within their competency, and as any use behaved to be an illegal use, the decision of the Justices could not thereby be wrought off or nullified.

The second of the decisions was of this nature. In 1824 the proprietor of grounds through which a public footpath ran presented a petition under the 21st section of the Edinburgh County Road Act to the Road Trustees for permission to alter the course of the path, and, on the new path being completed, to shut up the old path. A committee was appointed, and reported that the proposed alteration would be an improvement. The trustees then granted warrant to the proprietor to alter, and authorised him to shut up the old road as soon as the new line was completed. When the new line was made, the proprietor tried to exclude the public from the old road, but with only partial and varying success. In an action of declarator of right of way by the public it was held that the footpath had not been legally shut up, because, first, the 21st

No. 81. section of the Act referred to gives the trustees no power to shut up a footpath, and secondly, assuming that such a power was given, the necessary proceedings had not been followed. That case accordingly related exclusively to a footpath, but the present relates to a road for all manner of traffic. If there had been here a footpath independent of the carriage-way, what was done in *Murray's* case might be of some avail ; but so far as appears there was no footpath before the road as a whole was used by the public, or before the Justices assumed the administration, and consequently such a use as was taken by foot-passengers was only a use of the public road, and not the use of ground which was used as a footpath exclusively. The Justices, when they closed this road in 1869, closed it in its entirety. The issue upon which they decided was, whether the road as a whole, and taking the use of it by foot-passengers into account, was superfluous or useless ? They held that it was, and when the road was so closed, the right of footpath was as much extinguished as was that of all other kinds of traffic.

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The last of the three cases comes nearer the present in its circumstances than either of the other two, but still they are far apart. There a conveyance of a mill was granted by feu-contract in 1722, "with free ish and entry, and sufficient ways and passages of 12 foot breadth, besouth the lade of the said miln." These words were not repeated in any subsequent title. In 1872 the only road to the south of the mill-lade convenient to the mill was one under the management of the Statute Labour Road Trustees of the county. There was no evidence to shew at what period it had become a statute labour road. The trustees conveyed the *solum* of the road to the proprietor of the ground through which it passed under their statutory powers, receiving another road in substitution. In a petition for interdict presented by the proprietor of the *solum* of the road against the owner of the mill, it was held that a right of access in the line of the road was included in the grant of 1722 as a necessary adjunct of the mill, and that the Statute Labour Road Trustees had no power to interfere with it. Now, what was the ground of decision there is awaiting here. There is no proof that there was at any time any independent right of footway on the line of this road before it was a cart and carriage-road, and consequently the use of that road by foot-passengers was only the use of a public road under the administration and subject to the statutory powers of the Justices. When the road was shut up, the right of footway as well as to cart and carriage traffic was extinguished.

LORD YOUNG.—I agree in the opinion which has just been delivered, but some observations occur to me on the case generally, and also particularly, which I think it my duty to make.

The conclusions of the summons seem to me to require some attention. They are all in my judgment superfluous, and only tend to embarrass the case, with the exception of the first, which comprehends everything necessary to raise the question between the parties. It concludes for declarator that there is no public right of way or servitude of road or passage between the points A and B on the plan which was laid before us. "Servitude" is, of course, superfluous, because no servitude was ever alleged. The purpose of the action is really to have the right of public way or passage which the defenders contended for negatived, and to have the defenders interdicted from acting on the footing that there is such a public right of way. A declarator that any public right or right of way which formerly existed was duly and validly shut up by the Statute Labour Trustees

is absolutely superfluous as a conclusion, although the circumstances connected with that shutting up are, for the reasons pointed out by Lord Craighill, very material in the consideration of the question whether there is a right of way or not. The road in question is, as I understand, admittedly, but is, at all events, clearly and certainly, upon the property of the pursuers. The *solum* is theirs. No other proprietors are suggested; public property in the *solum* is an impossibility by the law of Scotland; it is not said to be in the Crown; it is in the titles of the pursuers. It is their ground, and they are absolutely entitled to a declarator that there is no right of road along their property unless it be established affirmatively to the contrary that there is. As I have pointed out, their first conclusion is simply for a declarator that there is no right of public road along this part of their private property. The question is, whether or not the defenders have established that there is! I have expressed my view that the conclusions of the summons are altogether superfluous except the first, and I think I may say the same of the pleas in law for the pursuers. They are all superfluous except the last, which is,—“The defenders not having right to use the road in question, interdict should be granted as craved.” That would have comprehended the declarator, and so exhausted the case.

I may here observe that when I use the expression “road” in any remarks I have to make, I am to be understood as signifying “cart-road,” which I need not say means a road for all purposes. A cart-road comprehends all the other uses for which a road may exist. The other uses do not necessarily comprehend it—indeed they frequently do not. A drove-road, for example, does not extend in the matter of use to carts. If it is a cart-road, on the other hand, it is open to cattle, horses, and certainly to foot-passengers. By the expression “road,” then, I shall always mean cart-road or road for all purposes.

The case presented by the pursuers is that there was a public road at one time here, although there is none now—that it existed prior to 1869, but was shut up by the proper authority in that year. The case presented by the defenders, on the other hand, is that there never was a road. They say there was a footpath, but never a road. It is a curious defence *prima facie*, but when one examines it, it comes to that logically. They undertake to shew that there was a public footpath there, and that there is that public footpath now. To prove that is a necessary condition of their success in the action, but they must prove it by their own evidence, they cannot avail themselves of the pursuers’ averment, which they deny, that there was a public road, which the trustees shut up in 1869. Their case is that there was no such road which the trustees could shut up. They may, of course, take the pursuers’ admission that there was a public road with its qualification that that road was shut up in 1869, but if they reject the qualification they must prove their case by their own evidence without the aid of the pursuers’ admission.

The Lord Ordinary expresses the opinion that prior to 1821, although it does not appear for how long, the ground in question here had been used as a public road. I agree in thinking that that is proved, and therefore that the pursuers’ averment that this was a public road is in accordance with the evidence. I agree also with Lord Craighill that although after 1821 the use by carts was less than previously—the new Glasgow and Carlisle road having then been formed—it nevertheless did not cease, but continued at least down to 1829, and probably to 1835. Even before 1821 there was perhaps not very much. The nature of the locality sufficiently accounts for that. I do not think there was more

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than the traffic of the neighbouring farmers. There was a funeral from a house on one occasion, and there was a conveyance used by the members of a marriage party on another occasion. But there was more or less use of it by members of the public with carts, and I daresay if the memories of the people were searched, it would be found that hearses went along it more than once. After 1821 this use continued, although, as I have said, it was still less.

Now, in these circumstances, and with all that use of it, I am of opinion that this road was a statute labour road, with respect to which the statute labour trustees had a duty. I agree with Lord Craighill that there is evidence, although not very much, that in the performance of that duty they not only shut it up in 1869, but that they had expended a good deal of statute labour money upon it. If it was a public road, it was a statute labour road. By the law of Scotland all public roads which are not turnpike roads are statute labour roads. I have already pointed out that they are formed, as all public roads except turnpike roads are formed, upon private property. The *solum* remains the property of individuals upon private, personal, absolute titles. Turnpike roads are otherwise, but not all turnpike roads by any means. By the Turnpike Acts turnpike road trustees are empowered to purchase land in order to make roads, and when they do that, and have paid for the land, and got a title, the land is theirs and is vested in them, and if the road should come to be unnecessary by another road being substituted, or otherwise, they may sell the land, as in the case of any other property, but except in those cases where they have bought the ground, and have a heritable title, the roads are mere road ways over *solum* belonging to private individuals. And that is so with respect to all statute labour roads. A statute labour road is nothing more nor less than this, that there are trustees appointed to look after the interests of the public in the maintenance of that road. Such roads were formerly maintained by labour—statute labour—because the Justices were empowered by statute to call out the labourers and impose the duty on them. When the administration of the roads was entrusted to trustees they were empowered to lay on assessments in lieu of statute labour. Instead of calling out farmers and labourers to repair the roads, they imposed an assessment so far as they thought it necessary for the purpose, and with the produce of the assessment they themselves employed the labourers. Upon some roads they expended very little, and upon some none at all, the public use of them requiring only a little or nothing at all to be expended. They were nevertheless within the jurisdiction of the trustees. The use of the word “jurisdiction” is not very appropriate. All that is meant is that it was for the trustees to consider whether they required a road, and if so, what aids the road required out of the statute labour money. A corresponding power and a corresponding duty was given to them with respect to the shutting up of such roads,—was given by the Statute Labour Acts or by the local Acts applicable to particular districts or counties. They were empowered to shut up superfluous or useless roads, and that upon the application of people who were interested to have them shut up, if such people could satisfy the trustees, who were the guardians of the public interest in the matter, that such roads should be shut up. If they were satisfied that the road was superfluous or useless, those guardians of the public interest, after giving the necessary notices, and hearing any parties who might come forward with opposite views, were empowered to shut it up absolutely. If the road was superfluous or useless, or if another line of road was found to be more convenient, or at least equally convenient, and the public were

satisfied to change the one for the other, the trustees were empowered to shut up the one in respect of the opening of the other. If another was not needed, and if the existing one was found to be unnecessary, the trustees were still empowered to shut it up absolutely. I think it was suggested that the trustees might shut up a public road with respect to all its uses except that of a footpath. I can find no trace of that exception in the statute. I think that when a public road is shut up, it is shut up for every purpose.

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Now, with regard to the history of this road—and it is necessary to consider that in considering the case made by the defenders here—we do not know its origin, except in so far as we can deduce that by inference from the evidence before us. It appears that this road was constructed just between two estates, the one half upon the land of the one estate, the property of Mr Tod, and the other half upon the land of the adjoining estate, belonging to Mr Hope Vere. It was constructed of a width varying from 24 to 26 feet, and it was fenced on either side by a feal dyke, and at some parts by a hedge. It is impossible to resist the conclusion that that road was thus made by those adjoining proprietors on their own properties for their own purposes. I think that it is an inference with reason and likelihood to support it—that a road on the boundary between two estates, one half upon the *solum* of the one, and the other half upon the *solum* of the other, 25 feet wide and duly fenced, was made by the proprietors on their own ground for their own use. I cannot resist that conclusion, nor can I doubt that the intention of these proprietors was to make a road, not a footpath. There is no suggestion, and no evidence, that they took the line of a footpath in making this road and fencing it in in this way. You might make a similar surmise with reference to any other such road in the kingdom.

The defenders, who are really pursuers of the issue, rely upon usage. The law of Scotland in regard to usage is difficult to administer, and I think that proprietors have perhaps suffered considerable hardship from the difficulties attending the administration of the law as it stands. A footpath, or any kind of a road, may be acquired by use; but then the use for forty years, or for time immemorial, must be proved to be such that the jury weighing the evidence shall impute to the proprietor that the use shewed an acknowledgment by him of the public right. Otherwise, use for any period you like is a matter of tolerance, and will not make a public right. The defenders' case is that the use by carts is to be imputed to tolerance, and the use by foot-passengers is to be imputed to right. I cannot assent to that for a moment. It reminds me of the argument in a case I remember very well. I was counsel for the defender. The pursuers contended that there was there a public footpath, or at least that they were proprietors or tenants or occupiers of an adjoining estate which had a right of servitude belonging to it. At the trial there was a great deal of evidence of use by the proprietor and tenants and occupants of the neighbouring estate, and also a great deal of evidence of use by strangers—members of the public as they are sometimes quaintly called—although the evidence of use by strangers was much less, probably owing to the fact that it was a footpath over a moor where not many strangers passed. The counsel for the pursuer, at the end of the evidence, and in addressing the jury, abandoned the claim to a public right, and asked only for a verdict on the issue of servitude. That immediately provoked the answer—You have led evidence that members of the public used this, endeavouring to support your contention that they did it as matter of right. But you are now constrained to abandon that, and to impute the use you have

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proved to tolerance and the goodwill of the proprietor, but much more likely is the use by his neighbours and friends upon the adjoining estate to be imputed to friendship. It would be more or less churlish to turn off a stranger crossing a moor, but doubly so to turn off those residing on the adjoining property. Therefore, if you impute the use by strangers to tolerance and goodwill, much more must you impute use by neighbours to tolerance and goodwill. That was my argument, and it was assented to by Lord Justice-Clerk Hope and by the jury. We had a verdict on both issues accordingly. So here I cannot see my way to impute the use of this road by carts to tolerance, and the use of it by foot-passengers to a right.

But what was the use by foot-passengers after all? They were chiefly children or poachers. There were no doubt neighbours passing along the road occasionally—people on the neighbouring farms. It was a short cut for some of the farms. There are some general words in the evidence to the effect that people were constantly travelling upon it, but one of the witnesses who gives such evidence says he has only been once upon the road for the last twenty-two years; and when you come to the details of the evidence you find the use to be of the most inconsiderable description. After the planting was put down in 1835, there was really no need for the road except for trespassers. I have noted some passages in the evidence. James Brown says,—“(Q.) What became of them? (that is, of the trees). (A.) Well, you cut one, and I cut one, and some other body cut one, just when they needed a thing of the kind. They were never quarrelled. We had no leave from anybody to do it.” Is presence there to be imputed to the right of the defenders? And in the same way he speaks of the road. “(Q.) Did you use to go along that road to your work frequently from Boghead? (A.) Yes, I have travelled it to my work from Boghead. I was going to and coming from Lochanbank. No man ever quarrelled me for going that road.” Then Janet Brown speaks to using the road almost every week. “The people whom I saw using it were going all airts, both ways.” John Brown says,—“There were trees upon the road when I was young. I cannot tell what became of them. (Q.) Did you ever cut any of them? (A.) Well, I have; I have seen other people cutting them.” Then James Brown says,—“There were trees that had been planted on the old peat road; I cut some of these because I was requiring them, and it was considered it was always a public place that belonged to no person, and when I saw any person take one, I thought I would do it too. There was no restriction, and they were not of much use.” In short, people wanted firewood, and the proprietor did not object. Some went there for that purpose, some to take advantage of a near cut, and some were in pursuit of rabbits, and the proprietor did not turn them away. I could not on that evidence have sustained the contention that a public road or a footpath existed here. I should have imputed it to goodwill and neighbourhood. Indeed, but for the case presented by the pursuer that this was a public road, I should have thought there was a real difficulty in proving publicity. I think it is proved that the use in respect of which he makes that admission was continued down to the year 1835, when the trees were planted, although the use was greatly diminished towards the end of that period. I am of opinion that in the exercise of their jurisdiction the trustees did well to shut up the road.

There is a question which crossed my mind more than once, namely, whether, if this was a public road, and the use of it by foot-passengers continued, the road

could be held to have ceased to exist, and be held to have been withdrawn from No. 81. the jurisdiction of the Road Trustees, merely because no carts went along it although it remained open to them. After it was shut up and became impass- Jan. 28, 1887. Hope Vere v. able for carts, which, I agree with Lord Craighill, was not until after the '30s Young. commenced, that question would not arise. But so long as it was usable by carts, and was used in any of the ways in which a public road is usable, I should think that it was not withdrawn from the jurisdiction of the trustees—that it did not cease to be a public road. There are many public roads in the country upon which a cart is never seen—upon which they do not go. You may see foot-passengers upon them occasionally, but not carts, simply because they have no occasion to go. I should not say that such a road had ceased to be a road because it has ceased to be used by carts, one or more of the uses, short of carts, to which a road is subjected continuing, and it being open to carts, if they have occasion to go. But it is not necessary to decide that question here.

Upon these grounds, and upon those stated by Lord Craighill, I am of opinion that this judgment ought to be recalled, and decree pronounced in terms of that which I think is the only material conclusion of the action, that there is no public right of way over this road.

LORD RUTHERFURD CLARK.—I am of the same opinion.

LORD JUSTICE-CLERK.—I am sorry I have come to a different conclusion on the evidence in this case, and although I shall not detain your Lordships long by explaining the grounds on which I reach the result, yet I think it only respectful and right to say in a few sentences what my view on the proof and the law is.

This is an action by Mr Hope Vere for the purpose of having it declared that the public have no right of passage along the line of the road in question. I do not wonder that he found it necessary to have recourse to a declarator to that effect, because the reply which is made in the first instance is that the public have had the use of this road as a public right of way for foot-passengers at least from the beginning of the century, and probably a great deal longer. That is the defence. The first question is, How stands the fact? Of course we are driven to inference in regard to the earlier period of the road. But this is certain, that, from the time when carts and horses went along the road, which goes back to the beginning of the century, the public have had the use of this line of road, when they required it, for foot-passengers. The proof, I must own for myself, I should have thought absolutely conclusive upon that matter. I do not think it necessary to go into that proof in detail, because sitting as one of a jury to decide this matter of use or no use, I find the Lord Ordinary's view is as clear and distinct as it can be, and he had the great advantage of hearing the evidence. He says,—“Accordingly, since 1821 the public have abandoned all use of the latter road for any purpose except that of a public footpath. But they have continued to use it as a footpath, although for that purpose only down to the present time. There is no real conflict of evidence as to this point—those of the pursuers' witnesses, who had the best opportunities for observation, being quite as emphatic in asserting the public use of a footpath as the witnesses for the defenders. If the only question, therefore, were whether the public had established a right of way for foot-passengers by continuous use for forty years and upwards, there can be no doubt that the defenders would be entitled to a verdict upon that issue.” Therefore, I assume as a matter of fact from which the argument starts, that for that period, far exceeding the prescrip-

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tive period, the public have used that right of way. They did not use it by tolerance, at least I find no indication that such was the fact, and all presumption of law, as well as the conclusions to be derived from the proceedings are the other way. Before the new Glasgow and Carlisle Road was made there was a considerable district of country which had no direct communication with the old Glasgow and Carlisle Road excepting by means of the road in question. For carts and carriages it was useful as well as for a footpath. When the new Glasgow and Carlisle Road was made, and communication made more direct with the places to the south, the use of this road for wheeled vehicles and horses was of course to a large extent lessened, although its use for foot-passengers continued. There were many places of importance in that neighbourhood. There was the mill, for instance, for access to which they used, and have continued to use, the road in question.

The question therefore is, whether the Road Trustees had a right to shut up the footpath? I say nothing about the road for carriages and horses. I should not think it important to dispute that they might have a right to shut up the carriage-way. But, as I have said, the question really is, whether the undisturbed and undisputed right which the public has exercised for eighty years was rightly or wrongly interfered with in 1868 by the shutting up of the road? And that is a question of some difficulty even if the Road Trustees had professed to shut up the road or footpath. In the ordinary case, Statute Labour Trustees have no jurisdiction to do anything of that kind. A public footpath is not a statute labour road. Nor is it supported in any way whatever by these trustees. It is not in the least impossible that a right of way may exist for foot-passengers although the *solum* over which the footpath goes was once a public road for wheeled vehicles. That a footpath may subsist and continue although the *solum* had been that of a public road shut up by the Justices is certain. An appropriate illustration of this is to be found in a case which arose out of very similar circumstances under the same Act of Parliament. It is the case of *The Glasgow and Carlisle Road Trustees*, 16 D. 521, and in that case the Justices had, in 1820, shut up a public road in the immediate vicinity of that in question here. But the road continued to be used as a footpath, and in deciding that the road was well shut up as a public road, Lord Cowan, who was Lord Ordinary, said,—“There is no dispute about the road being public as regards foot-passengers, and the interdict craved does not apply to such use of it.” Therefore, there is no inconsistency in the right of footpath remaining along the track of a disused and closed statute labour road. I rather suspect that a great many statute labour roads were originally nothing but footways, coming gradually from their convenience to be used by cattle and horses, and ultimately coming to be adopted by the Statute Labour Road Trustees. Be that as it may, I imagine that, after eighty years’ use of this as a public footpath, it is out of the question to say, there being nothing else to shut up, that the trustees can interpose, and deprive the public of that footpath.

These are the views I entertain. I think the Lord Ordinary has dealt with the case very satisfactorily, and I certainly should have been better pleased to have adhered to his judgment.

Your Lordships recall the interlocutor, and decern in terms of the summons.

THE COURT recalled the Lord Ordinary’s interlocutor of 25th June, and gave decree in terms of the conclusions of the summons, with expenses.

MELVILLE & LINDSEY, W.S.—ROBERT D. KEE, W.S.—Agents.

ROSS T. SMYTH & COMPANY, Petitioners.—*Shaw*.
 THE SALEM (OREGON) CAPITOL FLOUR MILLS COMPANY, LIMITED,
 AND OTHERS, Respondents—*J. C. Lorimer*.

No. 82.

Jan. 29, 1887.
 Smyth & Co.
 v. Salem Flour
 Mills Co.
 Limited.

Company—Winding-up—Creditor's petition for judicial winding-up—Where assets in America.—A petition having been presented by a creditor for the judicial winding-up of a company, which was admittedly insolvent, and for the appointment of a liquidator, answers were lodged by the company and certain secured creditors stating that all its assets were in America, and that, it being the intention to have a receiver appointed there, the appointment of a liquidator in this country was unnecessary. The creditors, other than the petitioner, were all either directors or concerned in the management of the company. The Court granted the prayer of the petition.

THE SALEM (OREGON) CAPITOL FLOUR MILLS COMPANY, LIMITED, registered under the Companies Acts, 1862 to 1883, and having its registered office in Scotland, was formed on 1st May 1884 to carry on the business of flour millers, &c., and to acquire the mills, warehouses, and other real and personal estate of the City of Salem Company of Oregon, situated at Salem, in the State of Oregon, U.S.A. 1st DIVISION.
B.

The Company was quite unsuccessful, and on 15th December 1886 a report was issued by its directors to the second annual general meeting, to be held on 23d December following, which stated as follows:—"Early in this year the directors resolved, in consequence of the condition of the trade, and the losses already apparent, to suspend operations, and confine the work to the realisation of the wheat and flour on hand. The mills were accordingly closed in June, and no new business has since been gone into."

After referring to the depreciation of the property and the business losses, the report further stated that these "will involve not only the share capital, but the creditors of the company will all suffer more or less, according as the properties realise a higher or lower price." The shareholders were accordingly asked to authorise the directors to proceed with the realisation and winding up, "as if the company were in liquidation." At the meeting on 23d December the report was unanimously adopted, and the shareholders granted authority to the directors to proceed with the winding up, "as if the company were in liquidation."

Ross Smyth & Company, corn merchants, Liverpool, who were creditors of the company to the extent of £2131, 6s. 2d., on 22d December presented a petition to the Court for a judicial winding-up, and the appointment of a liquidator, averring that the company was unable to pay its debts, within the meaning of the 79th section of the Companies Act, 1862.

Answers were lodged to this petition by the company and by William Stuart, Thomas Landale, and James Tait, directors and creditors of the company, in which they stated that there were now no assets of the company in this country, and that its whole property and assets in Oregon were hypothecated to the creditors there. In these circumstances, there were no assets with which a liquidator appointed in this country could deal, and they accordingly proposed that a receiver should be appointed in America, as the title of a Scottish liquidator would not be recognised in America, and he would not be appointed receiver. All the creditors in this country, with the exception of the petitioners, it was alleged, concurred in that course. They accordingly submitted that the petition should be dismissed, or that consideration of it should be superseded *hoc statu*.

It appeared that the other creditors in this country, other than the petitioners, were all either directors or concerned in its management, and their debts were more or less secured in America.

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The respondents argued that the Court ought to give effect to the wishes of the creditors, founding upon the terms of the 91st section of the Companies Act, 1862.*¹ According to American law, a liquidator appointed in Scotland would not be recognised there.²

LORD PRESIDENT.—The state of the case is that this company is in a state of insolvency. It is in a very bad condition indeed. Now, a creditor (and apparently the only independent creditor of the company, for all the others are connected with it) makes an application for a judicial winding-up. The company and the directors do not dispute the grounds on which the petition is presented, and they lay before the Court a report of the directors, of date 15th December 1886, which was considered at a meeting of the company on 23d December, and there it was agreed “to grant authority to the directors to proceed with the realisation of the properties and the winding up of the concern as if the company were in liquidation.” The issue therefore raised here is not whether the company is to be wound up, but whether the winding-up is to be conducted by the directors, or whether a liquidator shall be appointed by the Court. I have no doubt that the proper course for us to take is to make an order for winding up the company, and to appoint a judicial liquidator.

LORD MURE concurred.

LORD SHAND.—I am of the same opinion. It is conceded that the company is unable to pay its debts, and the petitioners are entitled to the order they crave *ex debito justitiæ* unless it be shewn either that the general voice of the creditors is against the application or that the refusal of the order will not prejudice the petitioners. I am not satisfied on this last point. The company is in a very peculiar position. It has resolved on winding up, and in these circumstances a creditor is entitled to say,—I desire that the winding-up shall be a judicial one, if for no other reason than that the effect would be to cut down preferences.

A number of cases were referred to in the argument, in which a winding-up was refused, but in all of these the company was carrying on its business, and maintained that it was best for all concerned that it should continue to do so. No case has been cited in which after a company has resolved to wind up, and a creditor has come asking that the company should be wound up judicially, the application has been refused. It is said that here the general voice of the creditors is opposed to the application, but all the other creditors are connected with the company, certain of them being directors who hold securities over the property of the company, and it may be the first duty of the liquidator would be to investigate their debts and securities. I have no doubt whatever that the application should be granted; even though an official receiver may be required in America, it is desirable that a liquidator representing the whole creditors should have a voice in the appointment. In every view I think the petitioners are entitled to have the winding-up placed in the hands of an official liquidator.

* The 91st section enacts,—“The Court may, as to all matters relating to the winding-up, have regard to the wishes of the creditors or contributories, as proved to it by any sufficient evidence.”

¹ *In re St. Thomas' Dock Co.*, Feb. 12, 1876, L. R., 2 Chanc. Div. 116; *In re Chapel House Colliery Co.*, June 27, 1883, 24 Chanc. Div. 259.

² Story's Conflict of Laws, secs. 409, 410, 412; Gillespie's Barr, sec. 128, p. 596.

LORD ADAM concurred.

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THE COURT accordingly ordered the company to be wound up under Jan. 29, 1887. the provisions of the Companies Acts, 1862 to 1866, and appointed Smyth & Co. James Alexander Robertson, chartered accountant in Edinburgh, v. Salem Flour to be official liquidator in terms of these Acts, with the whole Mills Co. Limited. powers thereby conferred, and remitted to Lord Kinnear, Ordinary, to proceed in the liquidation.

ROBERT FINLAY, S.S.C.—AULD & MACDONALD, W.S.—Agents.

ISABELLA HILL PEDEN OR GOW, Pursuer.—*J. C. Thomson—Baxter.*

No. 83.

JOHN GOW, Defender.

Jan. 29, 1887.

Husband and Wife—Divorce—Desertion.—Held that a wife who had left her husband's house on account of his drunken violence, and gone to live with her father, was not thereby barred from instituting an action of divorce on the ground of desertion. *Gow v. Gow.*

THIS was an undefended action for divorce on the ground of desertion at the instance of Mrs Isabella Hill Peden or Gow, the wife of John Gow, designed as "blacksmith," sometime at Macbiehill, in the county of Peebles, and now residing at Millerhill, in the county of Midlothian. The Lord Ordinary (M'Laren) thus narrated the circumstances of the case:—"The wife, who is the pursuer of the action, left her husband's house more than four years ago, and went to live with her father. The husband, a few weeks later, sold his furniture, and left the place where he resided. Up to the time of instituting the action he had not communicated with or made his address known to his wife. She alleges, and I considered it to be proved, that she left her home in consequence of her husband's intemperate habits, and his cruel behaviour to herself—behaviour which, in my opinion, would have entitled her to resist a demand for adherence, if such had been made by him."

His Lordship, by interlocutor of 11th January 1887, reported the case to the Second Division.*

After hearing counsel for the pursuer,—

LORD JUSTICE-CLERK.—I am of opinion that the evidence does not disclose any bar to the pursuer bringing an action of divorce. I do not think that the wife in going to her father's house in the circumstances deserted her husband; on the other hand, I think that the husband by taking up house by himself, and failing to communicate with her or to provide for her, has deserted her.

LORD YOUNG.—The Lord Ordinary has reported this case on a question of law; that question of law is so simple as this, whether the fact that a wife has

* "NOTE.— . . . The question arises, Is this constructive desertion by the husband? The inclination of my opinion is in the affirmative, because I see no real distinction between the cases of the man who drives his wife out of doors with blows, and the man who, with greater cunning, and possibly with the view of depriving her of her legal remedies, makes life intolerable to his spouse, and thus compels her to leave him. In the present case I think it is the husband who must be considered to have, in the words of the Scottish statute, 'diverted' from his wife. If the husband is the party originally to blame, there can be little doubt but that he is responsible for the continuance of the 'diversion' or estrangement during the four years that have elapsed, because during all that time he kept out of the way, and thus made it impossible that overtures of reconciliation should be addressed to him."

No. 83. justifiably taken refuge in her father's house from her husband's drunken violence is a legal impediment to her suing him afterwards for divorce on the ground of desertion. Whether he did desert her for a period of four years is a question of fact, and the evidence, I think, here is that he did wilfully desert her, and maliciously continue in desertion for four years. I think there is no legal impediment to her suing him for divorce on that ground.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Find that the fact that the pursuer sought refuge for a time in her father's house from the cruel treatment of the defender does not constitute a bar to her action of divorce for desertion, and remit the same to his Lordship to proceed."

T. SWINTON PATERSON, S.S.C., Agent.

No. 84. JOHN THOM (Clerk to the Linlithgow Police Commissioners), Petitioner.
—J. Wilson.

Feb. 2, 1887.
Linlithgow
Police Com-
missioners.

Nobile officium—Police Commissioners—Burgh—Sale of lands for which Commissioners had no use—General Police and Improvement Act, 1862 (25 and 26 Vict. c. 101).

1st Division.
M.

By minutes of September and December 1886, the Police Commissioners of the royal burgh of Linlithgow resolved to sell for £200, or to feu for a feu-duty of £10, 10s. to the town-council of the burgh a portion of the Fleshmarket, the property of the Police Commissioners, acquired under sec. 125 of the General Police and Improvement Act, 1862,* for which they had no use. On 5th January 1887, they presented a petition to the Court, setting forth the circumstances, and stating that though under the General Police and Improvement Act, 1862, secs. 161 and 373, they had power to discontinue the use of public washing-houses, drying-grounds, &c., and to sell the same, the Act did not contain any provisions authorising the sale of other property which was of no use to them. They therefore petitioned the Court for leave to carry out the proposed sale. The petitioner referred to the petition of Alexander Tait, clerk to the Commissioners of Police of Grangemouth, 1st July 1884 (not reported), in which warrant to sell the old Town Hall of Grangemouth by public roup had been granted. The Court having indicated an opinion that a sale by private bargain would be *ultra vires* of the Commissioners, the Commissioners thereupon craved and obtained leave to amend the prayer of the petition, to the effect of asking authority to put up the subjects described to public auction. This having been done, the Court granted the prayer of the petition as amended.

PARTY, Agent.

* Sec. 125 of the General Police Act, 1862, enacts,—“The Commissioners may from time to time purchase or rent any buildings or land, and convert such buildings into, or build on such land, offices, watch-houses, lock-up houses, and other places necessary for the purposes of this Act, with all proper conveniences thereto; and may repair the same from time to time, and furnish and fit up the same, and employ proper persons to take care thereof.”

WILLIAM WISELY, Pursuer (Appellant).—*J. C. Thomson—Watt.*
 THE ABERDEEN HARBOUR COMMISSIONERS, Defenders (Respondents).—
C. S. Dickson.

No. 85.

Feb. 2, 1887.

Wisely v.
 Aberdeen Har-
 bour Commis-
 sioners.

Reparation—Road—Harbour Commissioners—Obligation to provide new and improved plant.—Harbour Commissioners, as empowered by their Acts of Parliament, laid down and maintained rails on the streets and quays adjoining the harbour. A horse crossing the rails on its way to a ship in the harbour was injured through its foot being caught in the space left between the rail and the causeway blocks for the flanges of waggon-wheels. The owner of the horse brought an action against the Harbour Commissioners, alleging that a new and improved description of rail, which would have rendered the accident unlikely, had been introduced since the rails were laid down, and pleading that it was the duty of the commissioners to have substituted such rails for those in use at the time of the accident. *Held (dub. Lord Young)* that although the new rails were on the whole of a safer description than the old, the Commissioners had not been negligent in continuing the use of the old, which were of the form common at the date when they were laid down. Defenders therefore *assolvied*.

THE ABERDEEN HARBOUR COMMISSIONERS, incorporated by Act of Par-
 liament, were by their Acts authorised to lay down and maintain lines of
 rail along the streets and quays adjoining the harbour, and, in particular,
 under an Act passed in 1854, along the Waterloo Quay. The rails laid
 down were what are called bulb rails, *i.e.*, the rails in ordinary use on
 railways, the sides of which are concave. The rails rested on longi-
 tudinal timber sleepers, and the roadway on each side of and between the
 rails was filled up with granite causeway blocks, with a space of about two
 inches between the rail and the blocks on the inside to allow the flange
 of the waggons to pass. No such space was left on the outside of the
 rails. The Harbour Commissioners in later years were in the habit of
 replacing the old rails as occasion offered by another description of rail,
 known as "box rail," which was in fact the rail in common use on street
 tramways. The sides of these rails were straight, not concave, and no
 space was left on either side between the causeway blocks and the rails,
 the flanges of the waggon wheels being accommodated by a vacant space
 running along the centre of the surface of the rail.

On 6th January 1886 a cart belonging to William Wisely, carter,
 Aberdeen, was employed in carrying maize to a vessel at the Queen's
 Jetty, and to do so had to be taken across the rails on the Waterloo
 Quay, at a point at which the bulb rails originally laid down still re-
 mained. In crossing one of the horse's hind feet was caught in the
 inside space between one of the rails and the causeway. The horse was
 thrown on its side, its foot being still held fast under the rail; and a part of
 the street had to be torn up before the foot could be extricated. Wisely
 brought an action in the Sheriff Court at Aberdeen against the Commis-
 sioners for damages on account of the injury sustained by the horse.

The question came to be whether the defenders were bound to substi-
 tute box rails for bulb rails in all parts of their system, or at least at the
 crossing at which the accident took place, the pursuers maintaining that
 the defenders were so bound, the defenders that they were not, as having
 exercised reasonable care and skill in the superintendence of the line of
 rails in question.

A proof was allowed. The import of the evidence was as follows:
 Bulb rails were the rails commonly in use in 1854, when those in ques-
 tion were laid down; subsequently box rails became the commoner in
 the case of street lines laid down for the first time. At the date of the

2D DIVISION.
 Sheriff of
 Aberdeen,
 Kincardine,
 and Banff.
 I.

No. 85.

Feb. 2, 1887.
 Wisely v.
 Aberdeen Har-
 bour Commis-
 sioners.

proof the defenders had replaced with box rails about two miles of the five miles of which their system consisted. Carts were constantly crossing the rails in the harbour at various points. The pursuer proved that several accidents to horses had previously taken place there, though not exactly at the point here in question, where the cart traffic was comparatively small. Although box rails were on the whole safer than bulb rails as regards their liability to catch a horse's hoof, they presented a larger surface of iron, and so, according to some witnesses, made horses more likely to slip than bulb rails. The rails at the crossing were in good condition. The harbour engineer deponed that the Commissioners were substituting box for bulb rails because of the tendency of cart and carriage wheels when going along the street to get fixed in the flange spaces of the latter, and not because of the danger to horses crossing, of which witness stated he had never heard.

On 30th September 1886 the Sheriff-substitute (Dove Wilson) pronounced this interlocutor:—"Finds that the pursuer has failed to prove that the accident set forth in the petition happened in consequence of the negligence of the defenders; therefore assoilzies the defenders from the conclusions of the action," with expenses.

On 18th November the Sheriff (Guthrie Smith), on appeal, adhered. The pursuer appealed.

LORD JUSTICE-CLERK.—It seems that the pursuer's servant in the ordinary course of his employment had occasion to cross the rails at a jetty within the Aberdeen Harbour in order to remove goods from a vessel which was moored alongside the jetty. The rails there laid were bulb rails, which simply means that the top of the rails has a flange projecting over either side, and placed in a certain relation to the causeway along which it is laid. The driver was not using the rails for his cart, he was simply crossing at right angles, and it seems that while the horse was crossing its foot got jammed between the causeway and the rail, with the consequence that the poor animal was severely injured. The case made against the Harbour Commissioners is simply this: That these bulb rails have been out of use for many years; that they are dangerous in the very respect which gave rise to this occurrence—their tendency to cause the feet of horses to get jammed—and accordingly that they have been abandoned in all places where the crossing of rails is likely to take place. That is perfectly true, and I do not think there is the least difference of opinion on that subject. There is another form of rail which came into use about ten years ago, by which the bulb rail was displaced and the danger to the feet of horses was materially diminished, if not made impossible. The box rail is a safer form of rail—I have no doubt whatever that the evidence proves that incontestably. But I do not think that leads us very far in the solution of the question. The main and fundamental part of the defence is that these rails when they were laid were perfectly safe, and that they are not less safe now than they were when they were laid; the question therefore is just this,—When certain improvements in mechanism are introduced which conduce to the greater safety of the public, are a public body such as these Harbour Commissioners bound at once to introduce the improved mechanism and abandon the former system, which, though safe enough when it first came into use, has been superseded by the safer method? I am of opinion that the nature of the facts here is not sufficient to sustain that contention in this case. I do not say that there is not some difficulty in the matter. The Harbour Commissioners knew perfectly well that the

box rail was safer than the bulb rail at a place like this, as far as the mere crossing of horses is concerned. But, on the other hand, it seems to me that it is a matter to a certain extent in their own discretion. Both systems are in a certain degree dangerous to the traffic which has to cross the rails, but the liberty to lay down rails which must necessarily be to some extent dangerous is what their Act gives the Commissioners. It imposes on them the obligation of using that liberty in a way that is reasonably safe, and I am of opinion that the pursuer has failed to shew that the system which was formerly the best in existence does not still continue to be reasonably safe. I am therefore for adhering to the judgment of the Sheriff.

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LORD YOUNG.—I have throughout considered this a difficult case. The defenders are a public body, on whom no personal liability is sought to be imposed, and who have really no personal interest in the matter except in so far as they may be desirous of having it said that they have acted according to their duty, and it is their duty to see that the rails which they maintain along the public streets and quays are kept in a condition that is reasonably safe for the carts going to the loading and unloading of the ships. Now, I confess I am not so satisfied as I should like to have been that they have done everything in their power to secure the safety of the public in this respect, but then that is a question which it is very difficult to determine. The particular complaint is that it was necessary to the safety of the public to have box rails—bulb rails having been shewn by experience to be unsafe. That comes to be so much a question of degree that there is great difficulty in determining the matter, because there is no proposition more certain than this, that no public body and no private individual is always bound to provide the safest known invention. Human affairs could not go on on that footing. Here the Harbour Commissioners tell us that they have considered the matter, and that they are advised that it is really a nice question which is the safer of the two—box rails or bulb rails—that the one is safer in one direction, the other in another direction. Probably, on the whole, the box rail is the safer, but the Commissioners have not been inattentive to their duty. It is a matter of opinion, and the two Sheriffs are of opinion that the accident did not result from any negligence on the part of the defenders. Your Lordship agrees in that opinion, and I understand that that is the view of my two brethren also. I therefore cannot presume to differ on such a matter, though I confess my own opinion is that it would be better if the Commissioners, in the interests of the public safety, were to expend so much money out of the harbour funds in making this quay safer by the substitution of box rails for bulb rails, for, as I have said, I think it would be made safer, though I have no knowledge of the subject beyond what I gather from the evidence before us.

LORD CRAIGHILL and LORD RUTHERFORD CLARK concurred with the LORD JUSTICE-CLERK.

THE COURT pronounced this interlocutor:—"Find in fact (1) that on the occasion libelled, when a horse belonging to the pursuer was pulling a lorry loaded with grain across a line of rails at the harbour of Aberdeen, the property of the defenders, one of its hind feet slid into and became wedged in one of the rails, and was thereby injured; (2) that the said rails were laid down by the defenders under statutory authority, and are of the form and

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quality approved of and customary at the time and still in use, and at the date of the said accident were in good and sufficient order and repair; (3) that the accident was not caused by fault or negligence on the part of the defenders: Therefore dismiss the appeal," &c.

ANDREW URQUHART, S.S.C.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 86.

Feb. 2, 1887.
M'Lean v.
Angus
Brothers.

MRS FRANCES M'LEAN, Complainer (Respondent).—*Rhind—A. S. D. Thomson.*

ANGUS BROTHERS, Respondents (Reclaimers).—*Shaw—Craigie.*

Husband and Wife—Wife's capacity to contract—Promissory-note—Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21), secs. 1, 2, 8—Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), sec. 22.—Held that the Married Women's Property Act, 1881, and the Bills of Exchange Act, 1882, do not give married women capacity to grant promissory-notes.

2d DIVISION.
Lord Fraser.
I.

DUNCAN M'LEAN & SONS, wholesale provision merchants, Glasgow, finding themselves in difficulties, on 18th December 1885 convened a meeting of their creditors, and offered a composition of 8s. in the £, payable by four specified instalments. This offer the creditors present accepted. Mrs M'Lean, the wife of Duncan M'Lean, one of the partners, along with the firm, signed promissory-notes for the third instalment of 2s. 6d. in the £, payable at six months. The firm's signature was written by her husband, but he did not sign as an individual.

Mrs M'Lean having been charged on one of the promissory-notes for £200 in favour of Angus Brothers, produce merchants, Glasgow, brought a suspension, pleading;—(2) The complainer as a married woman could not validly sign the promissory-note charged on, and the charge ought therefore to be suspended.

Angus Brothers pleaded;—(2) The said Mrs M'Lean being possessed of means and estate exclusive of the *jus mariti* and right of administration of her husband at the date of granting said promissory-note and now, the said promissory-note constitutes a valid obligation against her and her estate.

On 20th November 1886 the Lord Ordinary (Fraser) suspended the charge, with expenses.

Angus Brothers reclaimed, and argued;—The Married Women's Property Act, 1881, sec. 1, subsec. 2,* gave a married woman power to grant an order for payments from the income of her moveable estate, and granting a bill was nothing more than that. Further, as section 2† must be interpreted by reference to section 1, the rents and produce of her heritable estate were in the same position. Then section 8‡ implied that although

* The Married Women's Property Act, 1881 (44 and 45 Vict. cap. 21), sec. 1, subsec. 2, enacts, with reference to the whole moveable or personal estate of the wife,—“Any income of such estate shall be payable to the wife on her individual receipt or to her order, and to this extent the husband's right of administration shall be excluded; but the wife shall not be entitled to assign the prospective income thereof, or, unless with her husband's consent, to dispose of such estate.”

† Sec. 2 enacts,—“Where a marriage is contracted after the passing of this Act, the rents and produce of heritable property in Scotland belonging to the wife shall no longer be subject to the *jus mariti* and right of administration of the husband.”

‡ Sec. 8 enacts,—“This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the recited Act (40 and 41 Vict. cap. 29).”

a wife's person could not be subject to diligence, her property might be. Further, under sec. 1, subsec. 2, she might contract to any extent with her husband's consent. These being a married woman's powers to contract, there came the Bills of Exchange Act, sec. 22, which declared that capacity to grant a bill was co-extensive with capacity to contract.*

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Mrs M'Lean was not called on.

LORD YOUNG.—I think the judgment is quite right here. By the common law of Scotland a married woman who has separate estate is not entitled to grant, or rather is protected against granting, a bill of exchange as cautioner for a debt. The Married Women's Property Act, which was intended to give her further protection, has, it is argued, taken away the protection which she already had. I cannot assent to that argument. I am quite unable to put such a construction on the words of the Act. The Bills of Exchange Act was also referred to. In it the general principle is announced—is quite superfluously announced—that the power to grant a bill of exchange is co-extensive with the power to contract. That is just the common law, and consequently the Act leaves the question exactly where it was. I therefore think we should adhere to the Lord Ordinary's judgment.

LORD CRAIGHILL, LORD RUTHERFORD CLARK, and the LORD JUSTICE-CLERK concurred.

THE COURT adhered.

MARCUS J. BROWN, S.S.C.—WINCHESTER & NICOLSON, S.S.C.—Agents.

LORD ELPHINSTONE, Pursuer.—D.-F. Mackintosh—D. Dundas.
THE MONKLAND IRON AND COAL COMPANY, LIMITED, AND LIQUIDATORS,
Defenders.—Ure.

No. 87.

Feb. 2, 1887.
Lord Elphinstone v. Monkland Iron and Coal Co. Limited.

Expenses—Skilled witnesses—Judge's certificate—Notice—A. S., 15th July 1876.—The Act of Sederunt, 15th July 1876, provides that where it is found necessary to employ skilled persons to make investigations previous to a trial or proof in order to qualify them to give evidence thereat, such additional charges for the trouble and expense of such persons shall be allowed as may be fair and reasonable, "provided that the Judge who tries the cause shall, on a motion made to him either at the trial or proof or within eight days thereafter, . . . certify that it was a fit case for such additional allowance." Held (1) that this Act does not apply to causes in which the evidence is led before one of the Judges of a Division on a remit by the Division, and (2) that in such causes it is in the discretion of the Court to allow additional charges in respect of skilled witnesses on the motion for the approval of the Auditor's report.

Opinion (per Lord Craighill) that notice that an application is to be made for a certificate for skilled witnesses need not be given to the opposite party.

(SEE *ante*, June 29, 1886, 13 R. (H. L.) 98.)

In this case the Court, on 30th October 1884, on a reclaiming note against Lord Lee's judgment giving decree in favour of the pursuer, allowed the parties a proof before answer of their respective averments,

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M.

* The Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), sec. 22, subsec. 1, enacts—"Capacity to incur liability as a party to a bill is co-extensive with capacity to contract: Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or endorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations."

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and remitted to Lord Rutherford Clark to take the proof. The proof was led before Lord Rutherford Clark on 2d December 1884. On 20th March 1885 the pursuer, Lord Elphinstone, applied to Lord Rutherford Clark for a certificate for an additional allowance of expenses in respect of four skilled witnesses under the Act of Sederunt, 15th July 1876.* This application, which was made without notice to the defenders, and was heard in their absence, was granted on the same day. On 27th May the Court dismissed the action, with expenses, but, on appeal to the House of Lords, this judgment was reversed, the pursuer being found entitled to expenses and costs. The Auditor taxed the account of expenses at £309, 3s. 6d., but reserved for the consideration of the Court the sum of £85, 0s. 3d. (included in the said £309, 3s. 6d.), being the amount of the additional expenses of the four skilled witnesses already mentioned, the defenders having objected to this sum being allowed on the grounds (1) that the certificate of the Judge had not been granted within eight days of the trial or proof, as required by the Act of Sederunt, and (2) that the application for the certificate had been heard in the absence of the opposite party, and without notice.†

On 2d February 1887 the pursuer moved for the approval of the Auditor's report, and argued that the sum of £85, 0s. 3d. ought to be allowed. If the Act of Sederunt applied to the case of proofs taken on remit by one of the Judges of a Division, the hearing before the Division was to be held as part of "the trial or proof" in the sense of the Act, and consequently the certificate here had been granted timeously. But alternatively, the Act of Sederunt did not apply, and that left the question of allowing this item of expense to the discretion of the Court. The Court had such a discretion; this was an Act of Sederunt, not an Act of Parliament. The second objection was bad, as it was neither a provision of the Act of Sederunt, nor the practice, to require notice to be given to the other side of an application for a certificate for skilled witnesses.

Argued for the defender;—"The trial or proof" in the sense of the Act was either the leading of the evidence before the Judge appointed to take it, in which case the certificate here was bad because not timeously granted, or it was the hearing before the Division, in which case equally this certificate was bad, because a single Judge of a Division could not act for the Division. The Act was the only warrant for such a charge: therefore if the case was not within the Act the Court had no discre-

* The Act of Sederunt, 15th July 1876, entitled "For regulating the fees and charges of enrolled law-agents practising before the Supreme Courts of Scotland," in the table of fees thereto annexed, provides (under head V., "Jury Trials and Proofs," subhead iii., "Allowances to Witnesses," sec. 2), that "in cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land-surveyors, or accountants to make investigations previous to a trial or proof in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the Judge who tries the cause shall, on a motion made to him either at the trial or proof, or within eight days thereafter if in session, or, if in vacation, within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance."

† In his report the Auditor stated,—". . . The terms of this rule are very precise, and, so far as my experience goes, it has been strictly applied. I may add that in cases where skilled witnesses are engaged the practice appears to be that the agents arrange for a meeting with the Judge, when they are heard on their respective applications for certificates, and (if necessary) against the crave of the opposite party in whole or in part."

tion, and must disallow the charge.¹ The second ground of objection was merely an example of the well-established rule of practice, that the opposite party was entitled to notice of all motions.

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LORD JUSTICE-CLERK.—My impression is that we ought to allow the charges to which objection is here taken. There is no doubt that the provision of the Act of Sederunt has been applied, and applied strictly in more cases than one, but nevertheless the matter must be dealt with according to the fair and reasonable meaning of the words of the Act. The proof here was taken before one of our own number—before Lord Rutherford Clark—whose duty simply was to report the proof to the Court. It may be difficult to say whether, in such circumstances, the trial of the case takes place before the Judge who acts as the Commissioner of the Court to take the evidence, or before the Court which decides the cause on that evidence, for the question involves a consideration of the conduct of the parties and of the matters evolved in evidence at the time. Lord Rutherford Clark gave a certificate, but he did so after the lapse of the eight days mentioned in the Act of Sederunt, if these are to be counted from the termination of the proof, and not from the trial of the cause in the sense of the judgment of the Court. On the whole matter I find it so difficult to apply the strict words of the Act to the case of the proof taken by one of ourselves, that I am not disposed to give effect to the objections here.

LORD YOUNG.—I concur. It is no doubt very fitting that the practice in ordinary proofs and jury trials should continue to follow the Act of Sederunt strictly. The question for the Judge is simply whether the evidence given by this or that witness before him is of such a character as to make it necessary or expedient that the witness should visit the locality which has given rise to the action in order to prepare himself for giving evidence at the proof. But there is no provision for the exact case which we have here. We must therefore consider this objection on its own merits, and I have no difficulty in holding that the charges which are here objected to should be allowed.

LORD CRAIGHILL.—I am of the same opinion. Looking to its terms I do not think that the Act of Sederunt applies here, and, accordingly, the question must be determined according to the view which the Court may take of these charges, and, for my own part, I am of opinion that these charges are charges which ought to be allowed. I cannot see that either the one party or the other will be prejudiced by our doing so. In regard to the second ground of objection, I do not think that notice was necessary. No doubt to give notice of motion by the one side to the other is convenient and proper, but I am not aware that there is any rule or practice in the Outer-House which makes such notice indispensable.

LORD RUTHERFURD CLARK concurred.

THE COURT approved of the Auditor's report.

DUNDAS & WILSON, C.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

¹ *M'Callum's Trustees v. M'Nab*, March 19, 1868, 6 Macph. 647, 40 Scot. Jur. 334; *Tough's Trustees v. Dumbarton Water Commissioners*, May 14, 1874, 1 R. 879.

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ADAM MORRISON, Pursuer (Respondent).—*Pearson*—*M'Lennan*.
WALTER MONTGOMERIE NEILSON, Defender (Reclaimant).—*Murray*—*C. S. Dickson*.

Ultra vires—Jurisdiction—Volunteer—Volunteer Act, 1863 (26 and 27 Vict. cap. 65), secs. 24, 25, and 27.—The 24th section of the Volunteer Act, 1863, enacts that the officers and volunteers of a volunteer corps may from time to time make "rules for the management of the property, finances, and civil affairs of the corps," which, when approved by Her Majesty through one of Her Majesty's Principal Secretaries of State, "shall be binding on all persons." The 25th section enacts that "the right to sue for and recover" current subscriptions, arrears of subscriptions, and other money due to the corps "shall vest in the commanding officer for the time being. The 27th section enacts that "if any person belonging or having belonged to a volunteer corps neglects or refuses to pay any money subscribed or undertaken to be paid by him towards any of the funds or expenses of such corps, or due under the rules of such corps, and actually payable by him," such money shall (without prejudice to any other remedy) be recoverable as a penalty.

Held that the rules for the management of the property, finances, and civil affairs of a corps, made and approved in terms of the above enactments, may competently include rules providing for the payment of subscriptions by officers (both active and honorary) to the funds of the corps, and that such subscriptions so provided for may be recovered in a Court of law.

Statute—Statutory rules—Construction—Prospective or retrospective—Volunteer corps subscription—Volunteer Act, 1863 (26 and 27 Vict. cap. 65).—The rules of a volunteer corps, made in terms of the Volunteer Act, 1863, were dated 26th March 1885, and provided, *inter alia*, that subscriptions of members to the regimental funds should fall due on the 31st October in each year for the twelve months preceding; and that all members of the corps should be liable for the full year's subscription, provided they had been members of the corps for one calendar month in the year. *Held (diss. Lord Young)* that a subscription was due for the year ending 31st October 1885, although four months of that year had elapsed when the rules were made.

2D DIVISION.
Lord M'Laren.
I.

ON 7th May 1886 Adam Morrison, of Gartloch, Lanarkshire, Lieutenant-Colonel commanding the 6th Regiment of Lanarkshire Rifle Volunteers, raised this action against Walter Montgomerie Neilson, of Queenshill, Kirkcudbright, Honorary Colonel of the same regiment, concluding for payment of £75 as the subscription due by the defender to the regimental funds for the year ending 31st October 1885, in accordance with certain rules alleged to have been made for the regiment in terms of the Volunteer Act, 1863, which "sum (as stated in cond. 4) fell due in terms of the said rules on 31st October 1885 for the twelve months preceding."

* The Volunteer Act, 1863 (26 and 27 Vict. c. 65), enacts, sec. 24,—“The officers and volunteers belonging to a volunteer corps may from time to time make rules for the management of the property, finances, and civil affairs of the corps, and may alter or repeal any such rules; but any such rules shall not have effect unless and until the commanding officer of the corps thinks fit to transmit the same to the lieutenant of the county to which the corps belongs—[By the Act 34 and 35 Vict. cap. 86, sec. 6, the intervention of the lieutenant of the county was abolished]—and such lieutenant thinks fit to submit the same for Her Majesty's approval, and such approval, signified through one of Her Majesty's Principal Secretaries of State, is notified by such lieutenant to the commanding officer of the corps, to be by him forthwith communicated to the corps; whereupon the rules so approved shall be binding on all persons.”

Section 25 enacts,—“All money subscribed by or to or for the use of a volunteer corps or administrative regiment, and all effects belonging to any such corps or regiment, or lawfully used by it, not being the property of any indi-

The rules founded on, which were dated 26th March 1885 (other rules No. 88. having been in force previously), provided, *inter alia*, as follows:—

"2. The corps shall consist of two classes,—(1) Enrolled members, consisting of efficient and non-efficient; and of (2) honorary members, including the honorary colonel and officers who retire, or have retired, with their rank and wish to continue members of the corps, the latter class contributing to the funds of the corps, but not being enrolled for service. Feb. 2, 1887. Morrison v. Neilson.

"3. All subscriptions shall fall due on the 31st of October in each year for the twelve months preceding. All members of either class shall be liable for the full year's subscription, provided they have been members for one calendar month in any one year.

"4. The annual subscription of officers, honorary officers, and honorary members shall be as follows, viz.:—

Honorary Colonel,	£75	0	0
Lieut.-Colonel,	50	0	0
Majors,	25	0	0
Captains,	10	0	0
Surgeon,	10	0	0
Lieutenants,	7	10	0
Acting-Surgeon,	7	10	0

Honorary officers (except hon. colonel), one-half of the subscription of officers of their respective ranks on the active list.

Honorary members,	1	1	0
or one donation of	10	10	0"

The pursuer pleaded;—The defender being due and resting owing the

vidual officer or volunteer or non-commissioned officer of the volunteer permanent staff belonging to the corps or regiment, and the exclusive right to sue for and recover current subscriptions, arrears of subscriptions, and other money due to the corps or regiment, and all lands acquired by the corps or regiment, shall vest in the commanding officer of the corps for the time being," &c.

Section 27 enacts,—“If any person belonging or having belonged to a volunteer corps or administrative regiment neglects or refuses to pay any money subscribed or undertaken to be paid by him towards any of the funds or expenses of such corps or regiment, or due under the rules of such corps, and actually payable by him, or to pay any fine incurred by him under the rules of such corps, such money or fine shall (without prejudice to any other remedy) be recoverable from him, with costs, at any time within twelve months after the same becomes due and payable as a penalty under this Act is recoverable, and when recovered shall be applied as part of the general fund of the corps or regiment.”

The War Office also issued “Regulations for the Volunteer Force”—(See Volunteer Act, 1863, sec. 16). Articles 447-449 of the Regulations for 1884 made provisions for “honorary members,” and, *inter alia*, that such members “will not be included in the muster-roll of the corps to which they belong”; that they “are not subject to military discipline, nor allowed to interfere with the military duties of the corps,” and that they “are not under any circumstances liable to be assembled for actual service.” [The Act of 1863, secs. 17 to 20, made provisions for the calling out of volunteers for active service.]

The Regulations for the Volunteer Force, 1884, further provide (art. 495) that “in order to give legal force to the rules proposed by a volunteer force for the management of its property, finances, and civil affairs, they must be approved at a general meeting of the officers and other members of the corps, and submitted by the commanding officer” to the War Office for the approval of Her Majesty.”

The Regulations further gave a model set of rules for volunteer corps. By these model rules it was contemplated, *inter alia*, that honorary members should pay a “donation” or an “annual subscription” to the funds of the corps.

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amount sued for, the pursuer, as commanding officer foresaid, is entitled to decree as concluded for, with expenses.

The defender denied he had ever consented to the rules being adopted, and stated that (Stat. 7) "Neither the said corps, nor the officers thereof, had any power or authority to pass or make the said last mentioned rules, and the same are *ultra vires* and illegal, especially in so far as they fix the subscription of the honorary colonel at £75, or bear, or are alleged to make the defender liable for a subscription of £75 per annum. The alleged subscription of £75 was not necessary for or imposed in order to benefit the regiment, but solely for the purpose of endeavouring to compel the defender to resign his rank by imposing a heavy fine upon him."

The defender pleaded;—(5) The alleged rules being *ultra vires* and illegal, the defender should be assolizied.

On 1st July 1886 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds, on a true construction of the enactment contained in the Volunteer Act, 1863, that the power of making rules, subject to approval of Her Majesty on the advice of the Secretary of State, includes the determination of the sums to be contributed by officers of each rank towards the regimental fund: Finds that the defender's contribution has, in conformity with the said statutory power, been fixed at the sum of £75: That no cause has been shewn for inquiry into the procedure relative to said rules, and that the same are *ex facie* valid, being approved of by the War Office: Therefore decerns against the defender conform to the conclusions of the libel: Finds him liable in expenses," &c.*

* "OPINION.—I am quite clear that I must give decree in this case. I think I must take it as matter of general knowledge, of which the Court may take cognisance, that there is a regimental fund in connection with all the Queen's regiments, whether they are the regular forces or the volunteers, and that it is part of our military system that the officers are called upon to contribute according to a scale to this fund. If there were any doubt about this, information could easily be got from the War Office. But, being part of the public administration of the country, I think I am entitled to proceed upon the general knowledge which everyone is supposed to possess of these facts—that there is a regimental fund to which officers are liable to contribute. That being so, and the Volunteer Act empowering the members of the corps to make rules, subject to the approval of the Queen on the recommendation of her minister, I hold that there is a sufficient statutory authority to the persons designated to deal with this fund—to deal with it as a fund kept up in the manner that has already become matter of practice. Now, this is not the first occasion on which the officers of the corps in question have been assessed according to a scale for contributions to the regimental fund, because what is complained of is that the scale of contributions has been raised, and it is admitted that there has been a fund in time past. I think the defender, as I read the record, does not indeed dispute that there is such a fund, and that all the officers are to contribute to it. That being so, I do not see any good reason why rules should not be made regarding it, and approved by the War Office under the statutory power. If it could be shewn that under an erroneous interpretation of the statute the approval of the military authorities has been obtained to something for which they had no statutory authority, then a question for a Court of law would have arisen; but that has not been shewn to my satisfaction. I conceive that the regulation of the contributions to the fund is fairly within the scope of the statutory powers; and under the statute a discretion is vested, in the first instance, in the corps itself, and, secondly, in the War Office, in the form prescribed, to enact such rules. I do not think that this Court has any power to interfere with that discretion. It is a proper matter of administration by the Executive. I think we have no more power to interfere with the War Office than the War Office would have power to review a decision of the Court of Session. But the aid of the Court

The defender reclaimed, and argued;—(1) If the sum here sued for was recoverable in a Court of law, that must be either because the defender had voluntarily agreed to pay it or because the regiment had the power to assess him compulsorily for it. He certainly had not agreed in express terms; the utmost that could be said against him, on the ground of agreement, was that he might have attended the regimental meeting at which (as was alleged) these subscriptions were imposed, and that his non-attendance was to be held as consent. But he had had no notice of this meeting—the rules were passed behind his back, and their true object was to impose a heavy fine on the defender in order to get him to retire. He was charged much more proportionately than other honorary officers. Even if he had been present when the rules were adopted, and had voted against the proposal, but had been out-voted, he had never agreed that the majority should have the power of imposing subscriptions on him, and to say that without any such agreement on his part the majority had that power was simply to say that they had the power of compulsory assessment. Now, such a power must be either statutory or in virtue of a crown grant, and it must be conferred expressly or at least by the clearest implication. The statute here founded on was the Volunteer Act, 1863, sections 24, 25, and 27. Section 24 certainly conferred no power to assess—it assumed the existence of regimental property, but said nothing about the mode of acquiring such property. Similarly, section 25 assumed the existence of “subscriptions,” but said nothing about their nature. Section 27 dealt first with “money subscribed or undertaken to be paid” by the volunteer—that plainly referred to subscriptions which the volunteer had voluntarily agreed to pay, and had nothing to do with assessment. The section also dealt with “money due under the rules of such corps, and actually payable by” the volunteer, but that simply referred back to section 24, and added nothing to it. The rules therefore dealt with a subject which was not within the scope of the three sections founded on. It might be said that the approval of the War Office made a difference. It was difficult to see how the approval of the War Office could alter the construction of an Act of Parliament, and bring within the scope of the Act what the Act itself did not include, or how it could make a contract for a man which he himself had not made, and it must do the one or the other if it was to have the effect of making this subscription recoverable in a Court of law. It might be that the War Office had the power of making such subscriptions a condition of holding the Queen’s commission in volunteer regiments. These subscriptions were essentially voluntary in their nature—alogous to subscriptions to a club—but then the regiment had not the power, which a club possessed, of expelling its members for non-payment, and the War Office therefore might agree that those members who would not pay should lose their commissions. That was the true remedy, if the pursuer had any, but it gave the defender an opportunity of shewing to the War Office authorities that the real object of these rules was to oblige him to retire, and of explaining the whole circumstances connected with their adoption. In any case, honorary officers could not be assessed compulsorily. They were not officers of the regiment in any real sense—they were not liable to be called out for active service. Their position was analogous to that of the colonel of a regiment in the regular army.

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At all events (2) the rules did not cover the sum here sued for, which

is necessary in order to enforce payment of the sum when fixed; and when it is admitted that the defender has not paid, I think that decree must be given against him. I therefore grant decree, with expenses.”

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was the subscription for 1884-5, while the rules were not adopted till March 1885. Otherwise the rules would have a retrospective effect; but they did not bear expressly to be retrospective, and that was necessary. If the defender had retired in January 1885, he would, on such a construction, have been liable, although he had ceased to be an officer when the rules were adopted, and had no power to prevent their adoption.

Argued for the pursuer;—(1) The only reasonable construction of the Act of Parliament was that officers' subscriptions might be included in the rules of a volunteer corps, and might be recovered in a Court of law. That was certainly the view of the War Office, as their regulations shewed. The rules had been approved by the War Office, and the Court of Session could not get behind that approval on the ground of any informality. All the formalities, however, had been duly complied with here, and the defender, had he pleased, might have attended and voted when the rules were adopted. He had had as much notice as any other officer had had. He was entitled to take part in the meeting though an honorary officer, nor was there anything in the Act to exempt honorary officers from payment of subscriptions—they were officers of the corps. It was not the fact that a large subscription had been imposed on the defender with the view of compelling him to retire. It was not to be supposed that the War Office would pass rules which would have such an effect. (2) The subscription for the year ending October 1885 was in accordance with the rules to which the defender must be held to have given his assent. Rule 3 provided that those who had been members for one month in a year were liable for the year, and that rule must receive effect.¹ The defender fulfilled that condition. If he had ceased to be a member before March 1885, though after October 1884, that would have been a different case. He would not then have assented to the rule.

At advising,—

LORD CRAIGHILL.—The pursuer of this action is Mr Morrison of Gartloch, Lieutenant-Colonel commanding the 6th Regiment of Lanarkshire Rifle Volunteers, and the defender is Mr Montgomerie Neilson, honorary Colonel of that regiment. The subject-matter of suit is the sum of £75 said to be due as the defender's annual subscription to the regimental funds for the year from 31st October 1884 to 31st October 1885. The ground of action is the rules of the regiment made in March 1885 by virtue of the 24th section of the Volunteer Act, 1863, for the management of the property, finances, and civil affairs of the corps, duly approved by Her Majesty, as required by that statute. The second of these rules is:—"The corps shall consist of two classes—(1) enrolled members, consisting of efficient and non-efficient; and of (2) honorary members, including the honorary colonel and officers who retire, or have retired, with their rank, and wish to continue members of the corps, the latter class contributing to the funds of the corps, but not being enrolled for service"; the third,—“All subscriptions shall fall due on the 31st of October in each year for the twelve months preceding. All members of either class shall be liable for the full year's subscription, provided they have been members for one calendar month in any one year”; and the fourth,—“The annual subscription of officers, honorary officers, and honorary members shall be as follows, viz., honorary colonel, £75,” the annual subscriptions of other officers being in like manner particularised.

There are five pleas in law set forth in defence on the record, but that alone

¹ Lord Macdonald v. Finlayson, Dec. 6, 1884, 12 R. 228.

upon which argument is offered in support of the reclaiming note was the 5th, No. 88. which is as follows :—"The alleged rules being *ultra vires* and illegal, the defender should be assoilzied." The Lord Ordinary has repelled this plea, and ^{Feb. 2, 1887.} ^{Morrison v. Neilson.} decreed in favour of the pursuer. I concur in this judgment, and in the reasons for it which have been given by the Lord Ordinary. These appear to me to be perfectly satisfactory, and consequently little in addition requires to be said in explanation of my views of the case.

The formality of the rules is not disputed, all the statutory conditions required for efficacy having been fulfilled. The interpretation of the rules is not doubtful. Contributions or subscriptions, according to the language of the rules, are not mere free-will offerings which may be given or withheld at the officer's pleasure. On the contrary, they are presented as matters of obligation, and it is upon this view alone that the consideration and decision of the defender's fifth, which may be said in truth, so far as his pleadings on the record are concerned, to be his only plea, becomes necessary on the present occasion. It would be strange were it otherwise, for the volunteer forces are essentially self-supporting, and wholly unpaid, although Government arms the men, and contributes a certain sum towards the corporate expenditure. Provision must be made accordingly within the regiment itself for supplying its wants, and hence not merely the propriety but the necessity there is for raising funds by which this result may be accomplished. There is no hardship whatever in the arrangement, for the corps itself with the officers fixes what is to be paid. This is the plain import of the rules. Are these within the purview of the Volunteer Act, 1863? This mainly depends on the interpretation of the 24th section of that statute, which enacts that "the officers and volunteers belonging to a volunteer corps may from time to time make rules for the management of the property, finances, and civil affairs of the corps, and may alter or repeal any such rules, but such rules shall not have effect unless and until the commanding officer of the corps thinks fit to transmit the same to the lieutenant of the county to which the corps belongs, and such lieutenant thinks fit to submit the same for Her Majesty's approval, and such approval, signified through one of Her Majesty's principal Secretaries of State, is notified by such lieutenant to the commanding officer of the corps, to be by him forthwith communicated to the corps, whereupon the rules so approved shall be binding on all persons." The rules in question were passed by the officers and volunteers belonging to the defender's regiment. They obtained Her Majesty's approval. They were transmitted to the officer commanding the regiment by the Secretary for War, the consequence being that rules so approved of and so transmitted are binding upon all persons. No enactment could be broader or more absolute. The rules having been passed, approved, and transmitted, everyone concerned is bound. The defender, even if others could, cannot say that he is exempted from their operation, because he is as good as named in the rules. The second rule provides, *inter alia*, that the honorary colonel and officers who retire or who have retired with their rank, and wish to continue members of the corps, shall be members, and shall contribute to the funds of the corps. This is not putting contribution in his option; it is making contribution a matter of obligation. What was said at the debate was that though by section 24 authority was given to make rules for the management of the property, finances, and civil affairs of the corps, this does not imply authority to pass rules for raising money by making subscriptions matters of debt. This contention is, I think, erroneous. The raising of

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money is a necessity, and when there was power given to manage the finances and civil affairs of the corps—or, in other words, to provide for the requisite expenditure—it is only reasonable to hold that power was given to pass such rules as those which are the ground of action here. This has always been the recognised interpretation. The War Office acts upon it. Other volunteer regiments have acted upon it, and, so far as appears, the defender is the first person in his position who has resisted legal liability. But in truth the point is fixed by the closing words of the 24th section of the Volunteer Act, 1863, already quoted,—“The rules so approved shall be binding on all persons.” Therefore the £75 sued for is of necessity a debt due by the defender in terms of the 4th of these rules. There can be no opposite determination unless the statute is to be disregarded in the judgment to be pronounced.

In connection with section 24, section 25 of the same Act must be taken into view. This latter section enacts that “all money subscribed by or to or for the use of a volunteer corps,” “and all effects belonging to any such corps,” “and lawfully used by it, not being the property of any individual officer, or volunteer, or non-commissioned officer of the volunteer permanent staff belonging to the corps or regiment, and the exclusive right to sue for and recover current subscriptions, arrears of subscriptions, and other money due to the corps or regiment . . . shall vest in the commanding officer of the corps or regiment for the time being, and his successors in office, with power for him and his successors to sue, to make contracts and conveyances, and to do all other lawful things relating thereto.” Subscriptions, therefore, are things that may be sued for, which they could not be if for them the officers of the regiment particularised in the rules were not under legal liability. The two sections taken together made it quite clear. The sums mentioned in the rules are debts in the ordinary acceptance of the word, and may be sued for as such by the officer commanding the regiment. This 25th section is not necessary for the case of the pursuer, but it is very convenient.

The defender, however, urged at the debate that the rules in question could not be acted on to the effect of giving judgment against the defender, because that would be to give to the rules a retrospective operation. I was somewhat impressed with this consideration when it was first presented, but I have come without much difficulty to the conclusion that it must be overruled. The rules must receive effect. This is matter of statutory enactment, and accordingly, as rule 3 provides that all subscriptions shall fall due on the 31st of October in each year for the twelve months preceding, and that all members of either class shall be liable for the full year's subscription provided they have been members for one calendar month in any one year, and as the fact is that the defender has been a member of the corps and honorary colonel for more than one calendar month in the current year, his liability for his subscription of £75 must be held to be established.

On the whole matter, my opinion is that the decision of the Lord Ordinary is right, and ought to be affirmed.

LORD RUTHERFORD CLARK.—I agree in that opinion.

LORD YOUNG.—This is, I think, an unpleasant case. I put the question when the case was being argued whether any similar case had ever occurred, and I think the answer was that none ever had. It is therefore the first case

of an officer of a volunteer corps and his brother officers getting upon such terms that an action is brought against him for his subscription to the corps. I should have thought, and past experience seems to prove it—if it be true that this is the first case of the kind—that subscriptions which are really due, whether in law or in honour and good feeling, are recoverable without resorting to a Court of law, and if not so recoverable that the corps had better go without them and without the officer. Because, in so far as subscriptions or any other payments stand upon the Queen's authority, they may be enforced against any officer who is contumacious in resisting that authority by the War Office, without anything so unseemly as an action in a Court of law.

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But this case seems to have been brought, or at least defended, in order to determine a general question of law. The only defence which is here stated is, that the rule under which the subscription sued for is imposed is illegal. There is a statement to that effect, and the plea in law founded upon that statement is as follows:—"The alleged rules being *ultra vires* and illegal, the defender should be assoilzied." That is the fifth plea; the other pleas might as well be stated in any other case as in the present. That plea is stated, of course, in reference to the particular case in hand, and the action is brought to recover a subscription for the year from October 1884 to October 1885 as prescribed by these rules. I must concur with my brethren in holding that these rules are legal, and therefore binding. It is suggested—and I must say there is an unpleasant amount of plausibility in the suggestion—that the officers of the regiment, having not a good feeling towards their honorary Colonel, but rather the reverse, made the rules for the purpose—and only for the purpose—of introducing into them the provision that the honorary Colonel should pay a subscription of £75 a-year, which was represented to us as an altogether extravagant and unprecedented sum. I asked if there was any precedent for such a thing, and I got much the same answer as I did to the question whether there was a precedent for such an action; I was told there was none. The defender says that this was done behind his back, and without any notice to him, and it was, he says, to his surprise, and of course pain, that he found that such a proceeding had been so resorted to in order, as he believes, that he might be forced to resign. I should have wished that there had been less countenance given to this surmise as a probable one in itself from the actual facts of the case. But I concur with the Lord Ordinary—I understand it is also the opinion of your Lordships—that upon that question we cannot enter here. If the defender has really been ill-used, and taken advantage of in an unworthy manner, he ought to have recourse to the War Office authorities, who are perfectly competent to inquire into the matter, and if they see fit, to redress any such iniquity if such was perpetrated. It cannot be supposed that the War Office authorities would countenance any indirect attempt to forward the one side of a quarrel, the object of which was to get rid of the honorary Colonel of a regiment, and if the answer to any resort on the part of the officer to the War Office was this,—"This is all right, and as we intended, and there is precedent for it in other cases," then of course the honorary Colonel, irrespective of all those other matters, would be acting unworthily and contumaciously if he refused payment. And if he did refuse payment in such circumstances, there is a remedy without coming to a Court of law as I have already observed. But since the case is here, I agree that we cannot make an inquiry into that matter because we cannot give any redress so far as it is concerned. I concur in expressing the

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opinion that the rules are lawful and binding, and that the subscription, whether a voluntary subscription or a subscription due by the rules of the corps (by that I mean lawful and binding rules, as the rules in question are), may according to the Act of Parliament be recovered by action, and may even be recovered as a penalty may be recovered without prejudice to other claims and remedies. Therefore had I been of opinion that the rules applied to the subscription here sued for, I should have concurred entirely in the judgment of the Lord Ordinary, and with that which your Lordships are to pronounce.

But then the question arises, Do these rules apply to the year in question, the subscription for which is sued for? The year was that from 31st October 1884 to 31st October 1885, as I have already mentioned, and the subscription, as stated in cond. 4, fell due in terms of said rules on the 31st day of October 1885, for the twelve months preceding. Now, it is to be observed that the rules here relied on are dated 26th March 1885. According to the previous practice, and according to existing rules, subscriptions are annual. Subscriptions for the year begin and end on the 31st October. They are as much "annual" as rents would be, or are, in the general case; as much "annual" as rates would be, or are, in the general case. This, then, is a subscription for the year from 31st October 1884 to 31st October 1885. Does a rule made in March 1885 apply to that year? I am of opinion—and I confess very clearly of opinion—that it does not. If the rule had said so—that it shall apply to the current year, six months of which had passed—of course it would have to receive effect. But with respect to the question,—retrospective or only prospective operation,—I cannot read the rule otherwise than I would read an Act of Parliament. If an Act of Parliament passed in the month of March 1885 dealt with an annual tax or rate which ran from October to October, I think it too clear to be disputed that it would not apply to a tax for the current year, but that its operation and application would begin with the commencement of the following year. The tax for the year 1884-1885 stands upon another Act or upon no Act at all; it is just like a rate or tax for a current year standing upon a prior Act of Parliament after another Act has been passed. Any Act of Parliament for increasing or reducing an annual rate must be passed in a current year, for there is and can be no interval. I confess, therefore, that but for the opinion which your Lordships have expressed to the contrary, I should have felt no doubt or hesitation about it. Neither the rule, which by statute is imperative, nor the Act of Parliament is, I think, to be read as retrospective. If the Act or the rule relates to an annual tax, an annual burden, annual rent, or annual subscription, it applies to the tax, rent, burden, or subscription for the year immediately following the passing of the Act of Parliament or the making of the rule. The rule says,—“All subscriptions shall fall due on the 31st October in each year for the twelve months preceding.” Well, but the only twelve months which follow this rule—that is, which immediately follow it—begin in October 1885, which is the commencement of the first year after the passing of the Act. Take another month. If the rule had been passed in the month of August, or any month before October, would its operation have commenced in the preceding or the following month of October? The rule containing nothing on the subject, there can in my view be no doubt when its operation would commence. I must say that upon this point I have a very distinct and clear opinion.

Therefore, agreeing with your Lordships and the Lord Ordinary upon the

merits of the case, that the rule is binding and that the subscription under the rule is a debt recoverable by action, I differ upon the other point, being of opinion that the rule founded on has no application to the annual subscription which is here sued for.

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The judgment of the Court, in accordance with the opinion of your Lordships, will be to refuse the reclaiming note and affirm the interlocutor.

The LORD JUSTICE-CLERK was absent.

THE COURT adhered.

JAMES SKINNER, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

ALEXANDER MACDONALD (Clerk to the Police Commissioners of Govan), No. 89.
First Party.—*Baxter.*

JOHN ARMOUR AND ANOTHER, Second Parties.—*M'Lennan.*

RICHARD RUSSELL AND ANOTHER, Third Parties.—*M'Lennan.*

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Road—Assessment—Roads and Bridges Act, 1878 (41 and 42 Vict. c. 51), sec. 54.—Section 54 of the Roads and Bridges Act, 1878, enacts, that the amount required for the purposes of the Act "shall be levied by the local authority at such rates as may be necessary for the purpose, by an assessment to be imposed and levied on all lands and heritages within the burgh, and such assessment shall be paid, except as otherwise expressly provided, one half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which such assessments are imposed." *Held (diss. Lord Rutherford Clark)* that under this enactment the commissioners were to levy from the individual owners and occupiers such equal rate per pound as would produce the aggregate sum required, and that the principle of *Galloway v. Nicolson*, March 19, 1875, 2 R. 650, under which the aggregate sum required would have been divided into two equal parts, and the one part levied from the owners as a class, and the other from the occupiers as a class, did not apply.

Road—Assessment—Exemption—Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. c. 51), secs. 54, 55, and 86—General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. c. 110), secs. 87, 88, and 89.—Under the General Police and Improvement Act, 1862, assessments are levied from the occupiers of lands and heritages, and from the owners of subjects let at a rent under £4 in place of the occupiers (but subject to deduction of one-fourth), and the 89th section makes provision for a deduction from the assessment where premises have been unoccupied for part of the year.

Under the Roads and Bridges Act, 1878, an assessment on lands and heritages falls to be paid one half by the owner and the other half by the occupier, and by its 86th section the Act provides that "the assessments authorised by this Act shall be subject to like exemptions and restrictions as are applicable to the said police assessment."

Held, on a construction of the foregoing and relative provisions of the above Acts, that the occupiers of houses within a burgh, under the Roads and Bridges Act, 1878, are entitled to the exemptions provided to occupiers by the 87th, 88th, and 89th sections of the General Police and Improvement Act, 1862, but that the exemptions were inapplicable to an assessment imposed on owners as such.

Held further, that the 86th section of the Roads and Bridges Act, in giving the local authority power to relieve occupiers of lands and heritages under the annual value of £4 on the ground of poverty, was not inconsistent with and did not supersede the power given under the 88th section of the General Police and Improvement Act to remit payment of the assessment under the Roads and Bridges Act on the ground of poverty irrespective of the amount of rent.

THIS was a special case presented on 25th October 1886 by (1) Alex-^{2d} Division.
ander Macdonald, clerk to and as representing the Police Commissioners
of the burgh of Govan, as first party; (2) John Armour and another,
owners of properties in the said burgh, which were at the date of the case,
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and had been since Whitsunday 1885, wholly unlet and unoccupied, as second parties; and (3) Richard Russell and another, occupiers of premises within the said burgh, as third parties, to have the opinion and judgment of the Court on certain questions arising under the sections of the General Police and Improvement (Scotland) Act, 1862, and the Roads and Bridges (Scotland) Act, 1878, quoted below.*

* The following were the provisions of the General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), referred to in the case:—

Sec. 64.—“The commissioners shall, in such manner as to them shall seem best for the police purposes of this Act, estimate, assess, levy, and apply the sums of money hereby authorised to be raised for the police purposes of this Act. . . .”

Sec. 84.—“The commissioners “shall assess all occupiers of lands or premises within the burgh, according to the Valuation-roll made up and completed in terms of the Acts in force for the valuation of lands and heritages in Scotland, subject to the exceptions hereinafter provided, in the sums necessary to be levied for the police purposes of this Act, in so far as the same may have been adopted, and for the purposes to which the police assessment authorised by any Act in force in such burgh at the time of such adoption might have been applied, . . . and such assessment shall, for the purposes of this Act, be called the police assessment.”

Sec. 87.—“The commissioners shall assess the owners in place of the occupiers of all lands or premises let at a rent under £4, and levy such assessment from such owners; but the commissioners shall allow to such owners a deduction from such assessment equal to one-fourth of the amount thereof. . . .”

Sec. 88.—“The commissioners may, on the ground of the poverty or inability to pay of any person liable in the police assessment under this Act, remit, in whole or in part, payment of said assessment by such person, in such manner as the commissioners shall in their discretion think just and reasonable, but upon no other account whatsoever.”

Sec. 89.—“The assessments hereinbefore authorised to be imposed shall be levied from the occupiers of lands or premises, but deduction shall be allowed by the commissioners of the assessment for any period during which any lands or premises shall not be let or occupied for three months consecutively in any one year, and owners who shall let for rent or hire lands or premises for less than a year shall, themselves as well as the occupiers, be responsible for the said assessment applicable to any period less than a year, and the same may be recovered from such owners or from such occupiers as the commissioners shall judge expedient.”

The following were the provisions of the Roads and Bridges (Scotland) Act, 1878, (41 and 42 Vict. cap. 51), founded on:—

Sec. 54.—“The amount required for carrying out the provisions of this Act within any burgh, or by the local authority thereof, where there is no rate or assessment now levied, wholly or partly for the maintenance and repair of streets or roads within the same, shall be levied by the burgh local authority at such rates as may be necessary for the purpose, by an assessment to be imposed and levied on all lands and heritages within the burgh; and such assessment shall be paid, except as otherwise expressly provided, one half by the proprietor and the other half by the tenant or occupier of the lands and heritages on which such assessments are imposed, unless where the name of the tenant or occupier is not set forth in the Valuation-roll, in which case the whole of the assessment imposed on such lands and heritages may be levied from and paid by the proprietor, who shall be entitled to recover half thereof from the tenant or occupier.”

Sec. 55 made provision for the adoption of sec. 54 in burghs in which the assessment for streets and roads had hitherto been levied under any local or general Act.

Sec. 86.—“The local authority of any burgh shall, in the imposing, levying and recovering of the assessments authorised by this Act, possess the whole powers, rights, and remedies in force for the time being within such burgh.”

The burgh of Govan was constituted in 1864 under the General Police No. 89. Act, 1862, by which the Police Commissioners, *inter alia*, had charge of the maintenance and repair of the roads, streets, and sewers in the burgh, but after the passing of the Roads and Bridges Act, 1878, the method of assessment provided by the 54th section of that Act was duly adopted by the burgh.

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The questions stated in the case were :—“(1) Are the Police Commissioners of Govan, in levying and imposing assessments under the 54th section of the Roads and Bridges Act, subjected by the 86th section of that Act to any of the exemptions and restrictions contained in sections 87, 88, and 89 of the General Police and Improvement Act, 1862? And if so, (2) Are occupiers within burgh entitled under the Roads and Bridges Act to the same exemptions as they were under the 87th, 88th, and 89th sections of the General Police and Improvement Act? (3) Are owners of unlet and unoccupied houses within burgh entitled to the exemptions and deductions provided for in the 87th, 88th, and 89th sections of the General Police and Improvement Act? (4) Do the terms of the 86th section of the Roads and Bridges Act, giving the local authority power to relieve occupiers of lands or heritages under the annual value of £4 as appearing in the Valuation-roll, limit or derogate from the power given under the 88th section of the General Police and Improvement Act, 1862, whereby the Commissioners are empowered to remit in whole or in part payment of assessment in the case of any person, irrespective of the amount of rent, on the ground of poverty or inability to pay assessment? (5) Is it legal for the Commissioners, as the local authority, to exact from owners more than one-half of the assessment requiring to be raised for the purposes of the Roads and Bridges Act (exclusive of monies required for payment of road debts),—that is to say, suppose they require to raise a sum of £5000, can they assess or exact from owners more than £2500?”

It was conceded at the hearing that the first question was stated too generally to entitle the parties to an answer.

On the second and third questions the first party maintained the negative answers, contending, in particular, that the deductions referred to in the 89th section of the Police Act had reference merely to the case of occupiers of lands or premises, upon whom alone by that Act the assessment was authorised to be levied, and that, as the Commissioners had assessed in virtue of the 54th section of the Roads and Bridges Act, the 86th section of that Act did not affect them at all, or, if it did, it compelled or entitled them to allow deductions under the 89th section of the Police Act to occupiers alone, and not to owners of unlet or unoccupied

with reference to the imposing, levying, and recovering of the police assessment, or if there be no police assessment, any other assessment or rate levied by the local authority within such burgh; and the assessments authorised by this Act shall be subject to like exemptions and restrictions as are applicable to the said police assessment or other assessment or rate, and may be collected either separately or along therewith. The whole amount of the assessments authorised by this Act may be levied on and recovered from the tenant or occupier, who, on payment and on production of a receipt therefor by the collector, shall be entitled to deduct one-half of the amount, or in the case of assessments for payment of debt and interest thereon, the whole amount thereof, from the rent payable to the proprietor; and all such assessments shall, in the case of bankruptcy or insolvency, be preferable to all debts of a private nature due by the person assessed; provided that it shall be lawful for the local authority to relieve from assessment the occupiers of lands or heritages under the annual value of £4, as appearing on the Valuation-roll, on ground of poverty.”

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houses. The second parties, who had been assessed in respect of their properties in the share of the assessment under the 54th section of the Roads and Bridges Act imposed on proprietors (but not in the share imposed on occupiers), and had been refused any deduction on the ground of unlet premises, maintained the affirmative answer to the third question, contending that by the Police Act the whole burden of assessment was laid upon occupiers, with a power as contained in the 88th section to the Commissioners to remit assessment in whole or in part on the ground of poverty or inability to pay, and with power as contained in the 89th section to the Commissioners to grant deduction from assessment for any period during which any lands or premises should not be let or occupied for three months consecutively in any one year; that under the Roads and Bridges Act owners and occupiers together took the place of occupiers under the earlier Act, and that consequently the Commissioners, in imposing assessments under the Roads and Bridges Act upon owners, were bound to exempt owners of property unlet for the year during which the assessment was levied, on the ground that such owners were, under the 86th section of the last mentioned Act, entitled to the like exemptions and restrictions as were applicable to the assessments levied under the Police Act. The third parties maintained the affirmative answer to the second question, contending that they were still entitled, under the recited Acts, to the exemptions from assessments which they enjoyed prior to the adoption of the Roads and Bridges Act, under sections 87, 88, and 89 of the Police Act.¹

The first party maintained the affirmative, and the other parties the negative answer to the fourth question.

On the fifth question the second parties maintained, on the authority of *Galloway v. Nicolson*,² decided with reference to corresponding provisions in the Poor-Law Amendment Act, 1845, that under the 54th section of the Roads and Bridges Act the amount required by the burgh for the maintenance of roads, &c. in each year was to be divided into two equal parts, one of which was to be levied from the owners as a class, and the other from the occupiers as a class, the result being that the occupiers individually would pay more than the owners individually if a large number of houses in the burgh were unoccupied. The first party maintained, on the other hand, that *Galloway v. Nicolson* did not apply, as it was there held on the construction of the provision in the Poor-Law Act, that the "assessment" which was to be divided equally between owners and occupants was the total sum required by the parochial board; but that the words of the Act here were different, and that their true construction was the equitable one, viz., that the "assessment" which was to be divided between the proprietor and the occupier was the rate imposed on each subject individually; in the case of unoccupied houses the occupier's half remaining unpaid, and going to swell the nominal sum required for the purposes of the Act.

At advising,—

LORD JUSTICE-CLERK.—This special case is brought by the Commissioners of the burgh of Govan. The questions that are raised in it are of considerable importance as regards the administration of public authorities under the Roads and Bridges Act, and also under the General Police Act of 1862. The diffi-

¹ *Authorities on these questions cited at the hearing.*—Burgh of Partick v. Marshall, Feb. 16, 1881, 8 R. 480; Russell v. Middle Ward of Lanarkshire Road Trustees, Dec. 9, 1884, 12 R. 298.

² *Galloway v. Nicolson*, March 19, 1875, 2 R. 650.

culty that has arisen has been caused mainly by the number of tenements and premises within the district of the Commissioners which are at present unlet, and the question substantially relates to the manner in which the assessment which is laid on the annual value of lands and heritages within the burgh—half being directed to be collected from the owners and the other half from the occupiers—is to be imposed in such circumstances. No. 89.
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There are some other questions stated in the case which I shall speak of immediately, but in the meantime I shall express my opinion on the fifth question, which is to this effect,—“Is it legal for the Commissioners, as the local authority, to exact from owners more than one-half of the assessment required to be raised for the purposes of the Roads and Bridges Act (exclusive of the moneys required for the payment of the road debts)—that is to say, suppose they require to raise the sum of five thousand pounds, can they assess or exact from owners more than two thousand five hundred pounds?” Now, it is plain that there cannot be an occupant liable in assessment unless the premises are occupied, and where premises are not let I am of opinion that that has simply the effect of diminishing the number of contributors who are to be assessed under the statute, seeing that the assessment is laid upon the actual occupiers. I think that the Commissioners of Police must determine how much, in the first place, they require to raise, and, in the second place, what amount of assessment laid on in terms of the statute will produce the sum they require. And if the area from which that sum is to be levied is diminished by reason of there being fewer occupiers, through the houses being unlet, the rate per pound must be proportionally increased alike, I think, in the case of actual occupiers and of owners. The result of that no doubt is, that the owners will pay more than if the premises had been all occupied, but so also will the actual occupants. But I do not think that that is really an element which enters into the question. If so much a pound is levied on the actual occupants and so much on the owners, that will give the amount that the Commissioners require, and I think that is what they are entitled and bound to do.

In regard to the other questions I do not think there is any material difficulty. The first question is, I think, too generally put, because it is not necessary for us to solve an abstract question as to whether the Police Commissioners are subjected to any of the exemptions or restrictions there referred to. It is enough for us to answer the specific questions which follow, the first of which is,—“Are occupiers within burgh entitled under the Roads and Bridges Act to the same exemptions as they were under the 87th, 88th, and 89th sections of the General Police and Improvement Act?” My opinion is that they are. The next question is in these terms :—“Are owners of unlet and unoccupied houses within burgh entitled to the exemptions and restrictions provided for in the 87th, 88th, and 89th sections of the General Police and Improvement Act?” I do not think that in regard to that question they are, because the assessment is laid on, one half on owners, and one half on occupiers. The third question is—“Do the terms of the 86th section of the Roads and Bridges Act, giving the local authority power to relieve occupiers of lands or heritages under the annual value of £4 as appearing in the Valuation-roll, limit or derogate from the power given under the 88th section of the General Police and Improvement Act, 1862, whereby the Commissioners are empowered to remit, in whole or in part, payment of the assessment in the case of any person, irrespective of the amount of rent, on the ground of poverty or inability to pay

No. 89. the assessment!" I do not think that these provisions are inconsistent with each other. My opinion is, that the Commissioners may give parties assessed the benefit of the exemptions without any inconsistency. I therefore propose that we should answer these questions to the effect I have indicated, finding it unnecessary to give an answer to the first, but answering the second in the negative, the third and fourth in the affirmative, and giving a special answer to the fifth.

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LORD YOUNG.—I am substantially of the same opinion. The only question here which the parties are interested that we should answer, and which I should have been disposed to answer—for we are not bound to answer any question which parties may choose to put—is the fifth. That is an interesting question, and after the decision of the First Division in 1875 upon a similar question under the Poor-Law Act, I must acknowledge that it is one of difficulty also. It is that decision alone which makes me regard the question as one of difficulty. If the words here had been the same as in the Poor-Law Act, it would probably have been our duty to follow that decision; or if we thought seriously that the question ought to be reconsidered, then to request the aid of our brethren, or of some of them. But the words here are different, and I am not prepared, as at present advised, to carry that judgment any further than it goes upon the precise words which were then under the consideration of the Court.

The question which we have here turns upon the words of the 54th section of the Roads and Bridges Act of 1878, the question being whether the sum which the Commissioners resolve has to be raised by assessment must be divided into two parts or moieties, and the one moiety laid on owners, and the other moiety laid upon occupiers; or whether an assessment at the rate per pound resolved upon as sufficient to raise the money which is required levied and imposed upon each individual tenement, has to be paid one half by the owner of the tenement and the other half by the occupier, if there is an occupier. I certainly prefer the latter view, as leading not only to the more equitable, but to the only equitable result. For the result to which it leads is this—that the same rate per pound is laid upon owners and upon occupiers without distinction. If it is 6d. per pound upon the owner then it is 6d. per pound upon the occupier if there is one—if there is no occupier there can be no assessment upon the occupier. What it leads to is perfect equality, which, I think, was intended to be brought about. The result of the other view, which was given effect to by the First Division in the case under the Poor-Law Act, is this—that if you have more owners than occupiers—that is to say, if some premises are unlet and unoccupied—then there must be a larger rate per pound imposed on occupiers than on owners. The only failure that can occur is in the case of occupiers. A tenement may be untenanted or unlet, or unoccupied, but a tenement can be without an owner. To put a case by way of illustration—imagine it does not occur in practice in such a marked way; but suppose you have twice as many owners as occupiers. If each class is to produce the same amount of money, you must impose upon the occupiers double the rate than you impose upon the owners. Now, that is *prima facie* unjust and inequitable. I do not lay out of view the consideration that the landlords of unlet tenements are more or less suffering, although it also is not to be forgotten that the fact that their premises are unlet may be entirely attributable to themselves—they may be with a view to their own profit. It may be with a view to the more pro-

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able use of their premises in the following year that their premises are unlet, or it may be owing to many other considerations. But the result of the view I have stated is what I have indicated. I quite follow the reasoning upon which our brethren of the First Division arrived at the conclusion that the money resolved to be raised by assessment must be divided into two halves, and one half raised from the owners, however numerous they may be, and the other half raised from the occupiers, however few they may be. I quite follow that reasoning, but I shrink from the result, and I should not be indisposed, if an opportunity occurs, to have that judgment reconsidered. The words here, however, are different. The assessment is to be imposed and levied on all lands and heritages,—that is to say, the amount required for carrying out the different provisions of the Act is to be raised by assessment on all lands and heritages. I do not think the amount is to be divided into two parts, and the one half imposed on owners and the other half on occupiers. The amount to be raised by assessment is the amount required for carrying out the provisions of the Act in the particular burgh or district—taking the illustration put in the question, the sum of £5000. But the amount to be raised is not the assessment; it is that for which the assessment requires to be imposed. The rate of assessment may be greatly more proportionately than the amount required to be raised. Indeed, it must be so, because in raising an assessment you have to take into account sums which must be given off by way of relief. You must take into account inability to pay, fraudulent evasions, and so on. And, as your Lordship has pointed out, one of the events to be thus contemplated is that premises will be unlet and that there will be no occupier. Using your judgment, you resolve what amount you will require to assess for in order to produce, after all the contingencies which I have mentioned are allowed for, the sum which is actually required. The assessment imposed and levied is therefore, I think, the sum imposed and levied on the individual tenements. Neither the sum which you have resolved upon as that which you require nor the sum for which you think it right to assess in order to raise what you require, is the assessment. It is what you impose and levy on each individual tenement. The assessment is not levied and imposed on a parish or burgh; it is levied and imposed on each individual property, and that is to be paid one half by the occupier and the other half by the owner. The owner can never be required to pay more than the half. If there is no occupier, then that half goes unpaid, but that, as I have said, is one of the contingencies which must be taken into account in determining the amount to be levied for in order to produce the sum required. The deficiency caused by want of occupation is made up by the owners and occupiers who pay, but the same rate per pound is payable by each individual according to the value of the tenement which he is owning or occupying. I therefore arrive—I confess without any reasonable difficulty except that which is suggested by the decision I have mentioned—at the conclusion at which your Lordship has arrived, that the assessment imposed and levied on each tenement is to be divided into two equal parts, one part to be paid by the owner, and the other by the occupier, if there be an occupier.

Now, I should rather have thought that an answer to the other questions might have been avoided. The question as to the levying of assessment from the owner of unlet property in respect of the occupant's share seems to me to occasion no difficulty. Clause 86 of the Road Act authorises the whole assessment to be levied from the occupier if the Commissioners find it convenient,

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With respect to the exemptions on the ground of poverty, there is a most comprehensive power given to the assessing body to make those exemptions. By the Police Act they may exempt on the ground of poverty in any case. In the Road Act there is authority given to exempt on the ground of poverty where the rent is under £4. There is also authority given there to assess the whole assessment upon the owner in similar cases, i.e., in cases where the name of the tenant or occupier is not set forth in the Valuation-roll; and again, the Police Act directs owners to be assessed subject to deduction, where premises are let at a rent under £4. I should have thought, however, that the provisions in the Road Act were sufficient in themselves for all practical purposes, one half of the assessment being, as I have said, laid upon the owner, and the other half upon the occupier. If there is any permission to levy the whole upon the owner, leaving him to recover from the occupier, where that is found convenient, still there is an absolute power to remit the amount on the ground of poverty wherever the Commissioners see cause. I must say, however, that though these are my views, I would have preferred to let the other questions go unanswered, and to have given an answer only to that which is the really interesting question here.

LORD CRAIGHILL.—I concur in the views which have been presented by your Lordship and by Lord Young. I rather think it will be well to answer all the questions, and as regards all the questions, the answers suggested by your Lordship are, I think, appropriate to the law of the case.

The only matter on which I have any difficulty in giving an affirmative answer is that which is suggested by the terms of the second question. What is there asked is this,—“Are occupiers within burgh entitled under the Roads and Bridges Act to the same exemptions as they were under the 87th, 88th, and 89th sections of the General Police and Improvement Act?” Now, the word “occupiers,” as here used, comprehends all occupiers whatever may be the size of the houses which they occupy, and whatever may be the rents paid for those houses, but the 87th section of the Police Act, which is the Act there referred to, provides that “the Commissioners shall assess the owners in place of the occupiers of all lands or premises let at a rent under £4, and levy such assessment from such owners, but the Commissioners shall allow to such owners a deduction from such assessment equal to one-fourth of the amount thereof.” Now, the General Police and Improvement Act did not impose an assessment on the lands and heritages, one half to be paid by the owners and one half by the occupiers. On the contrary, the occupiers, and the occupiers only, unless in exceptional circumstances, for which provision was made, were to pay the whole. The 87th section provides that where the rent was less than £4 the occupiers were not to pay at all. The landlord was there to come in their place, and the landlord was to pay the assessment which, if the rent had been more than £4, would have been paid by the occupier,—the landlord getting, in consideration for the fact that he was paying something not properly his own, an abatement of one-fourth of the sum paid. In terms that section is inapplicable to the arrangement made in the Roads and Bridges Act. But when we look at clause

86 of the Roads and Bridges Act I think practically the same result is obtained. No. 89.
 The Roads and Bridges Act provides that whatever the size of the house, and
 however small the rent paid may be, the occupier is to be put down as one of Feb. 3, 1887.
 the two parties by whom the assessment is to be borne, and the landlord is the Govan Police
 other. Now, the relief or exemption of the occupier cannot be procured in the Commissioners v.
 way provided for by the General Police and Improvement Act. For what we Armour.
 find at the close of section 86 of the Roads and Bridges Act is this,—“Pro-
 vided that it shall be lawful for the local authority to relieve from assessment
 the occupiers of lands or heritages under the value of £4, as appearing on the
 Valuation-roll, on the ground of poverty.” Now, if this clause is to be read as
 obligatory on the Commissioners the same result ensues as would have ensued
 suppose the terms of this statute had been the same, for although the occupier
 is, in terms of the Roads and Bridges Act, to be put down as one of the parties
 on whom the assessment is to be levied, yet there is this power given to the
 Commissioners of making as complete exemption as that which was secured
 under the arrangement of the General Police Act. It is a discretionary power
 which is conferred on the Commissioners. If they see fit they may exempt
 parties from payment on the ground of poverty. They have to learn what the
 circumstances are, and act according to their discretion. That is a thing which
 seems to me quite clear. In the case of the other Act there was no option.
 Parties under a certain rent had a right to be exempted. It was incumbent on
 those having the administration of that Act to make the exemption. Now, the
 proviso in the Roads and Bridges Act, to which I have referred, seems to me to
 amount to pretty much the same thing. Reading it as matter of obligation, the
 Commissioners are bound to come to the same conclusion—the conclusion,
 namely, that as all under £4 rent were exempted by the General Police and Im-
 provement Act, so the occupant of a house the rent of which is less than £4, as
 entered in the Valuation-roll, is entitled to exemption, which would put him in
 the same position. That seems to me to bring us to the same conclusion as your
 Lordship has suggested in the answer you have mentioned.

LORD RUTHERFURD CLARK.—The only difficulty I have is with respect to the
 fifth question. I confess I do not see any sound distinction between the case
 under the Poor-Law Statute and this case. I think we are bound to follow that
 decision. At the same time I am not sorry that your Lordships have seen your
 way to reach a more equitable result.

THE COURT pronounced this interlocutor:—“The Lords having heard
 counsel for the parties on the special case, answer the second ques-
 tion in the affirmative, and the third and fourth in the negative;
 as regards the fifth question, they are of opinion that in the cir-
 cumstances stated the Commissioners are entitled to levy from
 the actual owners and occupiers severally liable such equal rate
 per pound as will produce the aggregate sum required for the pur-
 poses of the assessment: Find and declare accordingly, and find
 it unnecessary to answer the first question, and decern.”

MARCUS J. BROWN, S.S.C., Agent for all the Parties.

No. 90. WILLIAM CAMPBELL MUIR, Pursuer (Respondent).—*D.-F. Mackintosh—Omond.*

Feb. 4, 1887.
Muir v.
M'Intyre.

JOHN M'INTYRE AND OTHERS, Defenders (Appellants).—*M'Kechmie—Salvesen.*

Lease—Partial destruction of subject by fire—Abatement—Retention of rent—Liquid and illiquid.—Held that a tenant is not bound to pay the full rent if, during possession, through no fault of his own, he loses the beneficial enjoyment of part of the subject let, and that his claim to abatement may be stated by way of defence to an action for payment of the full rent.

1st Division.
Sheriff of
Argyllshire.
M.

In January 1886 William Campbell Muir of Inistrynich, Argyllshire, raised an action in the Sheriff Court of Argyllshire against John M'Intyre and others, tenants of the farm of Hayfield, on the estate of Inistrynich, praying, *inter alia*, for payment of the sum of £25, 7s. 6d., being the balance of the half year's rent for the farm due at Martinmas 1885.

The pursuer averred that the rent of the farm was £300 per annum, and that the balance of £25, 7s. 6d. above mentioned still remained unpaid.

The defenders answered that "the subjects of let have been greatly diminished in value and materially reduced through a fire which took place upon 26th October 1885, whereby the entire range of office-houses at Hayfield, as well as the ploughman's house and the shepherd's house, were completely destroyed. The defenders have a just right to a deduction of more than the sum of £25, 7s. 6d. here claimed in respect of the reduced value, and they have formally given notice that, in respect of *damnum fatale* to the subject of lease, they now hold the contract as terminated."

The pursuer denied the statement, and averred further, that the fire was caused by carelessness on the part of the tenant.

The defenders further averred that they had used the farm mainly as a grazing farm, but that owing to the fire destroying their ingathered crops and the offices, they could no longer keep up their stock of cattle. They therefore maintained that they were entitled to terminate the lease as at Whitsunday 1886, and that they were entitled to a deduction from the rent for the current year in proportion to the diminished value of the subject of the lease. They offered to consign the £25, 7s. 6d. sued for in the hands of the Clerk of Court.

The pursuer pleaded ;—(2) The defenders being justly due and resting owing to the pursuer in the sum of £25, 7s. 6d., being the sum second concluded for, the pursuer is entitled to decree therefor, with expenses.

The defenders pleaded ;—(3) The defenders having been deprived to a material extent of the use of the subject contracted for, they are entitled to terminate the lease as at Whitsunday first, and they are also entitled to a deduction from the current year's rent of a larger amount than the arrears now sued for.

On 5th July the Sheriff-substitute (Campion) pronounced an interlocutor, in which he, *inter alia*, granted decree against the defenders for £25, 7s. 6d.

The defenders appealed to the Sheriff (Irvine), who, on 28th September, dismissed the appeal, "reserving to the defenders any claim for abatement of rent which may be competent to them on the ground of their not having the full use of the premises, and decerns." *

* "NOTE.—(After a statement of the branches of the prayer)—The main question, therefore, arises on the second, which resolves into a plea of compensation or set-off for damage done by a fire, by which a portion of the farm buildings was destroyed. That claim, in the form in which it is pre-

The defenders appealed to the Court of Session.

No. 90.

Argued for the defenders ;—They did not deny that if the claim was one for compensation they would have to bring another action for the purpose of constituting it, but their plea was that part of the rent was not due, in respect they did not get the whole subject let to them. They were entitled to a reduction of rent, and the only question came to be what amount of reduction they were entitled to.¹ There was authority for the proposition that where a tenant did not get the whole subject let he need not constitute his claim in a separate action, but might keep back the rent at least to the extent to which he had suffered.² The case was distinguishable from that of *Drybrough*.³ There the claim was one of damages, because the landlord did not keep the subjects in repair, while here the whole rent was asked for a part of the subject.

Argued for the pursuer ;—He admitted that when possession was not given of an essential part of a subject let the tenant was entitled to plead that in answer to a claim for the full rent, but when something happened after possession had been given of the whole subject then the tenant must constitute his claim.⁴ The proper course for the tenants would have been to have given up the lease at once,⁴ and that they did not do. The tenants' claim was simply of the nature of a claim for damages.

At advising,—

LORD PRESIDENT.—The present appeal is brought for the purpose of reviewing that part of the Sheriff's interlocutor which decerns for the balance of the rent. The tenant resists the demand for this balance on the ground that in October 1885 a fire took place, which had the effect of destroying almost the whole accommodation on the farm for housing cattle and horses, and he explains that as the farm was stocked with a large quantity of Highland cattle of a particular breed he is left in a state of destitution as regards accommodation for his cattle, and has suffered very great loss through the fire. The landlord has

resented, is disputed by the pursuer, and it appears to the Sheriff that it is so disputed on good grounds in law. Few legal principles are more clearly established than this, that a liquid demand for rent cannot be met by an illiquid claim for damages. It is only to 'debts *de liquido ad liquidum* instantly verified be writ or aith of the partie' that the old Scots Act, 1592, c. 141 (Act Parl. 1592, c. 61, vol. iii. p. 573), gives the benefit of being admitted by way of exception, nor can the maxim apply that 'things which can at once be rendered liquid are held as liquid,' for the existence, as well as the amount of the claim, is contested by the landlord—(See *Drybrough v. Drybrough*, May 21, 1874, 1 *Bettie*, 909). This and the kindred subject of retention of rent are treated of by Mr Hunter, L. & T., vol. i. p. 281, *et seq.*

"Of course it may be that the defenders have a claim for abatement, for not having the full use of the premises. As remarked by Lord Redesdale in *Bayne v. Walker* (1815), 3 Dow, 233,—'The justice of the matter amounts to no more than this, that the tenant should have an allowance equal to the diminution in the value of the subject by the loss of the house during the term.' But this loss must, in the opinion of the Sheriff, be constituted in the usual way."

¹ *Bayne v. Walker*, 1815, 3 Dow, 233—See Lord Redesdale's opinion; *Hamilton*, 1667, M. 10,121; *Deans v. Abercromby*, 1681, M. 10,122; *Hunter on Landlord and Tenant*, 4th edit. vol. ii. p. 453; *Allan v. Markland*, Dec. 21, 1882, 10 R. 383; *Duff v. Fleming*, May 18, 1870, 8 Macph. 769, 42 Scot. Jur. 423.

² *Kilmarnock Gas-Light Co. v. Smith*, Nov. 9, 1872, 11 Macph. 58, 45 Scot. Jur. 53; *Guthrie v. Shearer*, Nov. 13, 1873, 1 R. 181.

³ *Drybrough v. Drybrough*, May 21, 1874, 1 R. 909.

⁴ *Duff v. Fleming*—see note 1.

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not offered to reinstate the premises or to restore the steading, and the tenant in those circumstances maintains that he is entitled to an abatement on the half year's rent, which amounts to £150, and of which he has paid the whole except the sum of £25, 7s. 6d. The Sheriff says that that resolves itself into a plea of compensation, and as the amount of damages is illiquid and unascertained it is not competent to plead it in answer to a demand for rent.

Now, if I were of opinion that this demand was one for compensation I should agree in the conclusion to which the Sheriffs have come, but I do not think that this demand for abatement is of the nature of a claim for compensation; it is a plea that the rent to a certain extent is not due; and if that is the nature of the claim it furnishes a direct answer to the view of the Sheriff. The landlord cannot recover that part of the rent which is not due. The question, therefore, comes to be whether there is here ground for abatement, for I think that while the Sheriff has proceeded on the technical ground that the tenant cannot here plead compensation the landlord goes also on the ground that there is no abatement due, and says further that a claim for abatement is not the proper remedy, as the law does not recognise such a claim, but only gives the tenant a claim for damage. Now, if he is right, the claim of damages would certainly require to be constituted, and would not be pleadable in this action; but it is quite settled in law that an abatement is to be allowed if a tenant loses the beneficial enjoyment of any part of the subject let to him either through the fault of the landlord or through some unforeseen calamity which the tenant was not able to prevent. There are many examples of this in the books. One is the case of an urban tenement which was injured by the fall of an adjoining tenement, and there the landlord not having undertaken to reinstate the tenement an abatement of the rent was allowed. That is the case of *Hamilton*, 1667, M. 10,121. There is another case, *Deans v. Abercromby* in 1681, M. 10,122, where a tenement was occupied by different tenants, and belonged to different proprietors. The proprietor of the upper floor unroofed the tenement, and the tenant of the lower floor, who held of a different proprietor, claimed an abatement on the ground that his stock-in-trade (he was a vintner) had been injured during the execution of the repairs. He, too, was found entitled to an abatement of his rent. There are various other cases collected in the Dictionary, but at last we come down to the year 1778, when we have a very instructive record of a judgment of the Court,—“Although the tenant is allowed an abatement of rent where any part of the subject perishes by unforeseen accident, the Lords found that a tenant who had merely the use of a well was not on account of its failure entitled to any deduction.”—*Factor on Sharp's subjects v. Lord Monboddo*, M. 10,134. The judgment there was against the tenant, who claimed an abatement for the failure of a well, but the doctrine I have stated was there distinctly recognised.

In more recent times occurs the case of *Yeaman v. Gilruth* in 1792, Hume's Dec. 783. There an abatement was given because there had been a mistake between the parties as to the measurement of the subjects conveyed. Again, in the case of *Brown v. Brown*, Feb. 23, 1826, 4 S. 489, the landlord took a small portion of the farm he had let and gave it to the trustees of a road, who wanted it for the purpose of their trust. There, too, the form of the remedy given to the tenant was an abatement.

It is thus, I think, quite established that where, through no fault of his own, a tenant loses part of the subject let to him, he is entitled to an abatement of

his rent,—that is to say, he ceases to be the debtor of his landlord to the extent to which he is entitled to an abatement. If that be so, it seems to follow as a matter of course that that right can be pleaded in answer to a demand for rent. Of course, if the damage done to the subject is so great that it entirely puts an end to the demand for rent, that is a good answer for the tenant to the landlord's demand for rent, and I do not see why it is not an equally good answer where only a portion of the subject is destroyed.

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I am therefore sorry to say that with all my respect for the Sheriff of Argyleshire I am bound to differ from him here, and to hold, first, that there is a good claim for an abatement, and, secondly, that it is competent to plead that claim as a defence in this action. What is to be the amount of the abatement is a different question, but I think that out of a rent of £300 an abatement of £25 in the half year is hardly too much.

LORD MURE.—I am of the same opinion. The simple question we have to deal with is whether in the circumstances the tenant of this farm is now in a position to be called on to pay his full rent. It is admitted that with the exception of the dwelling-house all—or very nearly all—the buildings on the farm were destroyed by fire in October, and that through no fault of the tenant. I agree that according to law, and following many authorities, a tenant in such circumstances is entitled to an abatement of his rent. That is distinctly laid down in the cases your Lordship has referred to, and I therefore agree that the tenant here is entitled to some abatement of his rent; what that abatement is to be must be settled afterwards.

LORD SHAND.—If the tenant's claim could be regarded as one for damages I should agree with the Sheriff and Sheriff-substitute that the claim could not be made in this action, but it is not a claim of that kind. It would, I think, be most inequitable if the landlord could exact his full rent from the tenant who has been deprived of a large part of the subject let to him through no fault of his own. The position of the landlord is that he can no longer continue to give possession of the whole subject which he agreed to let. The principle on which the tenant is entitled to an abatement is founded on the highest equity, and I know no ground for holding that that claim must be constituted in another action. That being so, and having regard to authority, I have no difficulty in coming to the conclusion that the Sheriff's interlocutor should be recalled.

LORD ADAM.—The question is whether the tenants are entitled to an abatement of their rent. The Sheriff does not hold that they are not entitled to any abatement, for he reserves to the defenders any claims for abatement they may have on the ground of their not having full use of the premises. But he says,—"Few legal principles are more clearly established than this, that a liquid demand for rent cannot be met by an illiquid claim for damages." Now, I quite agree in that, but I may remark that there is no room for a demand for damages, for no wrong has been done by anyone, and the claim made is not of that nature. The claim here is a claim for abatement, and if it is clear that the tenant is entitled to an abatement, it follows that the claim of the landlord for rent is no more liquid than the claim of the tenant for abatement, for taking the claim as one for abatement, it is obvious that if abatement is due the whole rent is not due. What the Sheriff ought to have done was to ascertain what amount of abatement was due, and I think it was impossible for him to

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decern for the whole rent, and to allow the tenant to bring a separate action for his abatement.

That a tenant in the circumstances here is entitled to an abatement is quite settled by authority. I shall say no more on that subject than to refer to two cases not mentioned by your Lordship, viz., *The York Building Company v. Adams*, 1741, M. 10,127, where damage was done in some coal works by a hurricane, and it was found that the tenant was entitled to an abatement; and *Campbell v. Watt*, 1795, Hume, 788, where an abatement in the rent for an inn was granted because the landlord of the inn had set up another at a short distance. Looking at these cases, I have no hesitation in concurring.

THE COURT recalled the interlocutor complained of, and remitted to the Sheriff to allow parties a proof of their respective averments.

BOYD, JAMESON, & KELLY, W.S.—J. YOUNG GUTHRIE, S.S.C.—Agents.

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Feb. 5, 1887.
Robertson v.
Pringle.

JAMES ROBERTSON Senior, Pursuer (Respondent).—*Gardner*.
ROBERT PRINGLE AND MANDATORIES, Defenders (Reclaimers).—*Hay*.

Jurisdiction—Review in debts recovery actions—Debts Recovery Act, 1867 (30 and 31 Vict. c. 96), sec. 17.—A person against whom a decree had been obtained in the Debts Recovery Court brought a reduction thereof in the Court of Session, on the ground that the Sheriff had refused to hear evidence tendered by him. Held that the action of reduction was incompetent under sec. 17 of the Debts Recovery Act, 1867.*

1ST DIVISION.
Lord Lee.
B.

ON 26th April 1886 Robert Pringle, butter merchant, Ireland, raised an action in the Debts Recovery Court at Glasgow against James Robertson senior and his son, James Robertson junior, concluding for payment of the sum of £12, 5s. 10d., being the amount of an account for goods alleged to have been sold by him to the defenders, or one or other of them, on the order of James Robertson junior, who kept a grocer's shop in Glasgow.

James Robertson junior did not enter appearance in the case, but James Robertson senior lodged defences, in which he denied liability on the ground that he had nothing to do with the business which his son carried on.

On 14th August 1886 the Sheriff-substitute (Balfour) pronounced this interlocutor:—"Finds that the goods in the account sued for were supplied on the credit of the defender James Robertson: Finds that the other defender James Robertson junior acted simply as his father's manager in carrying on the shop for which the goods were supplied: Finds that the defender James Robertson junior has lodged no defences to this action; therefore finds them jointly and severally liable in the sum sued for."

In his note to this interlocutor the Sheriff-substitute narrated the procedure which had taken place as follows:—"Proof was led in the case at two diets, viz., 1st June and 14th June. At the first diet the father was not represented by an agent, but at the second he was. The proof was closed at the second diet, and avizandum made. The father's agent made no request to be allowed to lead more proof, but he asked for a continuation of the cause for the special purpose of considering whether he would raise an action of declarator in the Court of Session, in order to have the question of the father's liability determined in that Court. I continued the case upon

* Sec. 17 of the Debts Recovery Act, 1867, enacts,—"No interlocutor, judgment, order, or decree pronounced under the authority of this Act shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever."

two occasions for that special purpose, and at the last diet the agent appeared with six witnesses and proposed to examine them. I refused to allow the examination, because the proof had been closed on 14th June, avizandum had been made, and judgment would thereupon have been pronounced but for the special request of the agent to be allowed time to consider about raising an action of declarator." No. 91.
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No application was made to the Sheriff-substitute that a note of the evidence led should be taken, and no such note was taken.

The defender James Robertson senior appealed to the Sheriff (Berry), who, on 25th October 1886, adhered.

On 20th November 1886 James Robertson senior raised an action in the Court of Session against, *inter alios*, James Robertson junior, and the trustee under a trust-deed he had granted for behoof of his creditors, and Robert Pringle (the pursuer in the Sheriff Court action), in which he concluded for declarator that the business formerly carried on by his son did not belong to the pursuer in any manner of way, but solely to his son for his own behoof, and for reduction of the decree of the Sheriff-substitute of date 14th August 1886, and of the Sheriff of date 25th October 1886.

The pursuer averred,—(Cond. 6) "At the first diet of proof the pursuer appeared on his own behalf. No request was made to the Sheriff to take notes of the evidence. The diet of proof was adjourned for further evidence for the defender Pringle. Mr Martin, solicitor, appeared for Robertson senior at the second diet of proof on 7th June 1886, when some evidence was led on behalf of the said Robert Pringle, defender. . . . After some evidence for the pursuer, the case was again continued till 14th June for further evidence for the said Robert Pringle. At this diet the Sheriff-substitute appears to have made a marking on the roll of cases, making avizandum. On said 14th June 1886 further evidence was led for the said Robert Pringle, and the case continued. Next day—15th June 1886—evidence was led for the said Robert Pringle, his agent having then produced certain letters alleged to have been written by him. Mr Martin thereupon moved the Sheriff-substitute that instead of proceeding with the evidence the case should be continued, with the view of enabling him to raise an action of declarator at the pursuer's instance in the Court of Session, for the purpose of determining the question of liability for the whole liabilities of the said business, and his Lordship granted the motion. The Sheriff-substitute at a subsequent diet suggested that Mr Martin should ascertain whether the other creditors of the said James Robertson junior had acceded to the trust-deed, and if so, he thought the pursuer might just allow the case to proceed. After consideration, Mr Martin being of opinion that he was able to rebut the evidence led for the said Robert Pringle, did not proceed with the proposed action of declarator, but asked the Sheriff to fix a diet for hearing the evidence. The Sheriff-substitute accordingly fixed the 9th of July, at three o'clock afternoon. Mr Martin and his client accordingly attended at the said diet with seven witnesses. The agent for the said Robert Pringle thereupon objected to any evidence being led for the defence, but the Sheriff-substitute, in respect of the lateness of the hour, fixed a new diet for that purpose on the 27th July 1886. Mr Martin again attended with the witnesses for the present pursuer at the diet so fixed, but the agent for the said Robert Pringle pointed out to the Sheriff-substitute that he had made avizandum at a previous diet, whereupon his Lordship held that no evidence could then be led for the present pursuer, notwithstanding the fact that the Sheriff-substitute had specially fixed the diet for that purpose. The Sheriff-substitute then asked Mr Martin to debate the case for the pur-

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suer, but this he declined to do. The Sheriff-substitute again made avizandum." (Cond. 8) "The procedure in said debts recovery action was grossly irregular, unjust, and illegal, in consequence of the Sheriff-substitute, after having made avizandum, allowing the pursuer (the present defender Robert Pringle) to lead further evidence, and thereafter refusing to allow the defender (the present pursuer) to lead evidence in defence. The pursuer was thus denied the justice he was entitled to, and was deprived of the opportunity of leading evidence to rebut that which had been led for the said Robert Pringle, and to prove (which he was quite prepared to do) that the business in question did not belong to him, and that he was not a partner therein with his said son. In these circumstances, the pursuer is entitled to have said judgment or decree of the Sheriff-substitute and said interlocutor or decree of the Sheriff reduced as craved."

The defender Mr Pringle pleaded, *inter alia*;—(2) This action is incompetent.

On 11th January 1887 the Lord Ordinary (Lee) pronounced this interlocutor:—"Repels the defences as defences against satisfying the production, reserving them *quoad ultra*: Assigns this day eight days as a term for satisfying the production, and grants warrant to and ordains the Sheriff-clerk of Lanarkshire at Glasgow to transmit the decrees and interlocutors pronounced in the debts recovery action libelled, with the summons, note of pleas, and numbers of procedure, or certified copies thereof."*

On 12th January the Lord Ordinary granted leave to reclaim.

Argued for the defenders;—The action was incompetent under section 17 of the Debts Recovery Act, 1867. By that Act (sec. 10), it was not competent to appeal against a judgment of the Sheriff, so far as findings in fact pronounced by him were concerned, unless where either party had, "in the manner above provided (sec. 9), required the Sheriff to take a note of the evidence," and if that were not done "the said findings shall be final and conclusive, and not subject to review by any Court whatever." There was no such application made here, and therefore the condition precedent had not been carried out.¹ It was said that evidence had been here improperly rejected by the Sheriff-substitute, but he was entitled to reject any evidence he thought proper. Under the 17th section of the Act of 1867, reduction of such a decree as this was expressly forbidden. In that Act there was no section corresponding to section 31 of the Small Debt Act, 1837 (1 Vict. c. 41), where it was provided that a person aggrieved might appeal a judgment under that Act on the ground of wilful deviation in point of form on the part of the Sheriff, or if he have "prevented substantial justice" from being done. But even under that statute the Court had dismissed a reduction of a decree, on the ground that the appeal was to the Circuit Court, and that the Court of Session had no jurisdiction.² Even where a question of law could be brought

* "NOTE.—As the grounds of reduction alleged appear to be (at least in part) that the interlocutors and decrees challenged were pronounced by the Sheriff in disregard of the provisions of the statute, and not under the authority thereof, I think it necessary that the proceedings should be produced, and that the proper course is to pronounce an interlocutor, such as was pronounced in the first branch of the case of *M'Millan v. The Free Church of Scotland* (22 D. 290). It was suggested by me at the time the record was closed on these preliminary defences that the production might be satisfied under reservation, but the suggestion was not adopted."

¹ *Cumming v. Spencer*, Nov. 21, 1868, 7 Macph. 156, 41 Scot. Jur. 88—See Lord President's opinion.

² *Lennon v. Tully*, July 12, 1879, 6 R. 1253; *Graham v. Mackay*, Feb. 23, 1845, 7 D. 515, 17 Scot. Jur. 240.

under the Act of 1867 to the Court of Session the only way of doing so under the statute was by way of appeal. The case of *Murchie*¹ was not a case of a reduction of a decree granted by a Sheriff under the Small Debt Act, but the reduction of an extract decree in which the sum concerned for by the Sheriff had been altered by the Sheriff-clerk. It really did not fall under the statute at all.

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Argued for the pursuer;—This was not merely a case of irregularity in the procedure in the Sheriff Court, but was a denial of justice. In such a case the only remedy was reduction, and that course had been allowed in the case of *Murchie*.¹ That case was under the Small Debt Act, but the section as regarded exclusion of reduction was substantially the same in the two statutes. The Sheriff had done injustice by excluding evidence which was tendered (and according to the pursuer's statement timeously tendered), an act for which there was no authority in the statute. On that view of the case there was ground for saying that the judgment was not pronounced "under the authority of this Act" in terms of sec. 17 of the Act of 1867.

LORD PRESIDENT.—In this case the Lord Ordinary has repelled the defences against satisfying the production, reserving them *quoad ultra*. One of the defences is that "this action is incompetent," and I think that that defence ought to be disposed of before the production is satisfied, or before requiring the defender to take a day for doing so, for if the case is incompetent the defender is not bound to take any step at all towards doing so.

The question therefore comes to be, is the action incompetent on the ground that it is excluded by the 17th section of the Debts Recovery Act, 1867, which provides that "No interlocutor, judgment, order, or decree, pronounced under the authority of this Act, shall be subject to reduction, advocacy, suspension, or appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever"? The exception referred to in that section of course refers to the mode of appealing against decrees pronounced under the authority of the Act and in the way provided by the foregoing sections. The course there provided has not been adopted by the pursuer in this case; on the contrary he has allowed his opportunity to go by without availing himself of it. What redress he might have got if he had brought an appeal in ordinary form, it is needless to inquire. It might perhaps have been limited by the fact that he did not require that the evidence taken before the Sheriff-substitute should be noted, for he might have found a difficulty in getting leave to lead fresh evidence, unless the Court had before it a note of what had already been led. That, however, is not the question here. The question is, can we say that this reduction is competent when the statute says that no reduction of a decree is to be allowed on any ground whatever? The words of the section I have read are quite as strong as those of the corresponding section of the Small Debt Act, 1 Vict. chap. 41, sec. 30, yet in various cases that section has been applied where the circumstances were stronger than they are here. The complaint here is that the Sheriff-substitute refused to allow the pursuer to examine witnesses, and the Sheriff on appeal adhered. Now, in the first case which occurred under the Small Debt Act, viz., *Graham v. M'Kay* (7 D. 515), the question arose under the strongest imaginable circumstances. The objection there was to the jurisdiction of the Sheriff—it was alleged that the defender was not subject to his jurisdiction at all. The Sheriff repelled that objection, and the Court of Session

¹ *Murchie v. Fairbairn*, May 22, 1863, 1 Macph. 800, 35 Scot. Jur. 493.

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refused to inquire whether he had jurisdiction or not, because of the words of exclusion in the statute. Again, in the case of *Lennon v. Tully* (6 R. 1253) the allegation was that the execution of the summons had been illegal, and that the defender had no knowledge of the citation until the time had expired for appearing; yet there the Court held themselves bound to refuse a reduction because their jurisdiction was excluded by the Small Debt Act, 1837.

Now, if we apply that rule to the present case, there seems to me to be no doubt that the Lord Ordinary has gone wrong in refusing to sustain the plea of incompetency here. The Court is not entitled to look at this decree of the Sheriff, and consequently to require the defender to satisfy the production is most idle, for the production when satisfied could not be looked at. I think, therefore, that we ought to recall the interlocutor, sustain the plea of incompetency, and dismiss the action.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT recalled the interlocutor complained against, sustained the defender's second plea in law, and dismissed the action.

STURBOOK & GRAHAM, W.S.—ADAMSON & GULLAND, W.S.—Agents.

No. 92.

NORTH BRITISH RAILWAY COMPANY, Pursuers (Respondents).—

Balfour—J. C. Thomson—Strachan.

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chial Board.

WILLIAM S. PATERSON (Inspector of Poor of Cardross Parish), Defender (Reclaimers).—*Jameson—Younger.*

Poor—Assessment—Classification—Railway—Poor-Law Amendment Act, 1845 (8 and 9 Vict. cap. 83), sec. 36.—A classification of lands and heritages for occupants' rates, under section 36 of the Poor-Law Amendment Act, 1845, in order to be legal, must be exhaustive.

In 1846 a parochial board, with the approval of the Board of Supervision, adopted a classification of lands and heritages for occupants' rates into "(1) lands let for farming, (2) houses let as dwelling-houses and shops," the former being assessed at one-sixth of their value, the latter at their full value. At that date there were no railways in the parish, but a railway was constructed in 1850. It was assessed in Class II. at its full value, and continued to be so assessed without objection until 1886. *Held*, in a declarator at the instance of the railway company against the parochial board, (1) that while the Court had no jurisdiction to set aside a classification on the ground that it was inequitable, or to order a parochial board to adopt a new classification, it had jurisdiction to declare a classification to be invalid on the ground that it was not exhaustive of the lands and heritages in the parish; (2) that the classification in question was invalid on that ground, in respect that it did not, according to the ordinary meaning of its language, provide a place for railways, and was not shewn to have been approved by the Board of Supervision as implying anything else than its ordinary meaning; (3) that the pursuers were not barred by *mora* and acquiescence from having it declared that the classification was an invalid classification; and (4) that until a legal and valid classification had been adopted and approved, they were entitled to interdict against the parochial board levying from them as occupants higher rates than were imposed on any other occupant of lands and heritages in the parish.

Opinion (per Lord Justice-Clerk) that under the statute the power of the Board of Supervision in regard to classification is limited to the approving or disapproving of classifications proposed by parochial boards.

2D DIVISION.
Lord Fraser.
I.

At a meeting of the Parochial Board of Cardross, on 21st May 1846, it was resolved that the assessment for the relief of the poor under the Poor-Law (Scotland) Amendment Act, 1845, should be imposed according to the first mode of assessment provided by section 34 of that Act, viz.,

one half upon owners and the other half upon tenants or occupants of all lands and heritages in the parish; and it was further resolved that as regarded the tenant's or occupant's half there should be a classification of the lands and heritages, under section 36 of the Act,* into "Class I., lands let for farming; Class II., houses let as dwelling-houses or shops," the assessment of the first class to be on one-sixth of the annual rents of the lands and houses let along with them; of the second class, on the full annual rent.

This classification was approved by the Board of Supervision on 29th May 1846.

There was at that date no railway in Cardross, and although the Caledonian and Dumbartonshire Junction Railway Company had, in November 1845, given parliamentary notice that application would be made to Parliament for power to make a railway through the parish, when the classification was adopted that company was not incorporated, and possessed no heritable property in the parish. Its line was opened about five years afterwards, and was afterwards extended under the authority of subsequent Acts of Parliament, and ultimately the undertaking was amalgamated with the North British Railway Company.

From the time of the construction of its line down to 1886, the railway company was assessed for its occupiers' rates under Class II. of the above classification—at the full value of its heritable property—but in March 1886 the company brought this action against the inspector of the parish, concluding for declarator "that the following classification of lands and heritages in the said parish, viz., 'Class I., lands let for farming; Class II., houses let as dwelling-houses or shops,' which was adopted by the parochial board of said parish, with the concurrence of the Board of Supervision, on or about the 29th May 1846, is not now a legal and valid classification under the 36th section of the Poor-Law Amendment Act, 1845, in respect it does not comprehend or include the whole lands and heritages in the said parish"; for declarator that "unless and until a legal and valid classification of the whole lands and heritages in the said parish, distinguishing the same into two or more separate classes according to the purposes for which they are used and occupied, has been adopted by the said parochial board, with the concurrence of the Board of Supervision, in accordance with the 36th section of the said Act, the said parochial board are not entitled to impose on the pursuers, or levy from them as tenants or occupants of lands and heritages within the said parish, any assessment at a higher rate than is imposed by the said parochial board for the same period on the tenants and occupants of any other lands and heritages within the said parish"; and for interdict against the parochial board levying such higher rate until a valid classification should have been adopted. There was also an alternative declaratory conclusion (which, looking to the way in which the case was decided, need not be farther referred to) to the effect that if the classification was legal the pursuers' property ought to be included in Class I.

The pursuers' contention was, that since the introduction of the railway

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* The Poor-Law (Scotland) Amendment Act, 1845 (8 and 9 Vict. cap. 83), sec. 36, enacts,—“That where the one half of any assessment is imposed on the owners and the other half on the tenants or occupants of lands and heritages, it shall be lawful for the parochial board, with the concurrence of the Board of Supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes, according to the purposes for which such lands are used and occupied, and to fix such rate of assessment upon the tenants or occupants of each class respectively as to such boards may seem just and equitable.”

No. 92. into the parish the classification had ceased to be a legal and valid classification, because (assuming it to have been exhaustive at its date) it was no longer exhaustive of the lands and heritages in the parish.
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 In defence the parochial board pleaded;—2. The said classification having been made by the Parochial Board of Cardross, with concurrence of the Board of Supervision, in terms of the statute, and being a legal and valid classification, the defender is entitled to be assoilzied, with expenses. 4. The said classification falls to be interpreted by the practice following thereon, by the intention and understanding of all parties interested at the time it was made and approved as aforesaid, and by the construction put upon it by all parties interested, including the pursuers, since the date thereof down to the present time. 5. The said classification, interpreted as aforesaid, is a valid and legal classification, in respect that it proceeds upon the reasonable principle of separating all lands and heritages in the parish into two distinct classes—(1) lands let for farming, and (2) all other lands and heritages. 6. Said classification and mode of assessment having been in force in said parish since 1846, and the pursuers and their predecessors having been assessed in terms thereof without objection, they are barred by homologation, acquiescence, and *mora* from insisting in the present action.

A proof was allowed. The evidence disclosed the facts already narrated, in so far as they had been in dispute. It further appeared that at the date of the classification there were in the parish of Cardross a quarry, lime-works, a shipbuilding-yard, dye-works, chemical-works, and an iron-foundry. All these subjects were then assessed, like the railway, in class II, at their full value, and continued to be so assessed without objection. It also appeared that in consequence of the introduction of railways many parochial boards, with the concurrence of the Board of Supervision, altered the classification which they had previously adopted, and that in December 1868 the Board of Supervision issued the explanatory circular referred to by the Lord Ordinary, *infra*, p. 481, which, as regarded the principles of classification approved by the board, was to the same effect as the minute of the board quoted *infra*, p. 482.

On 1st July the Lord Ordinary (Fraser) pronounced this interlocutor:—“Finds that there is no legal classification, as under the 36th section of the Poor-Law Amendment Act, 1845, now in force in the parish of Cardross, of the tenants or occupiers of lands and heritages liable to be assessed for poor-rates: Therefore finds, decerns, and declares in terms of the first declaratory conclusion of the summons: Interdicts, prohibits, and discharges in terms of the conclusion to that effect, and decerns: Finds the pursuers entitled to expenses: Allows,” &c. *

* “OPINION.— . . . The classification of the parish of Cardross was professed to be made in virtue of the 36th section of the Poor-Law Amendment Act. That classification is simply as follows:—‘Class I.—Lands let for farming; Class II.—Houses let as dwelling-houses or shops. The rate on Class I. to be at the rate of one-sixth of the annual rent of the lands and houses let along with it, and the rate on Class II. on the whole annual rent.’

“This classification was made in 1846, and was approved by the Board of Supervision, and has remained unaltered ever since, although attempts have been made to get it altered. The Board of Supervision approved of it at a time when that board had very little experience in regard to the matter of classification; and they would certainly not sanction at the present day a classification so inequitable as this. Their later practice was to classify lands and heritages into four classes—(1) dwelling-houses; (2) shops and manufactories; (3) railways, fishings, canals, and quarries; (4) agricultural subjects. The first of these classes paid at the full rate, the second at two-thirds, the third at one-half, and

The defender reclaimed.

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On 26th November, after the hearing had proceeded some way, the

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the fourth at one-fourth. Therefore dwelling-houses paying 1s. per £ of assessment, the second class would only pay 8d., the third 6d., and agricultural subjects only 3d.

"In 1846, when the classification for the parish of Cardross was approved, no railway went through the parish, and the omission of any mention in 1846 in the classification of railways is thus accounted for. It is made matter of admission by the parties that the Caledonian and Dumbartonshire Junction Railway Company had given parliamentary notice, in November 1845, that an application would be made to Parliament for power to make a railway through Cardross. But no such railway was in existence when the classification was made in 1846, and the railway company had at that time no heritable property in the parish. The adherence to the classification, and the refusal to take means to change it, now that a railway runs through the parish, are based upon considerations of pecuniary advantage, which can scarcely be called fair dealing.

"The assessment imposed upon the railway is upon the whole annual rent, and the company are brought in under Class II. Having got such a classification with reference to so wealthy a parishioner as the railway company, the parochial board are very unwilling to let go their hold. They know perfectly well that if they made any change upon the classification the Board of Supervision would not approve of a classification which made railways assessable at the same rate as dwelling-houses; and they know that the Board of Supervision has no initiative power in this matter, and cannot compel them to take action, so as to remedy a most inequitable classification. Nor can this Court do so. But this Court can declare whether or not there has been a classification within the meaning of the statute.

"The ground upon which I hold that there has been here no legal classification is this, that properties liable to assessment have not been classified—such as railways, fishings, quarries, limeworks, dyeworks, chemical works; and there are all such properties within the parish. An improper classification of this sort does not fulfil the purpose of the statute, and it was *ultra vires* of the Parochial Board to make it, and of the Board of Supervision to sanction it.

"The principles upon which classification ought to be made were very ill understood by the parochial boards; and hence, in the year 1868, Sir John McNeill, the chairman of the Board of Supervision, at the request of the legal members of the board (Mr Edward Gordon, Mr Schank Cook, and myself), drew out the instructive explanatory circular, of date 10th December 1868, which has been put in evidence, and which, in regard at least to the parish of Cardross, seems to have failed in its intended effect. It was laid upon the table of the Parochial Board, the inspector states, and there it lies still—a dead letter. Its advice, with the explanations which accompanied it, were more successful with other parochial boards, who had got illegal classifications sanctioned in the early days of the Board of Supervision, and who gave concurrence to modification and amendment. But, notwithstanding this, one of the reforms still needed (when there is an amendment of the Poor-Law Acts) will be the giving to the Board of Supervision the power of enforcing equitable classifications,—instead of the mere negative power of amendment and disapproval which they at present possess, and this only in the case where application is made to them by a parochial board. The individual ratepayer is helpless. His appeals to the Board of Supervision were answered, and must always be (until an Amendment Act be passed), in the same way: 'We have no power to help you.'

"The parochial board bring the railways under the head of 'Houses let as dwelling-houses or shops.' But this is to do inadmissible violence to the English language, and for which there is no justification whatever in the circumstances

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arguments having been mainly directed to the question whether the Board of Supervision could competently withdraw its concurrence to a classification which had become inapplicable, the Court pronounced this interlocutor:—"Before answer, direct the process to be laid before the Board of Supervision, and request the board to inform the Court whether they continue to concur in the classification complained of as in their opinion just and equitable."

The Board of Supervision subsequently returned the minute quoted below.*

The hearing was then resumed.

Argued for the defender;—The classification here was an equitable and intelligible one. Its intention was to give partial exemption to farmers, and to assess everyone else at the full value of their properties. Whether equitable or not, it had been duly adopted and approved, and the Court had no jurisdiction to inquire into its equity. Further, it was a valid and legal classification. It was said not to be exhaustive, but though the natural meaning of its language might not cover the case of railways,

of the case. A railway is neither a dwelling-house nor a shop. No doubt an arbitrary and non-natural meaning may be attached to a word; but if that be intended, there must be a clause *de interpretatione verborum*. It may be allowed to a man to use his own glossary, provided he furnishes the translation; or to write in a cipher, provided he furnishes the key to it. He may declare that by 'houses' he means 'railways,' and by 'lands let for farming' he means 'dyeworks.' But unless this be done by way of glossary, a Court of law must give to words the meaning which they commonly bear; and therefore the only conclusion I can come to is, that there is no existing legal classification in the parish of Cardross, and that, therefore, this case must be dealt with on the footing that none such exists.

"Now, the result of this must be, of course, that all property shall pay at the full rate, under deductions allowed by section 37 of the Poor-Law Act. Consequently, farmers must pay at the same rate as all other ratepayers—a result also very inequitable, but which is the consequence of the non-existence of a legal classification. But the imposing such liability on farmers will have the good effect of very speedily forcing the parochial board to adopt a classification more in accordance with justice than the existing one.

"I am unable to adopt the contention of the railway company (which is sought to be given effect to in the alternative conclusion of the summons), viz., that 'railways' come under the first class of 'Lands let for farming.' That contention is just as absurd and untenable as the contention of the parochial board, that they come under the second class of 'Houses let as dwelling-houses or shops.'"

* "The board beg very respectfully to state that they have been in use to regard the duty devolved on them by the Poor-Law Act, in the matter of assessments, as of a judicial character, and have not considered it consistent with their statutory duty to determine as to any classification submitted to them by a parochial board without affording to the parties, supporting or opposing the classification submitted, an opportunity of being heard thereon. They therefore regret that they are unable to give the Court a definite answer to the question put to them in the remit, as by doing so they might be held to have prejudged the question, if it were hereafter to be submitted to them in the manner contemplated by the statute.

"Subject to this explanation, the board have to state that they have been in the habit of approving of classifications as just and equitable in which railways have been placed in a class between houses and shops on the one hand, and agricultural lands on the other. But they have not adopted any inflexible rule to the effect that railways must always be so classed, and would consider it their duty to have regard to the whole circumstances of a parish in each particular case."

that language had received a conventional meaning through usage, which was a competent interpreter in such a case.¹ No. 92.

Argued for the pursuers ;—If the later practice of the Board of Supervision was to be taken as a test this classification was plainly inequitable, and, further, it was an illegal classification, because it was not exhaustive. The illegality was either *ab initio* (for dyeworks, &c. had equally no place in it) or supervening. In either case there had been a failure in statutory duty, and no amount of use could justify that. The action was competent, for though the Court could not compel a parochial board to adopt a new classification, they could declare an existing classification to be illegal.

At advising,—

LORD JUSTICE-CLERK.—The Poor-Law Act was passed in 1845, and it seems that in 1846 the parochial board of Cardross had before them the question of classifying the lands and heritages in the parish under the 36th section of the Act, with the view of imposing a graduated scale of rates. Under the classification which they resolved upon they included, on the one hand, houses,—that is to say, houses let for dwelling-houses or shops,—and, on the other hand, land, by which they intended land devoted to agricultural purposes. They did not propose that their classification should comprehend any other branches. This classification was duly reported to the Board of Supervision, and I think we must read the interposition of the Board of Supervision as an assent to the classification so proposed. Since the year 1846 an important line of railway has been constructed through the parish, and the question which we have now to consider is, whether the classification which the parochial board have adopted does or does not apply to the rateability of that trading concern, for that is what it is. It is said on the part of the railway company that the classification does not and cannot apply to their line, in the first place, because the line did not exist at the time the classification was resolved upon ; and, in the second place, equitably, because it is said to lay upon the railway company an amount of burden entirely inequitable in itself, and which could not by possibility have been contemplated at the time the classification was made. Now, I do not think that there can be any dispute that the classification is of this inequitable character. The parochial board, however, had the remedy in their own hands, for they could have resolved upon another classification which would apply, and apply equitably, to the railway company, who occupy a large portion of land in the parish. The parochial board when applied to declined to take that course, and the Board of Supervision, who have a supereminent jurisdiction to give or refuse their assent to classifications which may be proposed by parochial boards, are of opinion that they are not entitled to take any initiative in this matter, and that their control over parochial boards is on this point limited to that power of giving or refusing their assent to classifications, which the statute confers on them. On the whole I am inclined to think that the Board of Supervision are right in taking that view of their functions. We, however, asked the board what their opinion was on such a question as we have here to consider, and they apparently indicate that if a proposal were made to them to classify the subjects in this parish now they would be inclined to rate the railway in a class midway between houses and agricultural lands.

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¹ Smith v. Wilson, June 4, 1832, 3 Barn. and Adol. 728; North British Railway v. St Ninian's Parochial Board, Feb. 24, 1885, 22 S. L. R. 446.

No. 92. I am clearly of opinion that this is not a classification which is applicable to this railway. It has no place for railways, and I think it is the plain duty of the parochial board to revise the classification, and to adjust it on a more equitable scale. I cannot see that there is any difficulty in coming to this result, because the classification at the time when it was adopted could not apply to railways, as there were none then in the parish, although it may have been suited to the other subjects in their existing condition. Therefore, without going further into the matter, I am for affirming the judgment of the Lord Ordinary. The parochial board may find their own way out of the difficulty. They may revise the classification, and get the concurrence of the Board of Supervision to the revised one.

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LORD YOUNG.—The question which the Lord Ordinary has decided by the interlocutor reclaimed against is, whether or not the classification of lands and heritages in this parish adopted on 29th May 1846 is a legal classification under the statute. The Lord Ordinary has found that it is not, and I think rightly. He is of opinion, and I agree with him and with your Lordship, that a classification in order to be good under the statute must be exhaustive. That, indeed, was admitted at the bar. It must be such as to include the whole lands in respect of the occupation of which the statutory assessment is imposed. It cannot be partial, and must be comprehensive, and so comprehensive as to be exhaustive. Now, the Lord Ordinary's decree imports no more than the assumption that a classification of the lands and heritages in this parish into, first, lands let for farming, and, secondly, houses let as dwelling-houses, is not an exhaustive classification. I think that is a sound assumption. I do not think it applies to railways, or to anything except lands let for farming, or houses let for dwelling-houses or shops. These are the words used in the statutory determination and direction of the Board of Supervision, or rather in the determination and direction of the parochial board which they submitted to the Board of Supervision in 1846 for approval, and they are the words of which the Board of Supervision then approved. The only ground on which it is sought to defend the classification as rightly made, so as to comprehend railways and be exhaustive of all other lands and heritages in the parish, is by reading the words "houses let for shops or dwellings" as comprehending railways, shootings, quarries—everything, in short, except land let for agricultural purposes. Now, I cannot so read these words, and with respect to the board having hitherto been in use to impose assessments on the occupiers of shootings, quarries, fishings, and the like, without any objection being made, I can only attribute that to the ease with which taxes are levied, and the willingness of people to submit rather than raise questions. If the question were raised, whether shootings, quarries, or fishings are either lands let for farming or houses let for dwelling-houses or shops, I cannot imagine that there would be any doubt about the answer, any more than about the answer to the question which we have here, whether railways are houses let for dwelling-houses or shops. I cannot say that I have any difficulty about the usage. It is not a usage between contracting parties, shewing what they meant by the contract. It is a usage between a taxing body and persons submitting to the imposition of the tax. That is not a sort of usage which would incline me to attribute to language a meaning so foreign to its ordinary meaning as that for which the parochial board here contend. But I do not need to go into that. The classification must be approved of by the Board of Super-

vision, but they had only the language of the classification, not the usage, before them to approve of, and I must hold that their approval was limited to the ordinary and proper meaning of the words of the classification of which they expressed their approval.

I am therefore of opinion that this classification is bad, and must be declared to be so, as the Lord Ordinary has done. The result no doubt is that there will be no classification at all in the parish, and that all lands and heritages will be assessed on their full value alike. That has not been found in practice to be desirable, because it has not been found to be equitable. I do not for a moment doubt therefore that the parochial board will set about making a new classification which will be exhaustive, and that they will name railways and the other subjects with a view to separate rating. That will be placed before the Board of Supervision for their approval; until that is done there is no classification, and the equal rating must continue, but after these two authorities have approved of a classification which is exhaustive of the subjects in the parish, this Court has nothing to do with the equity of it.

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LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

THE COURT adhered.

MILLAR, ROBSON, & INNES, S.S.C.—J. & J. ROES, W.S.—Agents.

JOHN ALLAN (Surveyor of Taxes), Appellant.—*Sol.-Gen. Robertson—A. J. Young.*

HAMILTON WATER-WORKS COMMISSIONERS, Respondents.

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Feb. 22, 1887.
Allan v.
Hamilton
Water-Works
Commissioners.

Revenue—Income-tax—Burgh water-works.—The Hamilton Water-Works Commissioners, by local Act, were empowered (1) to charge a “domestic water-rate on all premises within the town which were supplied with water; (2) to levy a “public water-rate” upon all premises within the town whether supplied with water or not; and (3) to sell water for other than domestic uses at such rates as should be agreed upon. The Commissioners annually made up a tariff of charges for supply under this head. It was further provided that the supply for domestic use should not be held to include a supply “for railway purposes or for public baths, or for public establishments.”

The barracks, which were within burgh, did not pay the domestic rate, but paid for water supplied to them according to measurement at the tariff rate. *Held* (following *The Glasgow Water Commissioners v. Miller*, 13 R. 489), that the payment thus derived was profit, and liable to assessment for income-tax under schedule D,—*dis.* Lord Shand, who held that the barracks were entitled to be supplied at the domestic rate, and that the fact of the other method of supply and payment having been adopted in lieu thereof did not alter the character of the payment so as to make it liable to assessment as profit.

THE HAMILTON WATER-WORKS COMMISSIONERS were empowered by 1st Division. M.
the Hamilton Water-Works Act, 1854, to supply the town of Hamilton with water, and to impose (sec. 31) a rate not exceeding sixpence in the pound, known as the “domestic water-rate,” upon the annual value of the premises supplied with water; and (sec. 42) a rate, called “the public water-rate,” not exceeding sixpence in the pound, “upon all dwelling-houses and parts of dwelling-houses occupied as separate dwellings, and buildings used as dwelling-houses, inns, hotels, and taverns, and all shops, warehouses, offices, manufactories, and other

No. 93. premises used for trade, manufacture, or business, situated within the limits of this Act, including the office-houses, yards, and pertinents of the same.”
 Feb. 22, 1887. *Allan v. Hamilton Water-Works Commissioners.*

By sec. 33 it was provided that the supply of water for domestic use “shall not be held to include a supply of water for railway purposes or for public baths, or for public establishments,” and by sec. 34 that “it shall be lawful for the Commissioners to supply any corporation, or company, or person with water for other than domestic use at such rates and upon such terms and conditions as shall be agreed upon.” Such supplies were given and charged according to a tariff and scale made up yearly and published by the Commissioners. Among other rates in the tariff or scale published by the Water Commissioners for the year to Whitsunday 1885, was a charge of £1, 15s. for each hundred thousand gallons of water supplied to persons who were charged with the public water-rate, and a charge of £3, 10s. for the like quantity of water where the person supplied was not charged with that rate. In these cases, where payment was made according to the quantity of water supplied, the domestic rate was not levied.

Hamilton Barracks, belonging to the Crown, were within the burgh boundaries, and were supplied with water, the quantity being measured by meter, and charged for at the tariff-scale of £3, 10s. per every 100,000 gallons consumed. The amount paid for the year to May 1885 was £396.

The Water Commissioners were charged with income-tax on a surplus revenue of £567 (in which was included this sum of £396), as the amount of profit arising from the supply of water by meter and agreement.

The Water Commissioners appealed to the Income-Tax Commissioners against this assessment on £567, and contended that it ought to be reduced by the amount of surplus revenue accruing from the above mentioned payment of £396 for water supplied to the barracks. They maintained that the payment being in lieu of both the “public water-rate” and the “domestic rate,” should be treated as if it had been actually levied in the form of rates.

They argued that such a payment did not fall under the principle laid down in the case of the *Glasgow Water Commissioners*, Jan. 22, 1886, 13 R. 489, which was that if the proprietors of a water supply undertaking went beyond their statutory obligations and sold the water, the profits derived from such sale were chargeable to income-tax. This was not the case of the supply to Hamilton Barracks. They were under an obligation to give a supply, the barracks being situated within the limits of the Hamilton Water-Works Act.

The Surveyor of Taxes maintained that the case of the supply to Hamilton Barracks was clearly ruled by the principle laid down in the Glasgow case. He argued that while the Glasgow Water Commissioners were strictly within their statutory obligations in supplying water to the suburbs and other places “within the limits of the Act,” the whole revenue, except that derived from “compulsory rates” levied within the municipal boundaries, was held to be revenue from which profits might accrue. This revenue included non-compulsory rates levied beyond the municipal boundaries, and all trade charges and charges for meter supplies, as well within as without the municipality.

The Income-Tax Commissioners were of opinion that the decision of the Court in the case cited by the Surveyor did not apply, as the sum of £396 really represented the statutory rates; and they accordingly reduced the assessment.

The Surveyor of Taxes took a case for the opinion of the Court of No. 93. Exchequer.

The Hamilton Commissioners were not represented at the hearing.

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Commissioners.

LORD PRESIDENT.—It appears to me impossible to distinguish this case from the second branch of the *Glasgow Corporation Water-Works* case. We have an Act of Parliament authorising the Hamilton Water-Works Commissioners to supply the town with water, and there are two rates which they are entitled to levy according to the nature of the premises charged with the rate. The first is a rate of 6d. a-pound, which is called the domestic water-rate, and the second is a rate called the public water-rate, which is levied upon all premises within the town, whether they are supplied with water or not. As regards the public rate, it has no bearing upon the present question. The domestic rate is a rate charged upon the annual value of premises which are supplied with water, and the occupier or owner of the premises is by section 31 "to request the Commissioners to supply him with water," and if he makes such request, then he is entitled to demand a supply of water for domestic use, and the Commissioners are bound to give that supply at the fixed rate of 6d. per pound upon the annual value of the premises. But then it is enacted by section 33 of the statute that "the supply of water for domestic use shall not be held to include a supply of water for railway purposes, or for public baths, or for public establishments, or for cattle, or for horses, or washing carriages when such horses or carriages are kept for hire or by a dealer, or for any trade, manufacture, or business whatsoever." And section 34 provides that "it shall be lawful to the Commissioners to supply any corporation or company or person with water for other than domestic use, at such rates and upon such terms and conditions as shall be agreed upon between the Commissioners and the corporation or company or person desirous of having such supply of water, and the rates so agreed upon shall be recoverable in the same manner as any other rates under this Act."

Now, although the payment that is to be made for this supply of water under section 34 is called a rate, that is rather an unfortunate term to use, because the section confounds the payment with the annual rates or the payments upon annual value which receive effect in the domestic rate. The thing which is called a rate is really the price of water sold, because the payment is levied according to the quantity of water received and used.

Now, that being so, the question in the present case is whether the water supplied to the barracks at Hamilton is properly charged for under the 33d and 34th sections, and so forms a source of profit within the meaning of the case which I have just referred to. It is quite possible that if the barracks had made an application under section 31 to have a domestic supply they might have been entitled to have it. I cannot tell. That question is not before us, but it is very possible, I think, that the barracks may properly be held to be a public establishment within the meaning of section 33. Be that as it may, however,—whether they would be entitled under the statute to a domestic supply, or whether under section 33 they are excluded from demanding a domestic supply,—the state of the fact is that as between the barracks, or the public authorities representing the barracks, and the Water-Works Commissioners, the existing arrangement is that the barracks buy the water under sections 33 and 34, and do not pay a domestic rate. Now, in that state of the facts, we must take it that that is the proper mode of charging, and if

No. 93. that be so, then the principle of the *Glasgow Water-Works* case is directly applicable, and must be applied in this case; and therefore I am of opinion
 Feb. 22, 1887. that the Commissioners are wrong, and that their judgment ought to be
 Allan v. reversed.
 Hamilton
 Water-Works
 Commis-
 sioners.

LORD SHAND.—I regret that we have not had the benefit of an argument from the respondents in this case, for, I confess, I have very considerable difficulty about it. I understand your Lordships are agreed in the view which your Lordship has now expressed, and accordingly, my opinion is of little moment, but the difficulty I have lies here. The distinction between the *Glasgow* case and the present is this, that in the *Glasgow* case it was clear that all the water sold, which was said to be the subject of profit made, was water given to persons who clearly were not entitled to it as for domestic purposes. They were all in trade, and it was for the purposes of trade that they were entitled to make arrangements to get water and did get it. In this case it is not supplied for purposes of trade. Section 33 of the *Hamilton Water-Works Act* provides that the supply of water for domestic use “shall not be held to include a supply of water for railway purposes, or for public baths, or for public establishments, or for cattle, or for horses, or washing carriages, when such horses or carriages are kept for hire or by a dealer, or for any trade, manufacture, or business whatever.” That, I take it, is meant to fulfil the same purpose as the clause of the *Glasgow Act*,—it is meant to provide that water is not to be given for trade purposes or uses under the head of domestic use. And accordingly, if this had been a case where parties were not entitled to water for domestic uses, as the *Glasgow* case was, I should have been clear with your Lordship that the judgment of the Commissioners should be reversed, but it is because I am not satisfied of that that I have a different opinion. I think the barracks are just as much entitled to water for domestic use as any large establishment or house where a great many people reside. And accordingly the view which the Commissioners have taken is this: They say that having considered the question, they “were of opinion that the decision of the Court in the case cited by the surveyor did not apply, as the above-mentioned sum of £396 really represented the statutory rates,”—that is to say, as I understand it, the payment represented an alternative way in which the barracks paid for the water, which they were entitled to get under the domestic rate, but which they wished to take and arrange to pay for in another way.

It is quite true that as matter of fact the water is paid for by meter, but that does not satisfy me that the Commissioners are making profit by the sale of it. If the barracks were entitled to get their water supplied under the domestic rate, then they are simply taking this alternative mode of reaching the sum they have to pay for the water so taken, and in that case I am not satisfied that the Commissioners are really making profit by it.

Accordingly, upon that distinction between the two cases, I do not feel able to concur with your Lordships in reversing the decision, but it is better that it should be decided now, and having stated the ground of my difference of opinion, I have nothing further to add.

LORD ADAM.—I agree with your Lordship in the chair, and do not share Lord Shand's doubts. It appears to me that the only case we have to deal with is the case of the *Hamilton Barracks*, which in point of fact are supplied, and pay for the

water by meter. It is said that the Crown, or whoever represents the Hamilton Barracks, may be entitled to have water for domestic use under an earlier clause of the statute, and that if they so obtained it they would not be liable. How that may be I cannot in the least tell. Whether the barracks would or would not be entitled to make a demand on the Commissioners to be supplied with water as they are now, and to be assessed only at the domestic rate, I have not the least notion. That is not the question before us, for we know in point of fact that they are not so supplied. On the contrary, they are supplied under a different section, which says that the supply of water for domestic use "shall not be held to include a supply of water for railway purposes, or for public baths, or for public establishments," and that it shall be lawful for the Commissioners to supply any corporation or company or person with water for other than domestic use at such rates and upon such terms and conditions as shall be agreed upon. Now, the representatives of Hamilton Barracks have agreed with the Water-Works Commissioners that they shall be supplied with water on certain terms and conditions. It follows that it was entirely optional on the part of the barracks whether they would take it on such terms and conditions or not. If they were not satisfied with the terms and conditions, they need not have taken the water. Therefore it is not compulsory, but it is entirely a voluntary contract between the two parties. In other words, the fact simply appears to me to be that the Water Commissioners are selling water to the Hamilton Barracks at certain rates and on certain conditions. It humbly appears to me that the circumstances are exactly the same as we had to deal with in the Glasgow case. I cannot assume on the facts stated here, that the Hamilton Barracks would have a right to get the water at the domestic rate, and treat the case upon that footing. I assume that they know their right, and that if they had that right they would have exercised it. But they have not done so. They have entered into an entirely voluntary agreement with the Commissioners to buy water from them at certain specified rates. That is the only case we have to deal with; and it is no hardship on the Hamilton Barracks to take it in this way, for this reason, that they may use the water not only for domestic purposes, but for public and general purposes without paying any more for domestic use, because they are not charged for domestic use. The price they pay covers that.

That being so, I think this is purely the case of a sale of water by the Water Commissioners to the Hamilton Barracks on the terms agreed on between them, and the case therefore distinctly falls, in my view, under the Glasgow case.

LORD MURRAY was absent on Circuit.

THE COURT accordingly reversed the determination of the Commissioners, and sustained the assessment.

THE SOLICITOR OF INLAND REVENUE, Agent.

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Allan v.
Hamilton
Water-Works
Commissioners.

No. 94. WILLIAM JAMIESON YOUNG, Pursuer (Respondent).—*Strachan*—*J. Wilson*.
ANDREW DOUGANS, Defender (Reclaimers).—*Murray*—*Salvesen*.

Feb. 23, 1887.
Young v.
Dougans.

Partnership—Joint adventure—Constitution of contract.—Correspondence which was held (rev. judgment of Lord Lee) not to constitute a contract of joint adventure, in respect it contained no *termini habiles* for determining the duration of the contract or its essential conditions.

Partnership—Joint adventure—Ish of contract.—*Opinions* (per Lord Justice-Clerk and Lord Craighill) that a contract of joint adventure, unless there be something special in its nature, is terminable at the will of either party, if that be exercised in good faith and at a seasonable time.

2D DIVISION.
Lord Lee.
M.

W. J. YOUNG, on 3d March 1886, took out a patent for "improvements in commodes or closets for indoor use." Not having any capital, he entered into negotiations with Andrew Dougans, an ironmonger in Glasgow, with a view to having his patent worked. These gentlemen during 1885-6 had many meetings on the subject, and a long correspondence took place between them. Models of the closet were made and fitted up, various small alterations were introduced into the original design, and specimens were exhibited at the Edinburgh International Exhibition under the name of Young's Patent.

In April 1886 Mr Dougans declined to assist the patentee farther in promoting the sale of his closet, and upon that, on 14th July 1886, the patentee brought an action against Dougans for damages for breach of contract, concluding for £100. The contract which he said had been broken was thus described by him,—“In or about the month of July 1885 the pursuer and defender entered upon a joint adventure for obtaining the said patent and for working the same under the name of ‘Young's Patent Earth Closet Company,’ and it was arranged that the defender should provide the capital necessary for the proper conduct of the business, as an equivalent on his side for the value of the pursuer's invention. The profits of the undertaking were to be divided equally.”

He further averred that the defender now repudiated his obligations in connection with the joint adventure, and refused to fulfil his part, and to furnish any funds for carrying on the said joint adventure.

The defender denied that there had been any contract of joint adventure. He stated,—(Stat. 3) “About the beginning of July 1885, negotiations were opened by the pursuer for a sale of his patent to the defender, or for a joint adventure between them for working the patent, the capital to be supplied by the defender. No concluded agreement, however, was ever come to, and no term of endurance for the joint adventure was ever mentioned. Pending the negotiations for a joint adventure, various experiments were made with a view of perfecting the commode and reducing the expense of manufacture, which had been found largely to exceed the limit indicated by the defender,” viz., £2. “. . . . The result of the experiments was to shew, both to the defender and the said David Dougans, that the commode was unsaleable through defective construction, and that it could not, in any case, be made in oak, so as to allow of its being sold at a price of 40s. . . . In these circumstances, the defender, about the middle of April 1886, resolved not to proceed any further with the matter, and he at once intimated his decision to the pursuer.” (Stat. 4) “The experiments for the manufacture of the commodes, as above stated, were made with the view of ascertaining whether the pursuer's patent would satisfy the conditions upon which alone the defender believed it could be made a success. The defender does not admit liability for the expense of said experiments, but he is, and has all along been, willing to bear the whole expense incurred by the pursuer pending the said negotia-

tions in connection with said experiments and the exhibition of the said commodore, so far as sanctioned by the defender. The defender has in point of fact paid the greater portion of that expense already."

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The defender pleaded;—(3) There being no concluded contract of joint adventure between the parties, the action should be dismissed, with expenses. (4) *Separatim*, No term of endurance having been specified, the alleged partnership was terminable at will, and the defender was therefore entitled to withdraw from the same.

A proof was taken. The chief evidence was in the correspondence of the parties. On 7th July 1885 Young wrote to Dougans,—“On considering your alternate proposals about the working of my commode, permit me to put the following questions:—

“A joint venture—what does it mean? Will it be necessary to value my patent? If so, how much value do you put upon it? It has lost me money, and as you are willing to join me in putting it into the market, it is worth something. Then please explain what position I will occupy in carrying out this proposal? Will my time be required? If so, when, and on what terms? If time not required, then how am I to be satisfied as to profits and working expense?

“Are Bennet & Co. to be manufacturers? If so, on what terms?

“Are A. Dougans & Sons to be sole agents, and on what terms?

“Under what name is our joint adventure to be placed?

“Is this adventure to be for the United Kingdom and Ireland, or only for Scotland? If for the United Kingdom, then who is to be agents and manufacturer?

“These questions being answered, I will be in a better position to decide which of the two ways I will prefer.”

Dougans replied,—“1. Joint venture means fair division of profits.

“2. Value of patent—my undertaking to provide capital for proper conduct of business would be equivalent.

“3. How much value? Same as above.

“4. Position in carrying out proposal of joint venture—have no fixed idea on this. Have you any?

“5. Your time required—not necessary after getting a fair start.

“6. As to profits, how known—books of the company will shew this.

“7. Are B. & Company to make all—certainly not, if a cheaper can be had.

“8. Are A. D. & Sons to be sole agents—not agents if to be partners in joint venture.

“9. Name carried on under—Young’s Patent Earth Closet Company, or—

“10. If for U. K. or—certainly appoint agents or advertise.”

On 6th August 1885 Young wrote to Dougans:—“Dear Sir,—I am willing to go on with you in a joint venture with my commode on the terms you name, viz.,—You to provide all funds for the proper conduct of the business to enable us to execute orders, print circulars, advertise, exhibit, appoint agents throughout the United Kingdom and Ireland, and otherwise bring the article prominently before the public, all of which is to be held as equivalent to my patent. Profits to be equally divided between us. The name of company to be ‘Young’s Patent Dry Closet Company.’ A set of books to be kept for the company.

“Commodore at first to be contracted for.

“My position, I think, should be bookkeeper and manager under your surveillance.”

On 8th August Young wrote again:—“Considering the stage of our negotiations, also of my finances, I think it proper to let you know that I am urgently in need of £100.

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"This has arisen partly from my being ill the whole of last summer, and partly from business not paying, and possibly from my being too much taken up with this patent and outlays connected therewith. Will you give me your name for this sum on the security of my share of the patent? I hope that you will see your way to do so, as I want to get clear of a few troublesome accounts before joining you in this adventure. As I said yesterday, if you deal generously with me now, I am willing to put the whole patent on the same terms."

Dougans replied on the 10th :—"Your favour of 8th inst. to hand. In reply I cannot agree to your request."

"I will be willing to carry out all I have promised to do in putting your commode before the trade, and provide funds, &c., for doing so, but I would not be warranted in its present stage complying with yours now replied to."

On 20th February 1886 Young wrote :—"I have been expecting a letter from you every day this last week, saying whether you are now satisfied with the commode and patent. Surely we are losing time, especially in view of the Exhibition. Your immediate attention will oblige."

On 23d February he wrote again :—"You must now appoint agents, and advertise, or write me your mind on what I will do in this way. We must now make commodores for sale as well as Exhibition. I am ready to give my whole time to this matter at a reasonable salary for a year, and will be glad to assist you otherwise, if you can make me of service. . . . P.S.—Name my salary for the first year, as you know I cannot work for nothing."

On 2d March Dougans replied :—"Your letters were duly received and considered. I have no fault to find with your desire to have the commode brought before the public, but I differ with you as to how it is to be done. It certainly cannot be by making them in dozens with no apparent present outlet. . . . Only thing to make at present is samples for Edinburgh, and they could be put in hands at once. As for employing you on salary, that does not appear at present advisable, because there is nothing actually to attend to. Were you to secure orders in Greenock, where you are personally known, that would be a start, and would probably lay the basis of what you desire."

After a long correspondence Dougans wrote on 10th April 1886 :—"As to your arrangements for either going or being with them during the Exhibition, I fear that must be left for yourself to decide, as my time now will be so fully occupied by my own business that I will not be able to separate myself from it. Since my son's leaving I have had fully two months' constant travelling, and if I have learned anything when out it is this, that if my connection is to be profitably maintained I must give it my personal attention."

"When you first named your closets to me both my sons were with me, and I had the desire then to push it in the form so often talked over with you; but this secession of those who could have wrought it under my direction has so completely changed my personal position that I am compelled to say it is quite out of my power to take further active steps in promoting their sale."

"I dare say from former letters you are prepared for this decision, one, I can assure you, very reluctantly come to. I trust, therefore, that you will be able to arrange with a more suitable party, one who could devote his whole time and means to pushing what I still think a decided want in Scotland."

The Lord Ordinary (Lee), on 17th December 1886, pronounced this interlocutor :—"Finds that the defender, in the month of August 1885,

entered into a joint adventure with the pursuer, whereby, in consideration of his obtaining an equal share in a private 'commode,' upon a plan designed by the pursuer, the defender agreed to join him in putting the said 'commode' before the trade, and to provide funds, &c., for doing so: Finds that the defender wrongfully failed to implement his part of said agreement of joint adventure, and on 18th April 1886, wrongfully and in breach of said agreement, withdrew from the same, to the loss and damage of the pursuer: Assesses the damage at the sum of £100 sterling, for which sum decerns against the defender in terms of the conclusions of the summons." *

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* "OPINION.—1. I think it proved by the correspondence (brought to a point in the pursuer's letter of 6th August 1885), and by the proceedings which followed, that the defender agreed to enter into a joint adventure with the pursuer with regard to a 'commode' upon a plan designed by him, and for which he obtained acceptance of a provisional specification; and it appears to me that the terms of the adventure are sufficiently and satisfactorily explained. The defender's letter of 10th August 1885 contains an acknowledgment that he had promised to join the pursuer in putting the 'commode' before the trade, and to provide funds, &c., for doing so. His subsequent actings confirm this view, and in my opinion the defender's attempt now to represent this agreement as having been subject to conditions which were not fulfilled is not supported by the evidence. He had sufficient opportunities of considering these matters before he agreed to join the pursuer in the adventure. His letters shew that to the end he professed to consider the 'commode' a 'good thing,' deserving of success; and that he broke off from the pursuer, not on account of any failure on the pursuer's part to fulfil his part of the agreement, but on account of want of time to attend to the matter. Even in his letter of 10th April 1886, the defender speaks of the pursuer's 'commode' as being 'a decided want in Scotland.'

"The defender may, no doubt, be able to shew that he had a sufficient ground for putting an end to the joint adventure. That is a separate question. But he was not entitled to keep the pursuer bound to him from August 1885 to April 1886, and then to break off merely because it did not suit his convenience to go on. I think that there was a concluded agreement, by which he acquired right to an equal share of the pursuer's patent, and became bound to join the pursuer in working it, at least to the extent of giving it a fair trial in the market.

"2. As to the alleged breach of agreement, there is no question that, by the letter of 10th April, the defender announced his resolution not to go on. The question is, whether his breaking off at that time was wrongful, or was done under circumstances which entitled him to put an end to the joint adventure? It is not doubtful that circumstances may arise in the course of carrying on a joint adventure which justify one of the adventurers in refusing to go farther. In the case of *Miller v. Walker* (3 R. 242), which was cited by the pursuer's counsel, the rule was stated by the Lord President as follows:—'The general rule is that one of two joint adventurers is entitled to put an end to the joint adventure if it comes to be attended with greater risk than when the contract was entered into, or if there be no reasonable belief that profit will be made for either party.' In applying that rule to the present case, it is necessary to keep in view that, though the agreement was for no definite period of time, it was for a definite purpose, and contemplated a reasonable endeavour on the part of the defender, jointly with the pursuer, to place the article in the market.

"I am of opinion that at the time when he broke off the defender had not made a sufficient endeavour to fulfil his part of the agreement, and that nothing had occurred to justify him in putting an end to the adventure. He knew all along that the pursuer had not the means himself of pushing his invention, or even of presenting it in the market. He acknowledges, in the letter by which he announced his withdrawal, that the article was what he called 'a decided want in Scotland.' He had frequently been applied to by the pursuer to arrange and carry out some course of action; and the correspondence, particularly after

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The defender reclaimed, and argued;—In the first place, there were no such *termini habiles* in the letters relied upon as to constitute a contract upon which a decree for specific implement could follow, and if there was no contract capable of specific implement there could be no foundation for a claim of damages for breach.¹ “A contract which cannot be enforced by specific implement, in so far as regards its form and substance, is no contract at all, and cannot form the ground of an action of damages.”² The defender might be liable for any loss incurred by the pursuer by way of outlay, as in the *Melville Monument* case,³ but he was not liable in damages for breach. But, in the second place, even if there was a contract, there was no term of endurance provided; yet there must be some term, for the defender was not to go on *ad infinitum* spending money in advertisements and experiments. The contract was either bad for want of a term, as had been held,⁴ or it was a partnership-at-will and dissoluble when either party pleased, provided always there was good faith.⁵ A joint adventure was merely a limited partnership,⁶ there was no distinction between them as regarded this matter of dissolution. In the case of *Miller*,⁷ relied on by the Lord Ordinary, there was a guarantee which implied an obligation to work for a period of years. The case of *Reade v. Bentley*⁸ was not contradictory of the doctrine of a partnership dissoluble at will, but merely affirmed that there must be nothing unfair in the selection of the time for dissolution.

The pursuer argued;—This was a joint adventure, and not a partnership; if it had been the latter, it would have been bad for want of a term. The endurance of the former was to be regulated by the nature of the work to be done under the contract, and could not be thrown over unless it became more risky or burdensome than it had been at first.⁷ Where the purpose of the contract was fixed the Court might settle what the term should be, and there was some indication in the correspondence that the term was to be a year. But here the defender had not fulfilled his obligation of bringing the article into the market.

At advising,—

LORD JUSTICE-CLERK.—After giving the evidence careful consideration, I am confirmed in my impression that there was no concluded contract between the parties. But it may quite well be that, though there was no contract for a joint adventure, the defender was willing to bear the expense of experimenting with

December 1885, affords proof of the defender's dilatory conduct and his unwillingness (notwithstanding inquiries about the article) to concur in the expense necessary to put the article before the trade. . . .

“I am of opinion, on the evidence, that the defender has wrongfully failed to implement his part of the agreement, and wrongfully broke off from it on 10th April.

“3. Holding, as I do, that the defender has been in the wrong in maintaining that there was no concluded agreement, and in acting as he did, I think that the damage sustained by the pursuer cannot be estimated below £100.

“I shall find accordingly, and with expenses.”

¹ *Allan v. Gilchrist*, March 10, 1875, 2 R. 587.

² *Per* Lord President in *M'Arthur v. Lawson*, July 19, 1877, 4 R. 1134.

³ *Walker v. Milne*, June 10, 1823, 2 S. 338 (2d edn.).

⁴ *Traill v. Dewar*, March 8, 1881, 8 R. 583.

⁵ *Bell's Comm.* ii. 521-3 in 7th edn. (631 in 5th edn.).

⁶ *Bell's Comm.* ii. 538 in 7th edn. (649 in 5th edn.); *Lindley on Partnership*,

p. 55.

⁷ *Miller v. Walker*, Dec. 10, 1875, 3 R. 242.

⁸ 1858, 3 K. and J., 271, and 4 ib. 656.

the machine to determine what its value was likely to be, and this he has very frankly undertaken to bear. There is certainly no formal contract, but no doubt a contract may be spelt out of letters and constituted in that way, but I find nothing in the terms of the letters or in the circumstances under which they were written to warrant me in saying that any contract was so constituted. Two important matters were never settled, viz., the cost of the machine and the precise nature of the mechanism.

It is said that on 6th August a letter was written by the pursuer, which is said in point of fact to have constituted the contract. But that letter does not profess to constitute a contract; it is an offer, and an offer made after certain preliminary negotiations have taken place. Its terms are important. They are,—“Dear Sir,—I am willing to go on with you in a joint venture with my commode on the terms you name.” Then he specifies the terms, and adds,—“My position, I think, should be bookkeeper and manager under your surveillance.”

In that last sentence he refers to certain scroll replies which Mr Dougans had made in answer to questions by Mr Young. These queries and replies illustrate what I have been saying. Mr Young asks,—“Then please explain what position I will occupy in carrying out this proposal? Will my time be required? If so, when and on what terms? If time not required, then how am I to be satisfied as to profits and working expense?” The answer is,—“Position in carrying out proposal of joint venture—have no fixed idea on this. Have you any?” There is certainly no contract there. There is a mere statement that the pursuer is willing to go on “on the terms you name.” There is an incomplete contract, part of the tentative negotiations in which parties were engaged, and which might result in constituting a contract, but on which parties had come to no agreement on certain essentials of the contract. In the next letter, dated 8th August 1885, also from Mr Young, he asks the defender for £100 as a loan on the security “of my share of the patent.” He says,—“I hope that you will see your way to do so, as I want to get clear of a few troublesome accounts before joining you in this adventure.” When he got an answer on the 10th August it was to the effect,—“I decline to give you an advance.” The defender no doubt says,—“I will be willing to carry out all I have promised to do in putting your commode before the trade, and provide funds, &c., for doing so,” but that is not an answer to the letter of 6th August.

I do not go further into the case. The defender seems to have been willing to bear all the preliminary expenses in a friendly spirit, but it is one thing to make a contract for an indefinite partnership, and quite another to bear the liability for the expense of initiatory proceedings.

I think, then, that there was no contract of joint adventure, but even if it were otherwise, I think that when one man contributes an invention, and another all the expense, the contract could not endure longer than the pleasure of both parties; either of them should have the power of determining it. That is consistent with the Roman law on the subject (Dig. xvii. 2, 1, and 4, 1), and Pothier lays it down distinctly that any one of the partners can dissolve the partnership by giving notice to his partners if the renunciation is made in good faith, and is not made at an unseasonable time—(Pothier on Partnership, Tudor's translation, p. 109). On these two considerations, good faith and good time, the whole law hangs. It is quite true that something may hinge on the nature of the joint adventure. But there is nothing of the kind here; in the

No. 94.

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Dougans.

No. 94. view of the matter which I take there never was a concluded contract here at all.

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(His Lordship then intimated his opinion that the pursuer was entitled to a sum of £40, in respect of outlays made by him in developing his invention.)

LORD CRAIGHILL.—I agree. The Lord Ordinary has held that there was proof of a contract, where I think no contract has been proved. It is remarkable that no consistent case is presented as to the period when the contract was entered into. On the record he says July 1885, but he refers to no writing, and one would therefore infer that when the record was closed his view was that the contract depended for its constitution on verbal communings between the parties. But that is not the view which he now takes, he rather stands on the letters of 6th and 10th August. But these letters do not constitute a contract, and their very terms shew how unsettled the matter was in the opinion of all concerned. The price of the articles is not mentioned, parties had not made up their minds how the business is to be carried on, or whether the articles were to be made by the partners or bought by them from others, and it was not known then what they could be got for in the market. A contract is said to be entered into without either party knowing the conditions of the contract or their prospects of success!

I look upon these letters as more an "instrument of negotiation," and in using that expression I use the words of Lord Selborne in the case of *Fowler v. Mackenzie* (April 17, 1874, 11 S. L. R. 485). These letters are no more contracts than many letters which go before, and a number which came after them. I need only refer to one, dated 20th February 1886. That which is said in that letter is this,—“I have been expecting a letter from you every day this last week, saying whether you are now satisfied with the commode and patent. Surely we are losing time, especially in view of the Exhibition. Your immediate attention will oblige.” That letter is asking him to make up his mind, not to enter upon the work. He is to make up his mind whether there is to be an agreement or not between the parties, and therefore it is that I say that these are rather letters written in the course of negotiation, and not in any sense a contract. That they may contain words of obligation is nothing, for that element was present in the case to which I have referred, where nevertheless Lord Selborne described the document as “an instrument of negotiation.”

In contracts like this it is of the greatest importance that there should be a term for the purpose of protecting both parties, and for determining how far they are to conduct experiments, and how far they are to go in pushing the invention. On that ground, also, I think these letters cannot be described as a contract on the ground stated by Mr Bell in his Commentaries (ii. 523).

LORD RUTHERFURD CLARK.—It seems to me that the pursuer has failed in every view of the case. He has brought an action for the purpose of recovering damages for breach of contract. The contract on which he founds is a contract of joint adventure, and the alleged breach is that the defender in April 1886 wrongously withdrew from that joint adventure.

Now, of course, all liabilities incurred so long as the defender remained a member of the joint adventure he is still liable for, but as debts, not as damages. It follows that it is impossible for us to take into account the liabilities incurred during the subsistence of the joint adventure in an action for damages.

But I do not see on the evidence that the pursuer has sustained any damage. No. 94.
 If I were to affirm that there was a contract, and that the defender was in breach of it, I do not see how I could affirm that he has sustained anything but nominal damages. Feb. 23, 1887.
 Young v. Dougana.

But I agree with your Lordships in thinking that there was no contract made for a joint adventure; there was nothing more than an agreement by the defender to pay such expenses as to enable parties to determine whether this invention was an article which they might afterwards join in manufacturing.

On both of these grounds I think that the pursuer is not entitled to decree at all, but the defender has acted very well in saying that the action may be used for determining the liability of the defender for certain outlays, but I am not disposed to agree that so much is due on that head as your Lordship proposes.

LORD YOUNG was absent.

THE COURT recalled the Lord Ordinary's interlocutor, ordained the defender to make payment of £40 to the pursuer (by way of recouping him for outlays for experiments, &c.), and *quoad ultra* assolized the defender.

H. B. & F. J. DEWAR, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

CHARLES BEGG, Pursuer (Respondent).—*Balfour—Jameson—Orr.*
 RACHEL ISABELLA LOCKHART OR BEGG, Defender (Reclaimer).—
R. Johnston—J. C. Lorimer—Kennedy.

No. 95.

Feb. 25, 1887.
 Begg v. Begg.

Proof—Evidence Act, 1852 (15 and 16 Vict. c. 27), secs. 3, 4—Recalling witness.—Opinions that it is incompetent to recall a witness to be examined as to statements alleged to have been made by him since he was examined as a witness in contradiction of the evidence he then gave.

In an action of divorce for adultery brought by Charles Begg, M.D., 2^D DIVISION.
 against his wife, a servant, Christina Fairbairn, who had lived with Mrs. Lord Fraser.
 Begg, was examined as a witness for the pursuer. She was examined on 15th July 1886. After the pursuer had closed his proof, and most of the defender's proof had been led, the proof was adjourned and was resumed on the 16th October. Before the close of the defender's proof the following motions were made to the Lord Ordinary, as noted in the notes of evidence:—"Counsel for defender moved the Lord Ordinary to be allowed to recall the witness Christina Fairbairn in order to prove through her that she stated to her sister, Mrs Margaret Fairbairn or Whitson, with whom she was living at the time at Dunbar, on the evening of the day on which she gave evidence, that her evidence against Mrs Begg was false, that she knew nothing whatever against Mrs Begg, and that the charges against her were not true; also that three or four weeks thereafter, at 14 Pipe Street, Portobello, in the house of Mrs Mary Clark or Fairbairn, she made a similar statement to Mrs Fairbairn, her aunt." The Lord Ordinary refused the motion. "Counsel for defender moved the Lord Ordinary to recall the same witness, Christina Fairbairn, to prove a statement made by her to Mrs Mary Clark or Fairbairn before giving evidence, and the second day after being examined by Alexander Macdonald (a detective employed for Dr Begg), to the effect that she knew nothing against Mrs Begg, and that false charges were being got up against her; and also that she repeated the same statement to Mrs Fairbairn or Whitson a day or two before her examination in the cause. Counsel stated that he

No. 95. had discovered this since the cross-examination of the witness Fairbairn." The Lord Ordinary refused the motion.
 Feb. 25, 1887.
 Begg v. Begg.

The Lord Ordinary having given decree of divorce, the defender reclaimed against his judgment, and renewed her motions, citing the cases of *Hoey*¹ and *Robertson*,² and referring to the Evidence Act of 1852.*

The pursuer opposed the motion, and argued that if such a motion were to be granted it was impossible to see where it was to stop; there would be no end to the recall of witnesses to qualify their evidence.

The Court heard the case on the merits, and in delivering their opinions upon the merits remarked upon the motions that had been made as follows:—

LORD JUSTICE-CLERK.—I think that the Lord Ordinary took the right course. With regard to the statements made by the witness after her examination, I must say I know of no precedent for her recall.

With regard to the statements made by her before her examination, if there is a distinct and specific averment of them, I think her recall would probably be competent under the provisions of the Evidence Act. But the allegations here are not sufficiently specific as regards the precise words said to have been used, or as regards the time and place of their use. As regards the time, we have no doubt the words "a day or two before her examination in the cause," but then the motion is lacking in detail of place and of the words said to have been spoken, and I am unwilling, three months after her evidence was originally taken, to open up her evidence on so meagre a statement.

I have thought it right to indicate my opinion on this question, as it was fully argued before us, although it is not necessary for the decision of the case. But, like the Lord Ordinary, I find in the evidence a basis for my opinion, which is in favour of the pursuer, without any reference to Christina Fairbairn's evidence.

LORD CRAIGHILL.—(After intimating that he would lay Christina Fairbairn's evidence aside)—It is obvious that there is a very material distinction requiring to be taken between these two motions. The first refers to things said by Christina after her examination as a witness. I think—although, dealing with the case as I am doing, it is not necessary to indicate an opinion—that the matter of that motion is not covered by the statute. It refers to matters occurring after the examination was closed, and I do not think that matters of this kind can be introduced under the cover of that section. The idea that under the provisions of that section you can bring back a witness to speak to things which occurred after her examination is an idea that cannot be entertained.

¹ *Hoey v. Hoey*, Feb. 21, 1884, 11 R. 578.

² *Robertson v. Stewart*, Feb. 27, 1874, 1 R. 578.

* 15 and 16 Vict. c. 27, sec. 3.—"It shall be competent to examine any witness who may be added in any action or proceeding as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the evidence given by him in such action or proceeding and it shall be competent in the course of such action or proceeding to adduce evidence to prove that such witness has made such different statement on the occasion specified."

Sec. 4.—"It shall be competent to the presiding Judge or other person before whom any trial or proof shall proceed, on the motion of either party, to permit any witness who shall have been examined in the course of such trial or proof to be recalled."

I am disposed, however, to hold a different opinion as to the second motion, **No. 95.**
 although, if judgment had to be given allowing Christina to be recalled, a more
 precise specification might well have been required. I say no more, and it was **Feb. 25, 1887.**
 not necessary that I should have said so much. **Begg v. Begg.**

LORD RUTHERFURD CLARK.—There is a motion before us on the part of the defender to recall the witness Christina Fairbairn for further examination, and that motion may be taken as divided into two parts. The first is that she should be examined as to statements made by her before she was examined as a witness; the second is that she should be examined as to statements made by her after she was examined.

The motion, as I understand it, is made under the Evidence Act of 1852. I am clearly of opinion that that Act gives no warrant whatever for the second part of the motion, that part which refers to the statements made after her examination. The purpose of the Act was, shortly stated, to enlarge the subject-matter of cross-examination, but that could not possibly be held to apply to statements made after examination. These are outwith the Act altogether. If a motion is made to recall a witness to unsay what she had already said, that is a different matter, and as to it I give no opinion.

As to the other motion, it stands in quite a different position, and I think it is sufficiently detailed to allow us to grant it; if it is necessary to give an opinion upon it, I am of opinion that the defender is entitled to recall the witness for that purpose. That being my opinion, the only condition on which I can consent to dispose of the case as it stands is that Christina Fairbairn's evidence should be laid aside altogether. I do lay it aside.

LORD YOUNG was absent.

On the evidence, apart from that of Christina Fairbairn, all their Lordships were of opinion that the pursuer's case was proved, and they therefore adhered to the Lord Ordinary's judgment.

STUART & STUART, W.S.—CROMBIE, BELL, & MATHESON, W.S.—Agents.

MARGARET FERGUSON OR M'GHIE AND OTHERS, Pursuers (Appellants). No. 96.
 —*Rhind.*

NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—Murray. **Feb. 26, 1887.**
M'Ghie v. North British Railway Co.

Reparation — Railway Company — Driver — Contributory negligence. — An engine-driver was killed by his head coming in contact with a bridge over the railway as he was leaning over the side of the engine to see if the brakes were working properly. It was averred, in an action of damages by his widow and children against the company, that the bridge was greatly narrower than any other in the kingdom, and was four inches narrower than was required by the Board of Trade in the case of new works. The bridge was upwards of thirty years old. There was no averment as to the length of time the driver had been in the service of the company, or as to his knowledge of the line. *Held* that there was no relevant averment of fault, and that the pursuers were not entitled to an issue.

MRS MARGARET M'GHIE, widow of Andrew M'Ghie, engine-driver in **2D DIVISION.**
 the employment of the North British Railway Company, and her pupil **Sheriff of the**
 children raised an action of damages against the company for the death **Lothians.**
 of Andrew M'Ghie, which they stated had been caused by the fault of the **I.**
 company. He had been killed while driving his engine on the Bathgate

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line through striking his head against the arch of a bridge that crossed the railway. The accident had happened as he was leaning over the side of his engine to see if the brakes, which were old-fashioned brakes, were working.

The averments as to fault were as follows:—(Cond. 4) "The death of the said Andrew M'Ghie was caused by the fault of the defenders in having the said bridge dangerously and unusually narrow. Had it been of the ordinary width the accident would not have happened. Further, the defenders were to blame in not warning their servants, and among others the said Andrew M'Ghie, of the undue and unusual narrowness of the said bridge. It was quite easy for them to have given such warning, and since the accident they have in fact done so. By their rules it is provided that engine-drivers before commencing their day's work must ascertain from the notices posted for their guidance if there be anything requiring their special attention on those parts of the line over which they have to work. Had a notice of the dangerous condition of the said bridge been posted as indicated in the said rule, it would have been seen by the said Andrew M'Ghie, and the accident would have been avoided." There was no averment as to the length of time the driver had been in the service of the company, or as to his knowledge of this part of the line. (Cond. 5) "The bridge before mentioned is about twenty-two feet two inches wide, and the space between the outside rail of the line on which the deceased's engine was running and the stone-work of the bridge is three feet and one-half of an inch, but, after deduction of the space which the engine overlaps the rails, there is barely two feet between the engine and the stone-work of the bridge. The bridge in question is thus to the extent of over four inches too narrow for the limits of safety, as defined in the Schedule of Important Requirements, issued as a memorandum by the Board of Trade in December 1885 (being six months previous to the accident), and which is herewith produced and referred to. It is believed and averred that the said bridge was one of the earliest constructed railway bridges in Scotland. It was constructed for a single mineral line wrought by horses, and is wholly unsuitable and dangerously narrow for a double line of railway worked by steam, which the line in question for many years past has been. It is averred that the bridge is greatly narrower than any other in the United Kingdom used for a double line of railway."

The pursuers appealed for jury trial. The defenders objected to any issue being allowed, on the ground that there was no relevant averment of fault. The bridge was an old bridge, and therefore well known to all the company's servants. All danger could have been avoided by a little care, and the danger could not be said to exist for a careful man, since, on the pursuers' own averment, four inches additional width was all that could possibly have been required. The requirements of the Board of Trade had reference only to new lines; that body had no jurisdiction to revise existing works.

Argued for the pursuers;—The requirements of the Board of Trade were a very good index of what was reasonably safe. This bridge was not only old-fashioned, but had been built for a tramway, not for a railway at all.

LORD JUSTICE-CLERK.—There is nothing like a relevant case here. The bridge may be narrow and dangerous, but the driver who met his death under it was well acquainted with it. He projected his head further than was safe, but I can find no relevant allegation of fault on the part of the company. They were not bound to pull down the bridge and build it anew.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

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THE COURT, in respect there was no relevant averment of fault on the part of the defenders, assoilzied them.

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BEGG & BRUCE LOW, S.S.C.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

JOHN ALEXANDER WEBSTER AND OTHERS, Petitioners.—*R. Johnston—C. K. Mackenzie.*

No. 97.

GEORGE MILLER CUNNINGHAM AND ANOTHER (Miller's Trustees), Respondents.—*Jameson.*

Feb. 26, 1887.
Websters v.
Miller's Trustees.

Process—Petition—Competency of presenting petition to the Inner-House.—

A petition by beneficiaries under a trust-deed for advances out of the trust-funds rested alternatively upon the *nobile officium* of the Court and the provisions of the Trusts Act, 1867, is competently presented in the Inner-House.

Trust—Nobile officium—Advances out of income directed to be accumulated.

—Circumstances in which the Court authorised advances to be made out of the income of trust-funds directed to be accumulated, being of opinion that it was highly expedient, if not necessary, for the maintenance and education of the beneficiaries that such advances should be made.

A trustor in his trust-disposition and settlement directed his trustees to accumulate the income of certain funds for behoof of the children of a married daughter till they should reach majority, and pay over to each as they reached majority their share of the capital and accumulations. In the event of the children's father dying before all or any of the children, then, but only in that event, the trustees were empowered to pay to the mother, or to lay out at their own discretion, such part of the income as they might consider right in the maintenance and education of the children.

The trustor, in his daughter's marriage-contract, had provided her in the income of a sum of £10,000, the capital of which she had power to appoint among her children. The whole income of the daughter and her husband was £380 per annum. They had three children, whose shares, including accumulations, of the fund directed to be accumulated, were estimated at upwards of £5000 each. They had also a contingent right in a sum of about £8000 provided to an aunt, their right being under the same restrictions as those attaching to the funds directed to be accumulated. The children, a boy and two girls, aged twelve, six, and five, with their father, presented a petition to the Court, asking the Court to sanction the payment of £90, £60, and £50 per annum out of the income to them respectively. The trustees stated that in their opinion it was desirable the authority should be granted. The boy had been nominated as a naval cadet, and it was impossible for him to provide an outfit for himself and meet the necessary expenses without obtaining an advance. One of the other children was extremely delicate, having had an attack of infantile paralysis, while the youngest was also delicate, requiring much attention. This the mother was unable to give, as she had become nearly blind. The Court granted the petition.

THE late John Miller of Leithen, C.E., by his trust-disposition and settlement directed his trustees to hold and administer a certain heritable property and a sum of £2500, the total value of the subject to be held being £4000, for the children of his daughter, Mrs Jessie Webster, wife of John Webster, Esq., who might be alive at his death, equally among them, with power to them to sell the heritable property at their own discretion.

He also directed his trustees, "with the exception under-mentioned, yearly to receive and accumulate and invest for behoof of the said children respectively the annual income, interest or proceeds of their shares of the said freehold property and sum above mentioned, and on the said children respectively attaining majority, to pay and make over to them respectively not only their equal shares of the said freehold pro-

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perty and of the said principal sum above mentioned, but also any income, interest, or proceeds that may have been accumulated in respect of their said shares, and in the event of any of the said children surviving me but predeceasing majority the share of such predeceasing child shall accresce and belong to his or her surviving brothers and sisters equally among them; but I hereby declare, notwithstanding what is above written, that in the event of the said John Webster predeceasing me, or on his death if he shall survive me but predecease the majority of all or any of the said children, then my trustees shall have power to pay to the said Jessie Miller or Webster, or in the event of the death of the said Jessie Miller or Webster, whether before or after the death of the said John Webster, to lay out at their own discretion, for behoof of the said children respectively, the whole or such part or portion as they may think right of the income, interest, or proceeds of the shares of the said children, for the education, maintenance, and upbringing of the said children respectively, aye and until they respectively attain majority, but that always only after the death of the said John Webster."

Mr Miller also directed his trustees to hold a fourth of the value of the plate, books, &c., and a fourth of the residue of his estate for the same children, in the same way, and under the same conditions.

By Mrs Webster's marriage-contract Mr Miller had bound himself to provide, and did provide, a sum of £10,000 to trustees for the liferent use of Mrs Webster, to be paid to her children on her death in such shares as she should appoint. Mr and Mrs Webster's children also took a contingent interest in a sum of about £8000 provided to their aunt, Miss Isabella Miller, by her father's settlement, but under the same restrictions as the sum directly provided to them.

Mr and Mrs Webster had a son, John Alexander, born in November 1874, a daughter, Mary, born in December 1880, and a daughter, Isobel, born in November 1881.

These three children and their father presented a petition to the Court craving the Court to authorise, direct, and appoint the trustees to pay over to the father for behoof of the children so much of the free annual income and produce of the estate provided for the children by Mr Miller as the Court might think sufficient for their proper maintenance and education, or alternatively, to grant authority to pay out of the capital of the fund under the 7th section of the Trusts Act of 1867 a sum of £90 per annum for the son, £60 for Mary, and £50 for Isobel.

In support of the petition they stated that the whole income of Mr and Mrs Webster from every source was £380 per annum; that their son John had been nominated to a naval cadetship; that the outfit for a cadet costs £40, the charge for board, &c. on a training-ship £70 per annum, while books, &c., exclusive of travelling expenses, would cost £20 per annum. Mr Webster's income, it was stated, was insufficient to meet these charges, and therefore unless advances could be made to him this opportunity might be lost.

Mary, the elder daughter, was, it was stated, extremely delicate, and required constantly expensive medical treatment and attendance. The youngest daughter was delicate in the chest.

Mrs Webster's eyesight, which had been failing for some years, was now almost entirely lost. She could not therefore herself give all the attention to her children that they needed. The education of the two younger children, it was pointed out, would now require to be provided for.

The trustees lodged answers, in which they stated,—“The trustees agree with the petitioners as to the reasonableness of the amounts of the

proposed annual payments to the children, and they are further of opinion that it would be greatly for the benefit of the children themselves that the proposed payments should be made. Having regard, however, to the terms of the trust-deed, they are advised that they cannot make the proposed annual payments except under the authority of the Court; and in the interest of the beneficiaries they respectfully submit that it is desirable that such authority should be granted." No. 97.
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An application had been presented in December 1883 by the children of another daughter, Mrs Thomson, in somewhat similar circumstances. The trustees opposed the application there, and it was refused. See the report of it of date 22d December 1883, 11 R. 401.*

At the hearing a question was raised by the Court as to the competency of presenting such a petition to the Inner-House.

The petitioners argued;—The petition came competently before the Inner-House, for it was in the main an application to the *nobile officium* of the Court,¹ and if it had been presented, for the sake of its second alternative, in the Outer-House, the Lord Ordinary could not have dealt with the first alternative. On the merits, counsel, after stating the facts, and pointing out the high expediency, if not the necessity, of granting the application, had referred to the case of *Latta*,² when the Court intimated that they were satisfied.

LORD JUSTICE-CLERK.—I am inclined to think that this is a reasonable proposal, and that there is nothing to prevent us from exercising the power which we possess. As to the matter of competency, I see nothing to hinder us from dealing with the petition.

LORD YOUNG concurred.

LORD CRAIGHILL.—I agree. The former case, as it was represented to us, was a case entirely dependent on the circumstances there presented. It is not the same case as the present, and, indeed, I am far from saying that, if Mr Thomson's children were coming back to us now, their application might not, in the light of all that we now know, be granted.*

LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Authorise, direct, and appoint" the trustees "to pay over to the petitioner John Webster, as administrator-in-law, and for behoof of the petitioners," his children, "out of the free annual income and produce of the sums of money and shares of residue provided to them by the said John Miller in his trust-disposition and settlement, the following sums of money, viz.:—(1) The sum of £90 sterling for behoof of the said John Alexander Webster, . . . continuing the said payment for the period of four years; (2) the sum of £60 for behoof of the said Mary Elise Webster, . . . continuing the said payment for the period of five years; and (3) the sum of £50 for behoof of the said Isobel Kennedy Webster, continuing the said payment for the period of six years," &c.

JOHN CLERK BRODIE & SONS, W.S.—R. C. BELL, W.S.—Agents.

* NOTE.—A similar petition was presented subsequently on behalf of these children, and was granted on 19th March 1887.

¹ Mackay's Practice, i. 218.

² June 5, 1880, 7 R. 881.

No. 98.

ALEXANDER STRONACH (John Ingram Wilson's Trustee), Pursuer
(Respondent).—*J. C. Thomson—Kennedy.*Mar. 1, 1887.
Wilson's Trust-
tee v. Fraser's
Trustee.JOHN MACQUEEN BARR (W. A. Fraser's Trustee), Defender (Appellant).—
Gloag—Shaw.

Process—Judicial sale—Storage of goods pending litigation.—Where a trustee on a sequestrated estate incurred expense in storing goods till it should be ascertained whether they belonged to the bankrupt estate, held, on its being found that they did not belong to it, that the owner was not bound to repay to the trustee the cost of storage, as the latter should have applied for a warrant to sell them.

1st Division.
Sheriff of
Aberdeen,
Kincardine,
and Banff.
M.

JOHN INGRAM WILSON, baker in Aberdeen, was sequestrated on 5th January 1884. Wilson's business and stock and plant had formerly belonged to William Alexander Fraser, Wilson being his foreman. Certain creditors who had supplied furnishings for a new bakery, and a tenement of dwelling-houses in course of erection by Wilson, alleged that the transference of the business and stock and plant to Wilson was merely simulate, and that Fraser was truly the owner of the business and stock and plant, and that the dwelling-houses also were being erected as a building speculation really by him, though in name of Wilson as feuar from him. In an action raised by an assignee of these creditors, in November 1884, against Fraser and the trustee on Wilson's sequestrated estate for payment of the sums due by them, decree was given in absence, and in a suspension raised in January 1885 by Fraser, who alleged that he was not the principal in the transactions, the Lord Ordinary (M'Laren), on 14th July 1885, repelled the reasons of suspension, finding that Fraser had given the orders as to the buildings, and that the goods had been supplied on his credit. This judgment became final.

Alexander Stronach junior, who had been appointed trustee on Wilson's estate on 31st January 1885, had been sisted some time thereafter as a party to the suspension. At Whitsunday 1885 (while the suspension was pending in the Court of Session) Stronach had removed the articles in question, which were lying partly in the unfinished buildings and partly in the outhouses of the bakery (the possession of which required to be given up at that time), to premises which he took for the purpose of storage at a rent of £7 per month.

In January 1886 Wilson's trustee raised an action of declarator in the Sheriff Court at Aberdeen against John Macqueen Barr, accountant, Glasgow, the trustee on the estate of Fraser, who was sequestrated in November 1885, to have it declared that the articles furnished as above mentioned were his exclusive property.

In June 1886, while this action, which had been carried by appeal to the Court of Session, was still in dependence, Wilson's trustee presented a note to the Court craving warrant to sell these articles, and to consign the proceeds. Warrant was granted and the goods sold, the nett proceeds of the sale being £262, 12s. 10d.

On 17th December 1886 the Court held that it had been decided in the suspension that the goods belonged to Fraser, and sustained the plea of *res judicata* stated for the defender, Fraser's trustee, assoilzied him from the conclusions of the action, and granted warrant to him to uplift the consigned money. The question was subsequently raised whether the pursuer was entitled to the storage rent he had paid for the goods from Whitsunday 1885 to the date of sale. The defender now presented a note to the Court praying for warrant to uplift the whole of the consigned sum.

Wilson's trustee maintained that the articles required to be removed at Whitsunday 1885 for the purposes of preservation, as they could not be

left with safety in the unfinished tenement, and his right of possession of the bakery terminated at that term, and that he was then in a position of great difficulty, as Fraser, who was not sequestrated for seven months thereafter, repudiated all right to the goods, though his trustee had now taken a different view. That he had acted in perfect *bona fides*, and had been obliged to pay out of his own pocket the sum ordered to be consigned.

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The defender argued that it had been conclusively settled that he was entitled to the property of the articles, and that the expense of storage must be borne by the party who had incurred it.

LORD PRESIDENT.—The goods in question were sold in the course of the process before us in June of last year, and it has now been determined conclusively that the proper owner is Barr, the trustee for Fraser. The consequence is that he has applied for payment to him of the consigned price of the goods, subject to deduction of expenses. Mr Stronach contends that besides the expenses of the sale he is entitled to deduct a sum of £115, 10s. 10d., being the amount of storage rent, and the expense of removal of the articles from the premises into which they had been delivered by the tradesmen who furnished them, amounting in all to the sum I have mentioned. That is rather an unusual kind of deduction to claim from the price of goods realised by judicial sale. The only proper deduction is the expense of the sale. The way in which Mr Stronach proposes to justify this deduction is by saying that he found himself in great difficulty at Whitsunday 1885, and had no alternative but to remove these goods from the premises formerly belonging to Wilson, and to store them at a high rent. I am not disposed to impugn severely Mr Stronach's *bona fides*, but it is necessary to see the position in which he was placed in order to see whether he had any justification. He was trustee for the creditors of Wilson, and represented the creditors, and was maintaining their interest. He was quite aware that there was doubt, to say the least, as to who was properly the party who had ordered the goods, and on whose credit they had been furnished. He knew quite well that it was alleged, and not improbable, that the arrangement between Fraser and Wilson was a fraudulent proceeding altogether, and that Fraser was the true owner of the goods furnished. He had at least this amount of knowledge, that there was great doubt to whom the goods belonged. He had it in his power, from there being a pending litigation at that time, to apply for a judicial sale of these goods. If he was confident that the goods belonged to Wilson I cannot understand the course that he took. Surely if he was confident of that the proper course was to sell and realise the goods and divide the money among the creditors. If, on the other hand, he saw that there was a very serious dispute, surely nothing but judicial sale could be a discreet course in the circumstances. But of all things to do, to store goods of the kind and bulk of these goods for an indefinite period was the most indiscreet and expensive course that could have been followed. We have it stated in the answers that the materials were very bulky and numerous, and he says that the premises which he took at £4 per month were 86 feet long and 30 feet broad. He says,—“These premises are built of stone and slated, and are thoroughly water-tight, and all the ironmongery and other perishable goods were stored in them. When the goods were being removed it was found that the said space was not sufficient. There was a large quantity of flooring, and the respondent was obliged to lease from Messrs Garvie a covered shed in the

No. 98. same place, but entering from Rose Street, at a rent of £3 a month. Both places were required." So that he undertook to pay £7 per month for the storage of these goods for an indefinite period to abide some result, and that was the result of what promised to be a tedious and expensive litigation just then beginning, and which turned out just what was expected. I cannot see any justification at all for the course Mr Stronach took in these circumstances. I think it was the worst possible course. Whoever was to be found in the end entitled, surely it was most inexpedient to heap up the expense of rent to such an extent as is now before us. He could not expect the case to last a short period. Accordingly, the result of Mr Stronach's action was that the goods realised £262, 12s. 10d., and the amount of storage rent is £115, 10s. 10d. I do not think that the person who is found in the end entitled to the price of these goods is bound to submit to that deduction. I think Mr Stronach's course was a clear one, to apply for judicial warrant and have the goods sold.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent.

THE COURT granted the prayer of the note.

MACPHERSON & MACKAY, W.S.—ANDREW NEWLANDS, S.S.C.—Agents.

No. 99. HUGH MAFFETT, Pursuer (Respondent).—*D.-F. Mackintosh—Ure.*
 ARCHIBALD STEWART, Defender (Appellant).—*Jameson—C. S. Dickson.*
 Mar. 4, 1887. Maffett v. Stewart.

Agent and Principal—Stockbroker—Contract for differences.—A stockbroker, in carrying over at the settlement £10,000 "Trunk Thirds" stock bought for a client, sent his client a continuation-note in these terms :—"I have continued for you as under. Sold 10,000 Trunk 3rds at £50, bought at £50, 3s. 3d. com. in a/c." In reality the broker had not bought that amount of stock at the price stated, but had bought a much larger quantity in different parcels and at different prices. These he lumped together and divided among those of his clients who had given him orders for Trunk Thirds, charging as the price the average of the different prices. This average price was that stated in the above continuation-note, and it corresponded to none of the individual prices. In an action by the stockbroker against the client for payment of the differences on a series of such transactions, held by a majority of seven Judges (viz., Lord Justice-Clerk, Lords Craighill, Shand, and Adam, *diss.* Lords Mure, Young, and Rutherford Clark), that in so purchasing the stock the pursuer was to be regarded as having bought it on his own account, and not as agent for the defender, and that the defender having employed the pursuer merely as a broker was not responsible, no special custom of trade in regard to brokers on the Stock Exchange having been averred or proved.

2D DIVISION. IN October 1884 Hugh Maffett, a stockbroker in Glasgow, but not a member of the Stock Exchange, brought this action in the Sheriff Court at Glasgow against Archibald Stewart, builder there, for the recovery of £1933, 7s. 3d. as the balance of his disbursements and commissions on the purchase and subsequent "carryings-over" on Stewart's account, and as his broker, of £10,000 Third Preference Stock of the Grand Trunk Railway of Canada, known among stockbrokers as "Trunk Thirds."

It was not disputed that on 11th October 1883 Stewart instructed Maffett to buy for him £6000 Trunk Thirds; that on the same day Maffett sent Stewart a note advising him that the purchase had been made; that on the following day Stewart had instructed Maffett to buy

for him a further lot of £4000 Trunk Thirds, and that Maffett had sent Stewart an advice-note of this purchase also. The first advice-note was in the following terms—the terms of second being identical, except that the price of the stock had fallen to $51\frac{1}{2}$ per cent, or £2060, and the commission was £10, 6s. 0d. :—

“Glasgow, 11th Oct. 1883.—Arch. Stewart, Esq.—Sir,—I beg to advise having bought on your account as under in Liverpool, and subject to the rules of that Stock Exchange.

“For account day—25th inst.—I am, &c.,	H. MAFFETT.
“6000 Trunk 3rds, at £52, 8s. 9d.,	£3146 5 0
Commission,	15 14 6

£3161 19 6”

Maffett also founded on a series of nine continuation-notes, which he sent to Stewart on each fortnightly settlement day, from 24th October 1883 to 26th February 1884. These continuation-notes were in the following form, taking the earliest as an example:—

“Glasgow, 24th Oct. 1883.—Arch. Stewart, Esq.—Dear Sir,—I have continued for you as under.

This Account.	Next Account.
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“Sold 10,000 Trunk 3rds at 50, bought at £50 3 3. com. in a/c.

“H. MAFFETT.”

Accompanying each continuation-note was an account bringing out the balance against Stewart as at the date of the note. The balance so brought out in the account which accompanied the first continuation-note was £238, or £138 after deducting a sum of £100 which Maffett admitted he had received from Stewart, as afterwards explained. The balance increased at each settlement day as the price of Trunk Thirds was falling rapidly, while Stewart paid Maffett nothing further except a sum of £45 on 15th November 1883, also to be referred to again.

Stewart also admitted the receipt of the following advice-note from Maffett, intimating that he had closed the account:—

“Glasgow, 7th March 1884.—A. Stewart, Esq.—Sir,—I beg to advise having sold on your account as under in Liverpool, and subject to the rules of that Stock Exchange.

“For account day 14th inst.—I am, &c.,	H. MAFFETT.
	Per H. M.

“10,000 Trunks at 33,	£3300 0 0
Commission,	

£3300 0 0”

The account accompanying this advice-note shewed a balance against Stewart of £1933, 7s. 3d., being the sum sued for.

In defence Stewart averred (Stat. 2)—after referring to the purchases and advice-notes of 11th and 12th October 1883:—“It was quite well understood between the parties that no delivery was to be made under any of the contracts, and, in point of fact, the pursuer had no stocks or shares which he could deliver. The alleged transactions were not *bona fide* contracts of sale, and were merely gambling speculations on the rise and fall of the market between the date of the purchase and said 25th day of October 1883.”

The defender further averred that on 19th October (*i.e.* before the first settlement day) Maffett agreed to take over the stocks on his own responsibility on payment of £150, and that the two sums of £100 and £45 above-mentioned were paid in implement of this agreement. This defence, however, was on appeal practically abandoned.

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The pursuer pleaded;—The sum sued for being the balance of an account-current between pursuer and defender, decree should be granted as craved.

The defender pleaded;—(2) The alleged transactions between pursuer and defender having been gambling transactions for differences between the price of stock at the date of purchase and the date of settlement, the sum sued for is not recoverable. (3) The pursuer not having acted as a broker in the transactions in question, but as a dealer, is not entitled to sue for commissions or for alleged differences.

A proof was allowed. Although the defender on record averred that the pursuer had no stocks or shares which he could deliver in terms of his first advice-notes of 11th and 12th October 1883, the defender admitted that this was an error, and that the original transactions were, as regarded the pursuer, *bona fide* purchases of stock to the amount and at the prices set forth in the advice-notes, effected on the Liverpool Stock Exchange through R. Thompson & Company, stockbrokers there, acting for sellers whose names were undisclosed to Maffett at the time, but were ascertained for the purposes of this case. The subsequent continuation-notes, however, did not correspond to any specific transaction which the pursuer had entered into on behalf of the defender. The pursuer in answer to a call made on him before closing the record produced an account setting forth his dealings with R. Thompson & Company, who were his brokers throughout these transactions, except the last. It appeared from these accounts that the pursuer's method of business was to purchase for each settlement day such an aggregate amount of Trunk Thirds as he had orders for from his various clients. This he did in lots at different prices through Thompson & Company, the names of whose clients the accounts disclosed. He then lumped the lots together, averaged the prices, and charged the stock which each client had ordered at the average price, which rarely corresponded to any of the actual prices. It was these average prices which the pursuer gave in the continuation-notes he sent to the defender, who contended that the pursuer by manipulating the stocks in this way had made himself principal, not broker, in the transaction, and so liable to the objection under the Gaming Act, 8 and 9 Vict. cap. 109. This point, however, though raised in argument in the Sheriff Court, was there merely based on inferences deduced from the accounts; it was not the subject either of averment or of parole proof.

The pursuer in his evidence admitted that he knew the defender had no intention of taking up the stock—that he was merely speculating in differences.

On 5th August 1885 the Sheriff-substitute (Erskine Murray) pronounced this interlocutor:—“Finds (1) that in October 1883 the defender, A. Stewart, employed the pursuer, a dealer in stocks in Glasgow, to purchase for him certain stocks in Liverpool, which the pursuer accordingly did through Liverpool stockbrokers, he not being himself a member of the Liverpool Stock Exchange, the transaction being, in the knowledge of both parties, merely transactions for differences; finds (2) that the transactions continued till March following, the pursuer regularly sending contract-notes to defender, which the defender has failed to prove that he ever objected to or repudiated; finds (3) that the transactions . . . were carried over from time to time, as per the contract-notes, at rates founded on the prices at which the stocks could be bought or sold to carry over: . . . Finds on the whole case and in law (1) that the balance sued for is due and payable by defender to pursuer; (2) that, as between defender and pursuer, the contracts founded on were not gaming contracts, but simply contracts of agency; (3) that, in the circumstances, the

carrying-over must be held to have been authorised by defender: Therefore decerns as craved: Finds defender liable in expenses; allows," &c.

The defender appealed to the Court of Session.

At the hearing the case came to turn mainly on the question whether by lumping the lots of stock and averaging their prices in the manner just explained, the pursuer placed himself in the position of principal instead of that of broker.

In consequence the parties obtained leave to amend their pleadings. The defender averred ;—" With the exception of the two original purchases of £6000 Trunk 3rds and £4000 Trunk 3rds, entered in the account, under dates October 11th and October 13th, the pursuer never entered into or made any contract for the purchase or sale of stocks, for or on behalf of the defender, and never had any specific lots of stock appropriated to, or held specially on account of, the defender. The pursuer bought and sold large slump quantities of stocks, and, in particular, of Trunk 3rds, through or from Thompson & Co. of Liverpool, and other brokers, at various prices, and allocated these either to himself or his clients, just as he thought fit, and at such prices and dates as he thought fit. The prices of the stocks represented by the pursuer as bought for the defender, which were entered in the contract-notes sent by the pursuer to the defender, were different from the prices at which Thompson & Co. bought and sold the said stocks. From and after 27th October, the stocks alleged by the pursuer to have been bought for, and to be at the disposal of the defender, were truly bought for and held for behoof of the pursuer himself, or some of his clients, other than the defender, and this appears from several entries in the pursuer's books. . . . In all the transactions, except the two original purchases, the pursuer truly acted as a principal, dealing with the defender as the other principal, in speculative and gambling transactions for differences."

The defender also made the following alterations and additions to his pleas :—(3) Alter word "dealer" into "principal," viz.,—The pursuer not having acted as a broker in the transactions in question, but as a principal, is not entitled to sue for commissions, or for alleged differences. (6) None of the transactions entered in the account after 27th October having been made or entered into for or on account of the defender, the defender should be assoilzied. (7) The pursuer not having made any contracts of purchase or sale, which the defender would have been entitled to enforce against any third party as the other contracting principal, the defender should be assoilzied.

A proof was allowed—to proceed before Lord Rutherford Clark. The pursuer, who was called by the defender, was the only witness. His evidence (the material portions of which are quoted in the opinions of Lord Mure and Lord Shand *infra*) substantially bore out what has been already stated as to the pursuer's course of dealing in continuing the stocks he professed to hold for the pursuer. There was no evidence that this course of dealing was according to the recognised custom of stockbrokers. It appeared that the last transaction was partly implemented by the sale of stock held by the pursuer on the Glasgow, not on the Liverpool Exchange.—See Lord Shand's opinion, p. 523.

After further hearing, the Court, "in respect of the importance of the questions submitted for determination, and in respect that the Judges of this Division are equally divided in opinion thereon," appointed the questions to be argued before seven Judges.

Argued for the defender ;—The pursuer, as a broker, was bound to make such a contract that the defender had someone in Liverpool bound to him, and whom he could sue. This the pursuer had, after the first

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transaction, failed to do. Neither as regarded the amount nor the price of the stock did the continuation-notes correspond to any real transaction, while the last transaction had not even been wholly carried out on the Liverpool Stock Exchange. That being the case, the pursuer was, according to *Robinson v. Mollet*,¹ a principal, not a broker, and so was not within the principle of *Thacker v. Hardy*.² It was true the defender was in default, and that gave the pursuer the right to do the best he could for him, but he was entitled to do so only in the way of the original contract, i.e., as a broker and not as a principal. The continuation-notes could not reasonably be construed in any other sense. There had been no proof here of the custom of stockbrokers.

Argued for the pursuer;—The original case against the pursuer was that he had never really bought or sold stocks in terms of his advice and continuation-notes. It was now admitted that he had actually bought the stocks (though the capacity in which he had acted was in dispute), and it was not said that he was suing for more than his outlay and commissions. It was part of the rules of the Stock Exchange that brokers were principals *inter se*; it followed that the defender had in the Liverpool broker a principal other than the defender, and would have a direct action against him in the event of the pursuer's bankruptcy. The effect of lumping several purchasers together at the worst put them to the inconvenience of suing jointly, and of so suing either Thompson & Company, or, if they disclosed their constituents, then these constituents, each at his own price. *Robinson v. Mollet* did not apply. There the so-called broker was principal to all intents and purposes, and would profit or lose by the rise or fall in the prices. Here the pursuer's commissions were his only interest. Further, even if that case was an authority for the proposition that the pursuer must establish privity of contract between the defender and a seller on the original transaction, that did not apply to the subsequent continuation-notes. The defender being in default, the pursuer had to finance for him, and consequently the relation of lender and borrower sprang up between them as well as that of broker and principal. In this complex relation the pursuer was entitled to act in any way that was consistent with the continuation-notes, and a comparison between them and the original advice-notes shewed that they could not be construed to mean a specific sale and nothing else. They implied an authority to keep the stock open for the defender in any way that was possible.

At advising,—

LORD MURK.—This action has been brought to enable the pursuer to recover the commission due to him as a broker, acting on the employment of the defender, in purchasing stock for the defender, and in afterwards carrying over that stock from time to time, and making the advances and disbursements for the defender which were necessary to effect the carrying over of the stock.

In the defences to this demand it is not denied that the defender employed the pursuer as his broker to purchase for him two lots of Grand Trunk Preference Stock, amounting together to £10,000 stock; and it is admitted that the defender duly received advice-notes from the pursuer of that amount of stock having been purchased for him in Liverpool, for settlement on the 25th of October 1883, subject to the rules of the Liverpool Stock Exchange. It is, however, at the same time alleged by the defender that he had no intention of

¹ *Robinson v. Mollet*, 1875, L. R., 7 Eng. & Ir. App. 802; see also *Bostock v. Jardine*, 1865, 34 L. J. Excheq. 142; *Higgins v. M'Crea*, March 1886, 116 U. S. Reports, 671.

² *Thacker v. Hardy*, 1878, L. R., 4 Q. B. Div. 685.

taking delivery on that day of the stock so purchased. He also alleges that in point of fact the pursuer "had no stock or shares which he could deliver," and that the transactions, in so far as he, the defender, was concerned, "were merely gambling speculations on the rise and fall of the market" between the date of the purchase and the day fixed for the settlement.

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It is, moreover, expressly averred in defence that, before the day of settlement arrived, the defender on two occasions instructed the pursuer to close the stocks, as the price was falling in the market, and that on the second occasion the pursuer agreed to take over the stock on his own responsibility if the defender would pay him £150 to meet the balance due upon the stock, which the defender agreed to do, and afterwards paid £100 and then £45 to account. The defender further alleges that, upon this being done, he understood that his responsibility was at an end, and that, if the pursuer carried over the stock, he did so for his own behoof and on his own responsibility. This alleged agreement and the instructions to close the stock are both denied by the pursuer.

So standing the averments in the defences, the main leading pleas for the defender were substantially these—(1) That the transactions being gambling transactions for differences between the defender and the pursuer as a principal, and not as a broker, the pursuer was not entitled to recover; and (2) that the pursuer having agreed "to take over the stock on his own responsibility," the defender was entitled to absolvitor. Upon a proof being led, the Sheriff repelled those pleas, and decerned in favour of the pursuer; and the case having been brought here upon appeal, the defender proposed and was allowed to amend his record, and upon that being done an additional proof was allowed.

In this amendment the more material of the facts alleged appear to be these, —1st, That with the exception of the original purchases of £6000 and £4000 stock entered in the account, "the pursuer never made any contract for the purchase and sale of stock for or in behalf of the defender," but "bought and sold large slump quantities of stock at various prices, and allocated these either to himself or his clients as he thought fit"; and 2d, That "From and after the 27th of October the stocks alleged to have been bought for the defender were truly bought for and held for behoof of the pursuer himself, or some of his clients other than the defender." With reference to these averments the following pleas were added to the record:—"6. None of the transactions entered in the account after 27th October having been made or entered into for or on account of the defender, the defender should be assoilzied. 7. The pursuer not having made any contracts of purchase or sale which the defender would have been entitled to enforce against any third party as the other contracting principal, the defender should be assoilzied."

In the discussion which took place before your Lordships on this amended record, and the relative proof, the parties confined themselves mainly to the questions raised in these two additional pleas. The defences relied on in the Sheriff Court, viz., those founded on the alleged gambling nature of the transactions, and on the alleged agreement of the pursuer to relieve the defender of the stock by taking them over on his own responsibility, were not reargued at that discussion. The first of them was, I think, incidentally alluded to; but, according to my recollection, and to the notes I made at the time, the defence founded on the alleged agreement was not even mentioned by the appellant; and I do not exactly know whether the parties expect the opinion of this Court to be delivered upon them. But, as they have not been withdrawn, I think it

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The defence founded on the Statute 8 and 9 Vict. c. 109, depends, as it appears to me, upon whether the pursuer is to be considered and dealt with as a broker, or as being a principal in these transactions. If he is held to be a principal the statute applies. But if, on the other hand, the pursuer has acted throughout as a broker, employed by the defender to carry on the transactions, it appears to me that he is, in that character, entitled to recover his commission and advances upon the authority of the case of *Thacker v. Hardy*, 1878, L. R., 4 Q. B. Div., p. 685, and of the earlier case of *Rosewarne v. Billing*, 1863, 15 C. B., N. S. p. 316, in which it was held that a broker paying differences for his principal might recover them.

As regards the defence founded on the agreement, I am very clearly of opinion that the defender has failed. The *onus* rests upon him to prove that special agreement, but the only evidence he has adduced is that of his own statement, which is directly contradicted by the pursuer; while the conduct of the defender, on the other hand, appears to me to be altogether inconsistent with the notion that he had ever transferred his right to the stock in question to the pursuer under any such agreement; and for these reasons:—(1) The payment of £45 to account is not made by the defender till the 15th of November 1883, as shewn by the receipt granted for that sum to the defender, and founded on by him. But before that payment was made the defender had received, and accepted without objection or protest, two separate notices from the pursuer, one on the 24th of October and the other on the 12th November 1883, to the effect that the stock had been continued on the defender's account. These notices, moreover, were on each occasion accompanied by an account of how matters stood between the pursuer and defender at the date of the respective continuations; and in these accounts, and in the next continuation account of the 27th November 1883, the balance stated as then due to the pursuer by the defender is brought out after placing to the credit of the defender in the general account the payments of £100 and £45 which had been made by the defender. By so framing the accounts the defender was duly warned of what the pursuer believed to be the defender's position relative to those payments, viz., that they were placed to account of the general balance due by him to the pursuer; and yet no objection was made to this mode of stating the account. (2) Neither was there any complaint made by the defender against his being charged as debtor to the pursuer in the subsequent continuation accounts for all disbursements made by him in relation to the carrying over of the stock, of which he now alleges the pursuer had undertaken to relieve him before the 24th of October 1883. He, on the contrary, receives these continuation notices, and the relative accounts, without objection throughout the whole period of his connection with the pursuer; and in these he is charged with all the usual expenses and disbursements incurred relative to the carrying over of the stock; and having carefully preserved these accounts, he produces them in the present action.

I agree with the Sheriff-substitute in thinking that, in these circumstances, the defender must be held as assenting to, and authorising the carryings-over as made on his behalf. His payment of £45 "to account of his balance" on the 15th of November, after he must have received a continuation-note and relative account not only of the first but of the second carrying-over, is, as the Sheriff has remarked, a practical adoption of those transactions, and tells much against

his attempt to repudiate the later transactions, none of which were repudiated at the time. No. 99.

If any such agreement as that founded on in defence had existed, the natural and proper course for the defender would have been to write repudiating the pursuer's conduct, and ordering him to abstain from acting any further as his broker in the matter. He, however, does not do that. He leaves the pursuer to believe that he is still authorised to act as his broker in relation to the Grand Trunk Stock in question; and when he is informed in the month of December 1883, and January and February 1884, by the letters written to him by the pursuer, that the pursuer will be obliged to take steps against him if further payments are not made to account of the balance due, he does not even then repudiate the pursuer's authority to act as his broker in carrying over the stock, or find fault with his conduct.

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The defender pleads in the record, both as originally framed and as amended, that the pursuer was a principal and not a broker in the transaction. But of this there is no evidence. The pursuer, when cross-examined in the additional proof, distinctly depones that in all these transactions he acted as "broker alone," and that of the sum claimed by him "between £80 and £100 is his commission—the balance is loss incurred in the reduction of the price of stock which I paid to brokers on behalf of the defender"; and there is no evidence to a contrary effect. The defender has all along admitted that he originally employed the pursuer as his broker to purchase stock on the Stock Exchange, which he says, and says truly apparently, that he was not in a position to pay for, and did not intend to take delivery of. That stock was admittedly purchased for him by the pursuer, and the defender's obligations in regard to it could only be got quit of or arranged through the pursuer, or some other broker employed to act for the defender on the Stock Exchange. But the defender has not condescended upon the name of anyone whom he employed to act for him instead of the pursuer. The stock moreover has been disposed of by the pursuer with the full knowledge of the defender, after a series of transactions of which the defender was kept duly informed, by means of continuation notices and accounts sent to him by the pursuer, as a broker acting on his employment, and which notices and accounts were not objected to at the time, but were duly received and preserved by the defender.

Upon the evidence then and pleadings as the action was originally laid, and apart from the questions raised under the amended record, the conclusion I have come to is, 1st, That the defender has failed to prove that the pursuer ever agreed to take over the stock he admittedly purchased for the defender, or that the defender ever gave the pursuer instructions to close that stock; 2d, That in carrying over the stock the pursuer acted with the knowledge and approval of the defender; and 3d, That the pursuer did this as broker for the defender, and not on his own account and responsibility.

In this state of the facts, and of the evidence bearing upon the case as the record was originally framed, I have been unable to find any grounds in law on which the defender can succeed in maintaining that he is under no obligation to pay the pursuer the commission due on the business he thus employed the pursuer to transact, or to repay the monies which were advanced by the pursuer on behalf of the defender with his knowledge and approval at the time.

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Neither do I think that the circumstance, which is one of those mainly relied on by the defender in the amended record, that the carrying over of the defender's stock as part of a larger sum of stock of the same kind which the pursuer required to have carried over at Liverpool for other clients, should invalidate the transaction to any extent, provided that was done in such a way as to secure to each of those clients the amount of stock required to be bought or carried over on his behalf. It is, I believe, not an uncommon thing for a broker, with orders to buy or sell a certain amount of stock, to buy or sell that stock in separate lots, when he finds he cannot acquire or dispose of it as a whole. That, as I have always understood, is a matter of everyday occurrence, and I do not very well see how in many cases the business of the Stock Exchange could be carried on if that were not allowed. And that being so, I fail to see how there can be any illegality in a broker, acting for two or more clients, each of whom wishes to acquire a lot of the same kind of stock, making a contract with the selling broker for the acquisition and delivery on a particular day of the gross amount required, and thereafter apportioning that stock among his clients with a view to the transference to each of them, when the day of settlement arrived, of the quantity he required.

Now that, as I read the evidence, was what was here done. It is not now disputed that the order given to the pursuer to purchase the stock was duly carried out on the 11th and 12th of October, by the purchase of two lots of Grand Trunk Thirds of £6000 and £4000 each. In the defences those purchases were distinctly challenged by the defender, when he alleged, in statement 2 of the record, that the whole was a gambling transaction, and that, "in point of fact, the pursuer had no stocks or shares which he could deliver." This allegation against the fair dealing of the pursuer is now withdrawn, for it was distinctly admitted by the defender's counsel at the discussion that the requisite amount of stock had in the first instance been duly acquired for the defender by the pursuer. And it is not now alleged that the amount of stock so bought for the defender had not, in point of fact, been carried over from time to time by the Liverpool broker, according to the rules of the Liverpool Stock Exchange. The continuation-notes of the Liverpool broker are quite distinct as to this, and their accuracy has not been challenged.

In obedience to a call, moreover, made upon the pursuer on the part of the defender in the pleadings in the Sheriff Court, the pursuer furnished the defender with the names of the various parties with whom, at the respective carryings-over of the defender's stock to the amount of £10,000, the pursuer's correspondents at Liverpool dealt. These names are distinctly set out in the account in the print of documents for the defender; and although the pursuer is asked one or two questions about this when examined for the defenders in the additional proof, no question was raised as to the correctness of the information he had given. The defender on each carrying-over, therefore, had a contracting principal from whom he could have demanded a transfer of the stock then bought, if the defender could have paid for it.

But although neither the accuracy of these continuation-notes, nor of the information as to the names thus given, is disputed, the legality or propriety of carrying the stock over on the 24th of October, as part of a larger sum, is disputed. That carrying-over appears to have been done in two sums of £18,000 and £20,000 stock, as shewn in the continuation-note of Thompson & Company,

the Liverpool brokers, "subject to the rules and regulations of the Liverpool Stock Exchange," as explained by the pursuer when adduced as a witness by the defender in the additional proof, where he says,—^{Mar. 4, 1837.} "I had to divide the Maffett v. £38,000 between Stewart and other clients who had stock open when I Stewart. was advising them." He is then referred to his day-book, extracts from which are printed in the appendix to the proof, where he explains how this was done as follows:—"I am now shewn my day-book, and referred to the entries under date October 24th. I distributed the £38,000 between R. Service, £20,000; Archibald Stewart, £10,000; Dr Russell, £2000; account No. 3, £5000; and H. Maffett junior, £1000. Dr Russell is one of my clients in Durham. Account No. 3 stands for myself. £5000 of these Trunk Thirds had been bought for a party who had become bankrupt. I was carrying them on. I was not aware the man was bankrupt, but he had become bankrupt. His trustee called on me and wanted me to sell them. I told him I thought they were to go up. I closed his account and kept them on for a time, calling the account No. 3 as for myself. I was the purchaser of these stocks. They did not interfere with my security at all. H. Maffett junior is my nephew." And when this account is looked at, as printed in the appendix, a distinct division of the £38,000 stock and appropriation of it in the way here described will be found.

But the matter does not stop there. Besides these entries in the day-book of the names of the parties in right to the stock thus carried over, there is an entry in the pursuer's memorandum-book, of date the 24th of October, to the effect that of these £38,000 stock carried over by Thompson & Company of Liverpool, £10,000 are for the defender. And there is, moreover, the continuation-note of the same date sent by the pursuer to the defender intimating,—^{"I have continued for you as under,—Sold £10,000 Trunk 3d at £50, bought at £50, 3s. 3d. Com. in acct."} There are thus three distinct acknowledgments, under the handwriting of the pursuer, to the effect that he had carried over through the Liverpool broker and held that amount of stock for the defender. Similar entries are to be found made in these books at each successive carrying-over till the close of the transactions, and there is also evidence of due notice of this having been regularly sent to the defender by continuation-notes and accounts, as has already been explained.

On examining the day-book it will be found that from the 24th of October down to the beginning of January pretty much the same amount of Grand Trunk Stock was carried over for the same and other parties. But it appears that about the 9th of January a sale was effected of the £20,000 stock belonging to Mr Service, and with reference to this the pursuer says in his evidence,—^{"I am referred to the account ending 14th January 1834, from which I see that the Trunk Thirds, which I had open in Liverpool with R. Thompson & Company at that date, was £41,000. On January 9 I sold out £20,000 Trunk Thirds—two lots of £5000 and £15,000. These were Service's Trunk Thirds. He instructed me to sell out. That left me with £21,000 open in Liverpool. On January 14th £21,000 were carried over. On page 32 you will find the £21,000 on both sides of the account. That was all that was open in the Liverpool market, so far as I was concerned, at the close of the account on page 30."} He then goes on to explain how on the 14th and 15th January further sums were sold out to close by others of the holders, amounting to £9000 in all, leaving £12,000 to be carried over. And with reference to these he says,—

No. 99. "The £9000 were not part of Mr Stewart's lot. The entries in my day-book
 Mar. 4, 1887. applicable to the £9000 are these,—
 Maffett v. "On the credit side:—
 Stewart.

Jany. 14. Dr Russell—£4000—38—£1520.

" " Account—£4000—37½—£1515.

" 15. Account—£1000—36—£360.

"On debit side:—

R. Thompson & Company are, of course, the Liverpool brokers. (Q.) Are those not simply cross-entries as far as those names are concerned? (A.) No; Dr Russell held the stock, and it was sold by Thompson & Company."

There thus remained open at Liverpool, after this £9000 stock was disposed of, £12,000 stock, £10,000 of which belonged to the defender. Of this fact a continuation-note and relative account was duly sent to the defender by the pursuer in February 1884; and the stock was closed as against the defender in March 1884 as he was unable to make arrangements for retaining it. As to this the pursuer says in his evidence,—“In Stewart's case the stock was in Thompson's hands until the last carry-over. There was only £9000 left in the market at the finish,” and with reference to this he adds in cross-examination as to his accounts,—“On the 26th February 1884 I purchase £10,000 Trunk Thirds for the defender, and I hold these on his behalf until the 7th of March, when I sell £9000 for him in Liverpool and £1000 in Glasgow.” It appears that there was some mistake about the sale of £1000 of the £10,000 held in Liverpool for the defender, and that he was credited on account with £1000 sold in Glasgow instead.

The entries to which I have referred in the pursuer's business-book, taken in connection with the continuation-notes, appear to me to afford conclusive evidence of the fact that, as the duly authorised broker of the defender, the pursuer had all along, at each carrying-over, under his control, and was under an obligation to obtain delivery of, £10,000 stock for the defender, should he wish to have that stock transferred to him when a day of settlement arrived. This the pursuer, as a broker, would, I conceive, beyond all doubt, have been obliged to do, had the defender asked him to procure a transfer of it, and furnished the pursuer with money to pay for the stock. And this the pursuer, in the ordinary discharge of his duty as a broker, could have had no difficulty in effecting when the day of settlement approached, by sending to his Liverpool correspondent a ticket with the name of the defender upon it, as the party to whom the stock was to be transferred, in terms of the recognised rules of the Stock Exchange. On that being done the selling broker would have been obliged to have that amount of stock transferred to the defender upon his tendering the price of the stock, and thus the matter would have been settled.

The rules of the Stock Exchange are very distinct in these respects, and the argument submitted on the part of the defender appeared to me to proceed upon some misapprehension as to these rules. When a broker is employed to purchase stock for a client in the Stock Exchange, he does not as a matter of course, as seemed to be assumed in the argument, at once disclose the name of that client to the selling broker, nor does the latter disclose the name of the vendor, and so make a contract between the purchaser and vendor. But the two brokers make a contract, the one to purchase a certain amount of stock for his clients for settlement on a certain day, and the other to deliver that amount

of stock on the day fixed for settlement to the buying broker or his nominees ; No. 99. and it is not until what is called the "name day" arrives, which is generally a couple of days before the day of settlement, that any disclosure is made of the purchaser's name, and a contract effected between the principal parties. But it is then effected, and there is then clear privity of contract. Mar. 4, 1887.
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This is very distinctly explained by Lord Justice Lindley when dealing with this subject in his work on Partnership (vol. i. p. 722), where, after mentioning the various leading cases on the subject, he says,—“That in the ordinary course of events a sale of shares on the Stock Exchange is essentially a transaction of the following description :—(1) There is a contract between the selling and buying broker or jobber to the effect that on a given day, called the ‘account day,’ the shares shall be deliverable and the price payable. (2) That on the day before the account day (called the ‘name day’) the buying broker or jobber gives or passes to the selling broker a ticket containing the name of the person to whom the shares are to be transferred, and the price which that person has agreed to pay for them. (3) That the name as passed may be objected to within a limited time, and if objected to on reasonable grounds, must be replaced by another name—the committee of the Stock Exchange deciding in case of dispute whether another name is to be given.” After so stating the rules he then goes on to explain that the above-mentioned ticket is prepared by the broker of the purchaser, and is in the ordinary case passed (between 12 and 2 o’clock on the same day) by such broker to the broker of the original seller, who executes a transfer (prepared by his broker) to the purchaser upon his payment of the agreed-on price.

Having thus explained the way in which a settlement is brought about, Lord Justice Lindley goes on to deal with the question of contract, and says, under the head “Privity of Contract” (p. 726),—“The precise moment when the contract in these cases is first created has given rise to some difference of opinion, but the better opinion seems to be that a contract between the vendor and ultimate purchaser exists as soon as the ticket containing the purchaser’s name has been handed by his authority to the vendor, and he has accepted the name, and indicated that acceptance to the purchaser. This opinion is based upon the ground that the ticket is drawn up and issued by the agent of the purchaser, who is authorised to use the machinery of the Stock Exchange, and to transmit the ticket to any person to whom the operation of that machinery may bring it. When that person is ascertained, and the ticket is handed to him, an offer is made by the purchaser to buy of the vendor, upon the terms specified on the ticket, and if the vendor accepts that offer, and informs the purchaser that he has done so, it is difficult to see that anything further is required to make a contract between the parties.”

Having regard to these rules, and the opinion I have just read, which are both fully borne out, I think, by the decisions which are referred to in support of them, it appears to me to be clear upon the evidence adduced that the pursuer, during the whole period of his acting as broker for the defender, had placed the defender in the position of being entitled to enforce delivery, after each successive carrying-over, of the £10,000 Grand Trunk Stock in question, at any one of the ordinary days of settlement on the Liverpool Stock Exchange. This the pursuer could have done for the defender by directing his Liverpool correspondent to pass a ticket with the defender’s name upon it to the selling broker for settlement in compliance with the above rules ; when, upon the price being

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paid, the stock would at once have been transferred to the defender. On these grounds it appears to me that the defender has entirely failed to instruct the only defence raised in the amended record, to the effect that the pursuer had not "made any contract of purchase or sale which the defender would have been entitled to enforce against another contracting principal," and that this defence, as well as those maintained in the Sheriff Court, should be repelled.

The case of *Robinson v. Mollett* (7 E. & I. App. p. 802) was referred to at the discussion as an authority in favour of the defender. But I am unable to see that the decision in that case has any direct bearing upon the present. That was not, as I read it, a decision relative to a Stock Exchange transaction. It was the case of a merchant in Liverpool employing a dealer in tallow in London, called a tallow broker, to purchase for him certain quantities of tallow. But instead of doing this the broker proposed to transfer to the merchant certain quantities of tallow belonging to himself, and which he had purchased in his own name, some of it before and some of it after he had received the order. Of this tallow the merchant refused to take delivery, as not bought for him in compliance with the order. Upon this the broker sold the tallow, and brought an action for the difference he had himself as a principal to pay. What, therefore, the broker had done was something quite inconsistent with the character of a broker. "He had converted himself from an agent" (as one of the Judges expressed it) "employed to buy for his employer into a principal to sell to him." Now, this plainly gave the broker an interest adverse to his duty, and on that ground the Court rejected the transaction, it being clearly proved that the broker had acted as principal throughout, and actually sold his own tallow, and claimed the difference as his own loss. Here, on the contrary, the whole was done under the rules of the Stock Exchange between brokers for their respective principals, and who had no interest in the matter beyond the amount of their commission.

In giving judgment in *Mollett's* case, Lord Chelmsford expressly put his decision on the ground I have alluded to, using the same expression as Mr Justice Hannen relative to the usage founded on as "converting a broker employed to buy into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty," which could not therefore be sustained. This is a most salutary rule, which it may be right to apply in any similar cases; but there is not, as I humbly think, any ground for its application here in the circumstances which I have now explained.

I am of opinion, therefore, that the defences should be repelled, and decree pronounced in favour of the pursuer.

LORD SHAND.—In this case, after the appeal by the defender, Mr Stewart, from the judgment of the Sheriff-substitute had been heard by the Court, an interlocutor was pronounced on 18th December 1885 recalling the judgment of the Sheriff-substitute, and allowing an amendment on the record to be made by the appellant and answered by the respondent, and also allowing the parties additional proof, which was taken before Lord Rutherford Clark, with special reference to the averments contained in the amendments by the parties respectively. Thereafter, as the result of the discussion on the additional proof, their Lordships, "in respect of the importance of the questions submitted for determination, and that the Judges of this Division are equally divided in opinion thereon," appointed the questions to be argued before them and three Judges of

the First Division. The argument submitted under this order related almost exclusively to the averments which had been made by way of amendment and the evidence adduced under the order for additional proof, and the question thus raised, and now to be determined, is—Whether, on the assumption that the pursuer was employed, as he alleges, to purchase stock for the defender, and that the original purchases were carried over or continued from time to time by sales of the stock purchased and repurchases of the same quantities of stock, the pursuer is entitled, in the circumstances disclosed in the additional proof, to recover the ultimate loss after the alleged sale on 7th March 1884 of the last quantity of the stock purchased, the amount of the claim being £1933, 7s. 3d. This amount is brought out on an account debiting the defender, on the one hand, with the prices of stock alleged to have been purchased for him, and crediting him on the other hand with the prices of stock alleged to have been sold on his behalf, to which is added commissions on all the transactions paid to brokers on the Stock Exchange, and also commissions claimed by the pursuer himself.

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The defender does not dispute that the original purchases on 11th October 1883 of £6000 Trunk Thirds, and on 12th October 1883 of £4000 Trunk Thirds, making in all £10,000 of stock, was all in order, the pursuer having made contacts on his behalf for these purchases with third parties, which he, the defender, was in a position to enforce against them; but he denies that, as regards any of the subsequent purchases after the sale of the particular stock just mentioned, any privity of contract was ever created, or could have been created, between him and third parties, so that he could have made effectual any right against them for delivery of stock. He farther disputes the averment that the stock alleged to have been purchased for him was at the close of the transactions sold on his behalf; and he maintains that, this being so, the pursuer has failed to establish liability against him for the balance sued for.

Both parties are agreed that the pursuer was employed in the character of a broker only. This is averred by the pursuer on record, and is admitted by the defender, and at the close of his evidence in the additional proof the pursuer himself deposes that "all through these transactions" he acted as "broker alone," while in the original proof he explains that he is not a member of the Stock Exchange, but is a stockbroker, and has been so for twenty years, adding the words, "I am an outside broker."

It is further of importance in the decision of the question between the parties to observe that there is no averment on the record of any custom of trade or custom of the Stock Exchange or otherwise in reference to the dealings of parties in the purchase and sale of stocks to vary in any way the ordinary duties arising out of the relationship of customer and broker. If any such custom had been averred it would have been a fit matter for proof, and the defender would have had an opportunity of leading counter evidence on the subject. It follows that the pursuer, as in a question between him and the defender, was not bound to incur any personal responsibility in the purchase or sale of stocks (whatever responsibility he may have incurred towards other brokers with whom he dealt under the rules of the Stock Exchange in which he effected purchases and sales), but was an agent merely, with authority to bind the defender to third parties. But, on the other hand, the pursuer, in the performance of his duties, was bound to make his contracts of purchases and sales of stock on the defender's behalf with third parties in such terms as to enable the defender, as principal

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on one side of these transactions, to enforce the contracts against third parties directly with whom the contracts were made. The importance of this to any one in the position of the defender as principal was this, that even although the brokers, who as between each other might bind themselves as principals, should become insolvent there would always be a principal to whom the defender was entitled to look for fulfilment of the contracts.

The parties are agreed that the defender in ordering the original purchase of shares did not contemplate a permanent investment. His intention was to hold the stock temporarily, in the expectation that the market price would rise before the day of settlement, and again to sell the stock for payment on that day, thereby gaining the difference. In order to make profit in this way by differences it is obvious there must be real transactions of purchase and sale of stock with third parties. As the stock in this case fell instead of rising a series of new transactions took place, all with the same object. Between 12th October 1883 and 7th March 1884, when the defender alleges that the sale of the stock purchased for the defender and belonging to him was made, there appear to have been nine transactions "carrying over or continuing" the original purchases,—that is to say, nine transactions in which the stock purchased from time to time was sold for immediate delivery, and a new purchase or repurchase made for delivery a fortnight afterwards, in the expectation or hope always of a rise in the market. In the case of each of his purchases, assuming that contracts binding on the defender were made, the defender was bound to take delivery of the stock at the settlement day on the Stock Exchange a fortnight after the contracts were made, and as he was not possessed of funds to pay for the stock, the sale of the stock purchased was made for immediate payment, and the purchase of another quantity of stock again made for payment on delivery a fortnight afterwards. The whole of the transactions at the expiry of the nine different periods of a fortnight each were of the same nature, and at the end of the last fortnight the pursuer closed the account by selling the stock which he alleges to have belonged to the defender, but without making any new purchase. The course adopted by the pursuer on the first occasion may be taken as shewing what occurred on each subsequent continuation or carrying-over of stock. The first purchases were made for delivery and payment on 25th October 1883, but on 24th October the pursuer sold £10,000 Trunk Thirds at £50 for immediate payment, and bought the same quantity of stock at the higher price of £50, 3s. 3d. for delivery and payment a fortnight afterwards, according to the advice-note and account sent to the respondent. These transactions of continuation involving the sale of the stock, and the repurchase of the same quantity, were duly intimated by advice-notes from the pursuer to the defender in these terms (taking the first as a specimen):—"I have continued for you as under:—Sold 10,000 Trunk Thirds at £50; bought at £50, 3s. 3d.—com. in account." The note stated that the stock was sold for "this account," and bought for "next account."

It is clear that the pursuer and defender both fully understood that the defender was truly speculating in differences—that is, was buying and selling for the purpose of gaining by differences in the expectation of a rise in the price of the stock before each settling day. It is equally clear that if the pursuer had been a principal himself, contracting as such with the defender for the sales and purchases of stock, which it was quite understood was not to be delivered on either side, he would have been a party to gambling transactions struck at by

the Gaming Act, and on which, therefore, he could not have maintained an action. No such case is however made out in the evidence. The pursuer by the arrangement and course of dealing between him and the defender was not in a position to make gains or losses by speculation, but was to be remunerated only by his commissions acting as a broker. And if he had properly performed the duties of a broker there would have been no valid defence to his present demand. No. 99.
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But, again, if the pursuer by the mode in which he carried out the orders given to him made the purchases and sales truly for himself as principal and not for the defender to the effect of putting the defender in the position of being able to enforce the contracts made with third parties on his behalf, then it follows that the pursuer was not truly acting as a broker bringing third parties together as contractors buying and selling to each other, but made himself a principal, and he is precluded from suing on the contract of agency or brokerage, under which alone he was employed. In the case of *Robinson v. Mollett*, 1874 (L. R., 7 E. and L. Appeals, page 802), being an appeal from the Exchequer Chamber (L. R., 7 Common Pleas, page 84), although there was a great division of opinion on the question whether the custom of trade in the Tallow Market of London could be held to enlarge the rights of brokers so as to entitle them to sue, although by the course of dealing they had made themselves principals in the transactions (a question which was decided in the negative), all the learned Judges in the different Courts in which the case was heard were clearly of opinion that, in the absence of a special custom which the law could recognise as affecting the relation and rights of parties, a broker can only sue on his contracts, if it be clear that he acted throughout as broker only, making contracts between his principal and third parties, and that he could not sue if he himself became principal in the purchases or sales, giving his customer only the benefit of the transactions in which he had made himself principal. Mr Justice Blackburn there defines the duty of the broker or agent as "requiring the broker to establish privity of contract between the two principals," and in this view all of the Judges were agreed.

The defender in this case denies that the pursuer in the contracts made by him maintained the character of broker only, and maintains that the proof shews that in place of purchasing the particular quantities of stock which he, the defender, ordered or authorised to be bought and sold, the pursuer made lump purchases of larger quantities, and in some cases made a number of purchases which in the aggregate were of much larger amounts than the defender's orders, these purchases being made at various different prices, and that having done so, he in his advice-notes to the defender fixed arbitrary prices not corresponding with the prices of any particular purchases, but striking what he conceived to be an average; and farther, that while by these notes he professed to the defender to have effected particular purchases and sales on the defender's behalf, no such transactions had really taken place. It appears to me on a consideration of the proof that this contention on the part of the defender has been established, and, farther, that it has been shewn that the last sale of £10,000 Trunk Thirds, made by the pursuer on 7th March 1884, was not a sale of stock held under any contract of which the defender could possibly have taken the benefit, or for implement of which he was responsible; and in this state of the facts I am of opinion that the pursuer cannot succeed in his claim.

The evidence on these two points seems to be clear. The pursuer, no doubt,

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on the day before what is called settling-day always duly intimated to the defender that he had sold £10,000 Trunk Thirds at a certain price for the "present account," and bought the same quantity at another price for the "next account," but in regard to the quantity of stock alleged to have been purchased and to the price of that stock as intimated to the defender, the pursuer is unable to point to any definite transaction entered into solely on the defender's behalf, or to shew that any purchase of stock at the particular price intimated to the defender was really made.

Thus, to take the first date on which the stock was carried over, viz., 24th October 1883, it appears from the accounts which have been recovered in this case, and the additional evidence given by the pursuer himself, that two quantities of stock, one of £18,000 Trunk Thirds and another of £20,000 Trunk Thirds, were bought—neither of these being at the price of £50, 3s. 3d. intimated to the defender as the price of the stock bought for him. The evidence of the pursuer referring to the continuation-note of 24th October 1883 is in these terms,—“You will see that £18,000 Trunk Thirds and £20,000 Trunk Thirds are ‘sold’ [this should be ‘bought’] at £50, 2s. 9½d. and £50, 2s. 6½d. These two together make up the £38,000. . . . Of course I had to divide the £38,000 between Stewart and other clients who had stock open when I was advising them.” And some lines farther on he says,—“I am now referred to the print, page 4, to the account between myself and the defender on October 24th. I see an entry on the debtor side of £10,000 Trunk Thirds at £50, 3s. 3d. (Q.) Why do you charge £50, 3s. 3d. to Mr Stewart when the prices at which the £38,000 were bought were £50, 2s. 9½d. and £50, 2s. 6½d. ? (A.) That includes R. Thompson & Company’s 1-16th of commission. The London brokers advised these things net. Instead of that, however, I made a calculation as to how much the commission would be, and caused that to be added to the contango.” And after farther evidence as to the pursuer’s mode of dealing with the commission, the pursuer goes on to say,—“I distributed the £38,000 between R. Service, £20,000; Archibald Stewart, £10,000; Dr Russell, £2000; account No. 3, £5000; and H. Maffet junior, £1000,” the last three lots being really purchased by the pursuer himself, and subsequently he proceeds,—“In the division of the stock I charged everybody £50, 3s. 3d. for it. (Q.) To whom did you apportion the stock which you bought at £50, 2s. 6d. ? (A.) To all the parties at £50, 3s. 3d., for the reasons already explained. (Q.) Was there any particular lot of stock open between you and Thompson & Company which was apportioned to any one of the five people ? (A.) No, it was apportioned to the whole of them. I never mentioned the names of my clients to R. Thompson & Company. They knew no person but myself in these transactions.” The result of this evidence is that not only was there no purchase made of a specific quantity of stock for the defender under any contract which the defender could enforce,—no privity of contract established between the defender and another principal, nor, indeed, any contract at the price intimated of which the defender could take the benefit,—but that lump purchases having been made of large quantities of stock, one part at one price and another part at another, the defender struck an average of prices, and merely in his note-books or jottings made a note, on each occasion of a renewed purchase, of the allocation of £10,000 to the defender at a price in each case which had no existence, except in the pursuer’s mind and in his jottings. In this way it appears to me to be clear that there was no contract

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entered into which the defender could enforce, either when the transaction was entered into in Liverpool or at any subsequent date, with any third party. The only way in which the matter could be worked out was by the broker himself becoming principal, taking delivery of stock which he purchased at certain prices, and transferring this to the defender and other parties at different prices altogether. This evidence does not relate to the settlement of 25th October only, but runs through the whole account, for the defender says,—“The system of lump purchases and charging an additional price to the Glasgow clients goes on regularly through the whole account.”

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But, farther, the true position of the parties in these dealings is made very clear by what occurred when the pursuer closed the account, by selling stock which he alleges was truly held by the defender under a contract which the pursuer had made for him. It rather appears that the defender clearly understood that all his transactions were taking place on the Liverpool Stock Exchange, and, at all events, the advice-notes and accounts he received from the pursuer were calculated to lead him to think so. The pursuer himself says that “on the last occasion of carrying over or continuation, which took place on 26th February 1884, £12,000 Trunk Thirds were bought in Liverpool,” and that £10,000 of this had been allocated to the defender. If that had been the case, the defender would have been entitled to demand delivery of this stock on the settlement-day on 8th March following. But in the meantime, on 5th March, the pursuer sold out £3000 of the £12,000 Trunk Thirds on behalf of another customer named John M’Leish, leaving £9000 only which he could represent as in any sense belonging to the defender. This mode of dealing with the £12,000 stock held in Liverpool is only an illustration of the manner in which the pursuer acted throughout. It is clear that if he had acted as a broker only he would not have dealt with the stock in that way, leaving the defender as a contracting party for £9000 only. In the continuation-note of the ultimate sale of the £10,000 stock, represented as belonging to the defender, the pursuer writes,—“Glasgow, 7th March 1884.—A. Stewart, Esq.—I beg to advise having sold on your account as under, in Liverpool, and subject to the rules of that Stock Exchange, for account day, 14th instant, £10,000 Trunk Thirds, at £33—£33,000”; and this is the amount with which he credits the defender at the close of the account. From the evidence, however, it now appears, in the first place, that there was no sale of £10,000 Trunk Thirds in Liverpool, but a sale of £9000 only, and that the pursuer sold in addition a quantity of £1000 Trunk Thirds which he held for himself, or some other party in Glasgow; and in the second place, that there is no price of Trunk Thirds sold either in Liverpool or in Glasgow which corresponds with the price of £33 intimated to the defender and credited to him. The pursuer explains that the price intimated was reached on the principle of striking an average already referred to. On this subject the pursuer being asked,—“Have you slumped all your Liverpool and Glasgow sales? (A.) They were all being closed at the same time—some at Glasgow at £32, 18s. 9d., and some at Glasgow at £30, and the fairest thing to do was to make an average. I therefore gave a separate average between the price of his own stock sold in Liverpool, and the price of some that I had open at Glasgow”; and the very loose way in which the business was done is clearly brought out by another passage in the pursuer’s evidence, in which, being examined in regard to day-book entries relating to Trunk Thirds held by John M’Leish, he is asked,—“Prior to that date was he interested in any of the

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£12,000 open with the Liverpool brokers? (A.) He had bought a lot in Glasgow, and some in Liverpool. (Question repeated.) (A.) I never point out who the stock is for if I hold it in any of the markets. Suppose I hold Trunk Thirds for ten people, and have them in three different markets. If a client comes and orders stock to be sold in any particular market, I will do it. But I do not feel myself bound to keep the stock in any particular market." This passage in the pursuer's evidence seems to me to make it clear that it was not his system to make his contracts such that his customer had a definite contract with a particular third person which he could enforce in his own right either when the purchase was made, or at any time afterwards when delivery might be required. That being so, it appears to me that he by his actings himself became a principal in the transactions in question, a fact which destroys his claim to recover the sum sued for as due to him for transactions in which he was employed to act simply as broker, and with the ordinary powers and duties of a broker only.

It was argued on the defender's behalf that although in the original transaction with parties in Trunk Thirds the pursuer was bound to make a specific contract for the defender, enforceable by him against a third party, no such obligation rested on him in regard to the succeeding fortnightly contracts made thereafter. It was said that the pursuer was left "to do his best" for the defender as his customer, as the defender had failed to supply him with the price of the stock, or to pay the differences which were accumulating from time to time. I cannot give any weight to this argument. When the day of each settlement came the pursuer's only right was to sell out the stock belonging to the defender (if such stock were in existence), and thereupon to sue the defender for the difference, and his commission. He was not entitled to carry over stock and make a new purchase, unless authorised by the defender to do so. It seems, however, from the evidence and the course of dealings that such authority has been proved in reference to each of the fortnightly transactions, when the stock was in point of fact carried over. The defender and his friend Mr Service were repeatedly in the pursuer's office, and must have been made aware, as the pursuer alleges, that new transactions were being entered into from time to time; and as the defender received notices of these transactions regularly from the pursuer without objection, it cannot be taken from him now that the transactions were not authorised. But the authority to carry over or continue purchases and sales of stocks must, I think, plainly be taken to mean that these purchases and sales shall be made by the broker on the same footing and in the same way as the original transaction. The pursuer was a broker simply, and had no authority to change his character at any time in the course of the transactions, and accordingly throughout the whole of the continuations and purchases and sales made on the defender's behalf it was represented to the defender that stock had been purchased from time to time for him, of a specific quantity and at a specified price, in the same way as in the case of the original purchase. It may be that on the occasion of one or more, or it may be of all of the continuations, the person who bought the stock then due for delivery, and in whose favour the transfer of that stock must be taken, again sold stock to be delivered at the next settling-day. This, however, does not make the transactions in themselves in any way fictitious in so far as the persons buying and selling the stock respectively are concerned, and cannot, in my opinion, make any difference on the duty of the pursuer to continue to act as a broker only,

as indeed he represented he did under the employment, as to the terms of which the parties are agreed. No. 99.

The case would have been very different if it had appeared and had been proved that the defender had authorised the pursuer to speculate for him, precisely in the way that the pursuer did,—that is, to buy stocks in different quantities and at varying prices—to lump these and strike an average price—and to take and hold the stocks, or rather a certain proportion of them, as allocated and as applicable to the defender's orders; or even had authorised the pursuer to carry on the whole transactions as principal himself, in his own name, though truly as agent for the defender. And the defender's authority for all this might possibly have been proved by clear evidence that he was made fully aware of the details of the pursuer's actings. But no case of this kind is either alleged or proved. Such a course of dealing would be quite beyond the ordinary duties or powers of a broker, while the pursuer's case on record is that he acted, and was employed to act, as a broker only, without any special powers given to him as an agent. Besides, on the evidence, there is no proof that the defender agreed to make the pursuer an agent to speculate in his own name for the defender, and in the way he did, mixing up the transactions of different customers in regard to quantities and prices of stocks. The case of *Thacker v. Hardy*, 1878, L. R., 4 Q. B. D. 685, has therefore no application.

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On the whole, on the ground that it appears from the pursuer's account and evidence (1) that his actings after the first purchase and sale of stock were not those of a broker making transactions which the defender could enforce as against third parties contracting with him, and (2) as the stock sold at the close of the transactions did not belong to the defender, I am of opinion that the pursuer must fail in the action, except in so far as regards the balance of £138, 10s. 6d. due as the result of the first transaction of purchase and sale of stocks, which sum is admittedly due if the defences stated in the Sheriff Court be repelled, as I think they must be.

LORD YOUNG.—I concur with Lord Mure.

LORD CRAIGHILL.—The appellant is defender in an action raised in the Sheriff Court at Glasgow by the respondent, a stockbroker in Glasgow, in which the Sheriff gave judgment against the defender for £1933, 7s. 3d., the amount concluded for in the summons. That sum is alleged by the pursuer to be a debt incurred to him "as a broker on the employment and instructions of the defender in buying and selling shares for him." The transactions in question began in October 1883, and were carried on till March 1884. The defences are (1) that the alleged buyings and sellings were gambling transactions for differences between the price of stock at the dates of purchase and at the times for settlement; (2) that the pursuer had agreed to take over the loss on the first two (said by the defender to have been the only real transactions) on receiving £150 from the defender, which was subsequently paid; (3) that the pursuer did not act as a broker in the other transactions, but as a dealer; and (lastly) that the pursuer's statements as to instructions for carrying over, and as to the purchase and sale of stocks upon these instructions, are misrepresentations, the fact being that any orders given expressly or by implication to the pursuer were not fulfilled.

The first question relates to the first two transactions, the reality and regularity of which are not disputed. The only thing which has to be decided regarding

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there is whether the alleged agreement to accept of £150 instead of £238, which is sued for as the amount of the differences affecting them, has been proved; and the finding of the Sheriff upon this subject must, I think, be sustained. The burden of proof is on the defender, and he supported his statement by his oath. The pursuer, however, swore the contrary, and as the *onus* lay on the defender, what he alleged, as his evidence was not corroborated, cannot be held to have been established.

The next defence for consideration is the alleged gambling character of the subsequent transactions, but this does not require separate consideration, for, if the pursuer executed the orders he received by buying for the defender, he was in these not a principal, but only a broker or agent, and so is not affected by the plea in question. If, on the other hand, the pursuer did not execute the orders said to have been given to buy for the defender, the latter upon that ground is entitled to be assoilzied. We may therefore proceed at once to consider the two other pleas which have been put forward by the defender.

The first of these is that the pursuer had no authority to carry over. The burden of proof is here upon the pursuer. The order to buy stock does not involve authority to carry over in the event of stock not being taken up, or the difference not being paid. The broker may protect himself, but the way in which he is entitled to act for this purpose is to close the account, dispose of the stock which has been bought, credit the price to his client, and sue for the difference if the difference be not voluntarily paid. The right so to act affords the necessary protection, and were it to be held that a broker at his own hand is entitled to carry over—in other words, to continue the employment which was given upon the first order—this would be giving him the right to involve his client in indefinite liability. Such a thing is not necessary for the broker's security, and might be ruinous to the customer.

Such is my view of this matter, and therefore, unless there be proof of authority or ratification, the defender's liability for the differences on the transactions in question cannot be sustained. This is neither more nor less than what was decided in *Newton v. Cribbes*, 9th February 1884, 11 Rettie, p. 554. But it appears to me that the requisite proof has been provided. The defender, no doubt, swears that he gave no authority; the pursuer, again, swears the contrary, and the pursuer is corroborated by the sale-notes which were sent out to the defender the days on which the carryings-over occurred. All these sale-notes were produced by the defender. There was thus timeous intimation of what had been done. There was no repudiation, and whether there was an order or not to carry over, there was subsequent, and indeed immediate, ratification of the transactions. This distinguishes the present from the case of *Newton v. Cribbes*, which, therefore, is not a precedent on the present occasion.

The defender, accordingly, must be held to be liable for the consequences of the authority to carry over which was thus imparted.

Before proceeding to consider whether this authority was duly exercised, it appears to me to be necessary to explain that, in my view of the law, there must be on the part of the stockbroker carrying over—which is done by selling out and by buying in—as strict a fulfilment of the order as if it were the first order, or the order in which all the others originated. There was some controversy between counsel upon this subject, but I cannot say that I have any doubt upon it. For the pursuer it was said that when the carrying-over occurs the client is under a breach of contract, and therefore that the proceedings of the broker,

whatever they may be, must be favourably regarded. To me it appears that there is no cogeney in such an excuse. The purchaser, no doubt, has neither taken up his stock nor paid his differences, and so far, in the one case and in the other, there was a failure to perform what, expressly or by implication, had been undertaken; but the carrying-over was the act of the broker. He consented to the arrangement, and this renders immaterial the consideration of the cause by which the carrying-over was induced. If the broker in his operations has put aside his character of broker, and acted as if he were a dealer, the fact that this was done in the carrying-over operations is not a reason for dispensing with the obligations of his contract. The transactions in question must be judged of on the assumption, which is indeed a fact, that the orders in question were given by the defender as client or principal to the pursuer as his agent or broker, and this introduces at once the question, which in truth is the question in the case, Were the alleged transactions, as these appear upon the proof, what they behoved to be according to the law by which the case is governed? That law, as I think, is not doubtful. The order is to buy for the principal. The broker is to fulfil the order given, and that cannot be fulfilled unless there is a purchase from a seller who is brought face to face with the purchaser, and is laid under obligation to deliver to him the thing which was the subject of the transaction. Any other rule would, using the words of Mr Justice Blackburn, as quoted in the opinion of Lord Chelmsford in *Robinson v. Mollett*, 7 Eng. & Irish App. 837, be a "departure from the ordinary duty of a broker, that duty requiring the broker to establish privity of contract between the two principals." That the order was given is at this stage of the argument not in controversy. Did the broker buy from another for the client the thing for which the order was given by the client? Were the parties to the transaction brought face to face, and was privity of contract established between them? And, as a consequence, could there be a right of action the one against the other? That the pursuer bought Grand Trunk Thirds after he had the defender's order is, I think, proved, but the form of the transaction was as if the purchase had been for himself. He may have intended, and probably did intend, that there should be distribution of the quantity bought among clients who had given orders. But all the same the bargain with the seller was such as it would have been if there had been no client in the case, and the pursuer had bought on his own account. This is as plain to me as anything could be upon the proof which was recently led.

These are the facts of the case, and they leave for determination only the question whether a lump purchase for distribution among several clients, where there is no allocation by, and no introduction of the client to, the seller, and no obligation undertaken by the one to the other, is a fulfilment of such an order as that which the pursuer says was given by the defender. If it be, then the duty of the broker must be different from that which has been explained by Mr Justice Blackburn. But I think that it is not different, and the circumstances related in other parts of the proof clearly shew that it would be dangerous to recognise what was done as the due fulfilment of such an order. Not only was there no allocation of any portion to any client, but even a portion which was intended by the pursuer to be held for a particular client was in part sold to make up a quantity which had been made the subject of a new transaction with or for another. This is said to be within the broker's right. The pursuer, indeed, adds,—“I would not book an order on any other terms.” The result of

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all seems to be that, were the pursuer's contention to be sanctioned, a broker need not purchase anything specific for his client, but may buy a lump quantity for him and for others at the same time, of which there need be no allocation; nay more, that he may in the end dispose of a part of the lot to others than any of those who gave the order, and supply the deficiency out of stock which was not bought even ostensibly to carry out the broker's obligation. The pursuer suggests that what he did was conformable to the practice of the Stock Exchange. There is no proof as to this. But even if there were proof, and if it were not shewn that the client was cognisant of the alleged custom, such custom would not be a rule by which the obligations of parties would be governed. This is one of the points which was fixed by the decision in *Robinson v. Mollett*.

LORD RUTHERFURD CLARK.—I concur with Lord Mure.

LORD ADAM.—I concur with Lord Shand, whose opinion I have had an opportunity of reading.

LORD JUSTICE-CLERK.—I concur with Lord Shand and Lord Craighill.

THE COURT pronounced this interlocutor:—"Having, along with three Judges of the First Division of the Court, heard counsel for the parties on the appeal, in conformity with the opinion of a majority of Judges present at the hearing, find, as regards the first quantities of stock differences upon which are sued for in the present action, being those under dates 11th and 13th October 1883, that the orders therefor given by the defender to buy for him were duly executed by the pursuer, and that there is in respect of these a balance of £93, 10s. 6d. still resting owing by the defender: Further, as regards the other quantities of stock differences on which also are sued for in this action, find that these shares were parts of larger purchases made on behalf of the pursuer himself or for the general purposes of his business, and were not in implement of the alleged order to buy for the defender: Therefore sustain the appeal: Recall the judgment of the Sheriff-substitute appealed against: Decern against the defender for the said sum of £93, 10s. 6d., with interest thereon from the 7th day of March 1884 till paid: *Quoad ultra* assoilzie the defender from the conclusions of the action: Find no expenses other than those for which judgment has been already given in favour of the pursuer due to or by either party, and decern."

DOVE & LOCKHART, S.S.C.—ALEXANDER GORDON, S.S.C.—Agents.

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TOWN AND COUNTY BANK, LIMITED, Appellants.—*D.-F. Mackintosh—Murray.*

INLAND REVENUE, Respondents.—*Sol.-Gen. Robertson—A. J. Young.*

Revenue—Income-tax—Income-Tax Act, 1842 (5 and 6 Vict. c. 35), schedule D, cases I. and II., Rule first—Deduction for value of premises occupied as dwelling-house.—A bank was charged with income-tax under schedule A of the Income-Tax Act, 1842, on certain premises belonging to it in which it carried on its business, and which were also to some extent occupied as dwelling-houses by the manager and agents, that accommodation being given by the bank to them as part of their emoluments. In assessing the bank for income-tax under schedule D, the Income-Tax Commissioners refused to allow deduction from the gross profits of the bank of the annual value of these premises, in so far as they were occupied as dwelling-houses. In an appeal *held* that the bank was

entitled to deduct the value of the whole premises in question—the portions used as dwelling-houses not being beneficially enjoyed as such by the bank. No. 100.

Opinion (per Lord President) that officers of the bank occupying bank premises as dwelling-houses are liable for income-tax under schedule E for the premises so occupied by them. Mar. 4, 1887.
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THE TOWN AND COUNTY BANK, LIMITED, Aberdeen, appealed against an assessment upon the sum of £1058, under schedule D of the Income-Tax Act, 1842, for the year 1885-86, which had been confirmed by the Commissioners of Income-Tax for Aberdeenshire.

The point of law stated in the case was, “Whether the bank is entitled to deduct from its profits, before returning them for assessment under schedule D, the whole value of their bank premises, where such premises are in part occupied for residence by officers of the bank?”

The following facts were admitted:—“1. That the whole premises, both in Aberdeen and elsewhere, in which the appellants carry on business, are the property of the appellants, and that the appellants pay income-tax on these premises under schedule A of 5 and 6 Victoria, caput 35. 2. That the premises used as the head office of the bank in Aberdeen, and in the same way the premises used as the branch offices of the bank in the different places where they carry on business, contain certain accommodation occupied as a dwelling-house by the manager or resident agent of the bank, as the case may be. The said manager and agent receive said accommodation as part of their emolument in the service of the bank, but the annual value of this accommodation is not assessed to income-tax otherwise than under schedule A as aforesaid. 3. That the sum in question, *i.e.*, the £1058, is the aggregate annual value of the portions of the said premises occupied by the officials or agents of the bank as their dwelling-houses. 4. That the sum in question, like the other sums on which tax has already been paid, had been deducted from the bank's profits before these were returned to the Income-Tax Commissioners for assessment under schedule D. 5. That the sum in question did not include any portion of the premises belonging to the bank used solely as counting-houses, but that deduction had also been made, and not objected to, from the bank's profits of the aggregate annual value of the portions of the bank's premises so used.”

The case further bore,—“The appellants contended that in the return submitted by them deduction had been properly made from the bank's profits of the sum representing the annual value of its premises occupied by its officials or agents as their dwelling-houses; that these dwelling-houses form the official residences of the agents, and are necessary for the proper carrying on of the business of the bank; that owing to the nature of the bank's business it is essential that a responsible official should reside on the bank premises, and that thus the whole premises belonging to and occupied by the bank or its officials or agents are used for the purposes of the bank's business. There is no necessity and no possibility for the bank as such having a dwelling-house merely for occupation. The whole premises are for the purposes of the bank business premises. The case is totally unlike one where a private banker both resides and carries on business in the same premises. The appellants have no dwelling-house in the sense of section 101, which must, in terms of section 100, be a dwelling-house in part used for the domestic or private purposes of the trader, and not one wholly used for the purposes of such trader's business. A dwelling-house is necessary for the private trader unconnected with trade *prima facie*, therefore the dwelling-house must be considered as simply part of his private expenditure, and not as

No. 100. an incident of trade expenditure, and the fact that he uses part of it in connection with his trade does not alter its character as his private dwelling-house. The provisions of section 101 obviate the hardness of this last conclusion. . . . Now, in the case of the appellants the general rule as for the private trader has no application. If a further duty is imposed on the sum of £1058, the appellants will be charged on that sum twice over. It has already paid duty under schedule A, and as the sum is for part of the value of the premises used by them for purposes necessary or incidental to their business as bankers, they are entitled to make the deduction in terms of Rule I, Cases I. and II., as being disbursements or expenses wholly and exclusively laid out or expended for the purposes of their trade as bankers in earning their profits. . . .

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"The Surveyor of Taxes maintained that under the rules of the Income-Tax Acts the deduction in question could not be allowed. That, according to the first rule of the first case of schedule D of 5 and 6 Victoria, caput 35, the duty had to be charged on a sum not less than the full amount of the balance of the profits 'without other deduction than is hereinafter allowed'; and that by the first rule,* applying to the first and second cases of schedule D of the above Act, it is expressly provided that no deduction shall be allowed 'for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern, not exceeding the proportion of the said rent or value hereinafter mentioned'; and section 101 of the same Act provides, *inter alia*,—'That nothing herein contained shall be construed to restrain any person . . . renting a dwelling-house, part whereof shall be used by him for the purposes of any trade or concern, or any profession, hereby charged, from deducting or setting off from the profits of such trade, concern, or profession, such sum, not exceeding two-third parts of the rent *bona fide* paid for such dwelling-house, with the appurtenances, as the said respective Commissioners shall, on due consideration, allow.' That in the present case the managers and agents represented the bank, and the parts of the bank's properties occupied by them as their private dwelling-houses must be held as occupied by the bank exactly the same as in the case of a private banker: Further, if the assessment were confirmed, the amount would not, as stated by the appellants, be charged twice over; but, on the contrary, if the bank's contention were given effect to, the sum in question, or an equivalent amount, would escape assessment altogether."

The arguments of the parties sufficiently appear from the above statement and from the opinions of the Judges.

At advising,—

LORD PRESIDENT.—The facts of the present case are very simple, and they

* The first rule applying to both the first case (*i.e.*, "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act"), and the second case, (*i.e.*, in respect of professions, &c.) was, "In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation; . . . nor for the rent or value of any dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern, not exceeding the proportion of the said rent or value hereinafter mentioned. . . ."

are stated very shortly in the case before us. The Town and County Bank carry on business in Aberdeen, and also in some other towns in the north of Scotland, and the whole premises, both in Aberdeen and elsewhere, in which they carry on business, are their own property. They pay income-tax upon the whole of these premises under schedule A of the Act 5 and 6 Victoria, c. 35. The premises at the head-office of the bank in Aberdeen, and in the same way the premises used as the branch offices of the bank in the different places where they carry on business, contain certain accommodation occupied as a dwelling-house by the manager or resident agent of the bank, as the case may be. The manager or agent receives that accommodation as part of his emolument in the service of the bank. But the annual value of this accommodation is not assessed to income-tax otherwise than under schedule A, by which I understand is meant that the bank manager or bank agent who receives the accommodation as part of the emoluments of his office is not charged with income-tax under schedule E. I shall have something to say about the propriety of that arrangement by-and-by, but in the meantime I merely notice it in passing.

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The footing upon which the Income-Tax Commissioners make the assessment to which I have referred is that the part of the premises used as a dwelling-house by the servant of the bank is held to be a dwelling-house used by the bank itself in the same way as if the bank, being a private individual, really dwelt in these premises. They state it thus in the course of the case: They say that "by the first rule, applying to the first and second cases of schedule D of the Act 5 and 6 Vict. c. 35, it is expressly provided that no deduction shall be allowed 'for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern'; and they contend that in the present case the managers and agents represented the bank, and the parts of the bank's properties occupied by them as their private dwelling-houses must be held as occupied by the bank exactly in the same way as in the case of a private banker."

Now, I am of opinion that that contention is not well founded, upon the construction of the particular rule which is referred to, viz., the first rule applicable to the first two cases under schedule D. Schedule D charges income-tax upon the profits of trade, and also upon the emoluments derived from any profession or calling. These are the two heads of schedule D. The first is, "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule"; and the other case is, "The duty to be charged in respect of professions, employments, or vocations, not contained in any other schedule." It is important to observe that the rule which we have to construe here is applicable to both these cases under schedule D, both to the profits of trade and to the profits of professions or callings. In regard to the profits of trade, we have this general provision in the first rule applicable to the first case under the schedule, that "the duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years." The duty is to be charged upon the balance of profit. Now, I do not apprehend that that term is used in this statute in any other sense than that in which it is used by traders and manufacturers in the management of their business and in the keeping of their books, and one has no difficulty in understanding what is meant by a

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balance of profits in a trader's books. It means the free balance left in name of profit after deducting the whole outlay and expenses. I know no other meaning of "balance of profits." The question therefore comes to be, in the first place, before we go to the particular rule we have to deal with, how the matter would be dealt with under this leading rule applicable to the assessment of profits on trade. Can it be doubted for one moment that the whole sums paid to the servants and officers of the bank are outlay to be deducted before striking the balance of profit? I do not think anybody could say that that is not so. The circumstance that the emoluments may come either in the shape of money or in some other shape—some advantage to the servant or manager—can make no sort of difference. If it costs the employer so much money to secure the services of the officer or manager, that is just an outlay that must be charged against the profits before you can strike a balance. And therefore, in the present case, when dealing with those leading words of schedule D, I have no hesitation whatever in saying that, although part of the emoluments of the bank agent or the bank manager may be the enjoyment of a dwelling-house free of rent, that is just part of his emoluments, and part of the charges against the bank in striking a balance of profits.

We come next to the particular rule upon which the Income-tax Commissioners found their deliverance, and that is the first of the two rules applicable to both the first and second cases under schedule D. The form of this rule is to prohibit deductions of certain things in estimating the balance of the profits or gains to be charged according to either of the first or second cases—that is to say, the profits or gains charged according to the rule applicable to the two cases of trading profits, and of professions and employments. Now, there are four things embraced in this rule which, it is provided, shall not be deducted in estimating the balance of profit, and it so happens that the one we are more particularly concerned with is the third of these four. I shall take the liberty of asking attention, in the first place, to the other heads of prohibited deductions before I come to the one in question. The first is this,—there is to be no deduction "for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation." That is the first of them. One would have said that this was hardly a necessary provision, for it is involved in the enactment that the tax is to be levied upon the free balance of profit. The second is this,—there is to be no deduction "for any disbursements or expenses of maintenance of the parties, their families, or establishments." Now, I apprehend, there can be no doubt about what is meant by the parties. It means the trader or traders who are carrying on the business. There is to be no deduction of any disbursements or expenses for their own maintenance, or the maintenance of their families or establishments. And then the fourth is this,—there is to be no deduction "for any sum expended in any other domestic or private purposes distinct from the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation." Now, taking these three together, I think they may all be described shortly in this way, that there is to be a careful distinction made between money that is expended for the proper purposes of the trade and money that is expended for any other—for any domestic or other similar purposes. The maintenance of the trader himself or his family, or of his establishment, is thrown entirely out of the question. It

is only the outgoing—the outlay—which is rendered necessary for trade purposes, that falls to be deducted in striking the balance of profits. No. 100.

Now, it is, as it were, in the very heart of this same rule that we find the words which are founded on by the Income-Tax Commissioners, and they are these,—“Nor for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern.” That is quite in accordance with the other provisions of this rule, and it must be read in connection with them in order to see what is intended. The Income-Tax Commissioners say, that if an officer of the bank occupies a dwelling-house, then that is a dwelling-house within the meaning of this rule, although it may be given to him as part of his wages or emoluments, and so be directly and not merely in substance, but also in form, an outlay for the purpose of carrying on the trade. That would be entirely inconsistent with the general scope of the rule in my opinion, and would be to introduce into the middle of that set of provisions which I have just described a provision of a totally different description. It appears to me plain that the value of the dwelling-house which is not to be deducted is the value of the dwelling-house of the trader himself, and that in using that language the Legislature has really in view—mainly, at least—the fact that a trader or a professional man may use one part of his house for the purpose of his trade or business and another part for domestic purposes, and, accordingly, they distinguish between the two and say,—So far as you devote a proportion of your house to trade purposes or professional purposes exclusively, you shall be entitled to deduct that, because that is an outlay connected with your trade, but so far as you yourself dwell in it and keep a domestic establishment in it you shall not be entitled to any deduction. That is plainly the true meaning of this clause, and, applying it to the present case, I cannot doubt that this is a good deduction which is proposed, because it is not the dwelling-house of the trader. No part of the premises is occupied by the trader. The part of the premises which is occupied as a dwelling-house is simply given as part of the emoluments or wages of an officer of the bank.

The mistake, I think, which the Income-Tax Commissioners have committed, and which, we are told, prevails in practice, in some places at least, is that they have got the income-tax applicable to the occupation of this dwelling-house from the wrong person. They are not entitled to charge the bank as the owner of the premises and as the trader in this way, by refusing to deduct the value of this part of the wages of their officer, but they are quite entitled to charge against the officer himself, who occupies these premises, the income-tax upon the value of his occupation. The case of a bank-agent falls quite clearly within the provisions of schedule E, for there it is provided that the duties shall be charged “on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said schedule, or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever” accruing by reason of such offices or employments. It cannot be doubted that this house occupied by the officer of the bank is a perquisite or profit belonging to his office. I think, therefore, the determination of the Commissioners must be reversed.

LORD SHAND.—I am entirely of the same opinion, and I have nothing to add to the statement your Lordship has made of the grounds of our judgment.

Mar. 4, 1887.
Town and
County Bank,
Limited, v.
Inland
Revenue.

No. 100.

Mar. 4, 1887.
Town and
County Bank,
Limited, v.
Inland
Revenue.

LORD ADAM.—The sum upon which the Crown proposes to assess amounts to £1058, and what that sum is appears clearly from the third article of the case. It is the aggregate annual value of the portions of the premises occupied by the officials or agents of the bank as their dwelling-houses, and if we go back to the second article of the case we find this fact stated, that these houses "contain certain accommodation occupied as a dwelling-house by the manager or resident agent of the bank, as the case may be." And then it is said,—“The said manager and agent receive said accommodation as part of their emolument in the service of the bank.” Now, that appears to me to shew clearly that, so far as expense to the bank was concerned, it mattered nothing as in a question of profits whether the bank paid their officers entirely in money or gave them so much of their emoluments in money and so much in accommodation. The expense to the bank in either case would be entirely the same. That being so, the question we have to deal with arises on the first rule of the first case of schedule D, and it says this, that the duty to be charged in respect of profits shall be paid on a sum not less than the full amount of the balance of the profits or gains of such trade, and so on.

Now, what is meant by the balance of such profits and gains? I cannot but think that if this bank was making up a balance-sheet, altogether apart from revenue statutes or anything else, the only way it could arrive at a balance would be to strike off the whole expense of earning the profit, and that the salaries or emoluments paid to their servants in so doing, and also the expense of the necessary office accommodation, must necessarily be deducted by the bank before striking the balance. And I think it would matter nothing—it would be a mere matter of accounting and figures—whether the deduction was made in the shape of increased emoluments, paid all in money, or whether the deduction was made as so much money and so much value given to the officials in the matter of house rent or house accommodation. The result as it concerns the bank would be entirely the same in arriving at the amount of profit out of which a dividend was to be paid. Therefore, altogether apart from these revenue statutes, I should entertain no doubt at all that the whole of this sum would form a proper deduction before the profits were arrived at.

But then the revenue statute says, that upon the full amount of the balance of profits so ascertained income-tax shall be paid “without any other deduction than is hereinafter allowed,” and the curious thing, so far as I can see, is that there is no deduction allowed at all except by way of exception. The construction of the statute is to prohibit deductions, excepting so-and-so and so-and-so, from which we may draw the inference that that deduction is to be allowed. That is the frame of the statute, and accordingly in the third clause it sets out,—deductions not to be allowed for so-and-so,—and then we come to the case of professions, which is the second case, and the rules applying to both the preceding cases. It also proceeds on the same footing of deductions not to be allowed on the first and second cases, and we find it says this, that in estimating the balance of profits and gains to be charged according to either the first or the second case, no sum shall be set against or deducted from such profits or gains,—and then comes the deduction, “not being money wholly or exclusively laid out or expended for the purposes of such trade,” and so on, from which the inference is direct, that money wholly or exclusively laid out or expended for the purposes of such trade shall be deducted. Now, in asking myself whether the expense to the bank of house accommodation is a

necessary disbursement, I think it is beyond doubt that that money was exclusively laid out and expended for the purposes of their business, and therefore this exemption falls directly under that first rule. No. 100.

The second rule does not bear directly upon this matter. The next branch of the same rule goes on to say, as before, that no deduction is to be made "for the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern, not exceeding the proportion of the said rent or value hereinafter mentioned." I entirely agree with your Lordship that that rule does not apply to the present question. In my view no part of these premises is occupied as a dwelling-house by the party who is being assessed. I think this rule is meant to apply to the case of a person who actually occupies the dwelling-house. If the party actually occupying the dwelling-house happens also to occupy a portion of it for his business purposes, then, and in that case, he is to be allowed that deduction only, but that is not the case we have to deal with at all, because the bank occupy no part of their premises as their dwelling-house. So far as they are concerned, the whole of these premises are occupied solely for the purposes of the bank. I therefore agree entirely with your Lordship in the result at which you have arrived.

With reference to the question whether or no the occupants of those parts of the bank occupied as a dwelling-house are assessable under schedule E, I see no reason to doubt that what your Lordship has said is sound, but as some of those officials, if the Crown are to lay hold upon them, may have something to say upon the subject, I would rather reserve my opinion.

LORD MURE was absent on Circuit.

THE COURT accordingly reversed the determination of the Commissioners, and remitted to them to allow the deduction claimed, with expenses.

J. & F. ANDERSON, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

JOSIAH M'GREGOR, Pursuer (Respondent).—*Murray—C. S. Dickson.* No. 101.
ALLEY & M'LELLAN, Defenders (Reclaimers).—*Jameson.*

Retention—Deposit.—*Held* that a depositary was bound to restore to the depositor the balance that remained of a fund deposited to meet a contingent claim, when that claim had been ascertained and satisfied, and was not entitled to retain any part of the balance on the plea that he himself had a claim against the depositor for expenses incurred in ascertaining by arbitration the amount of the contingent claim to meet which the fund was deposited. MAR. 4, 1887.
M'Gregor v.
Alley &
M'Leilan.

MESSRS ALLEY & M'LELLAN, engineers in Glasgow, contracted with Mr Josiah M'Gregor, C.E., to build certain boats for an Indian Navigation Company. Alley & M'Leilan gave out a subcontract for the hulls to Messrs Russell & Company, Port-Glasgow. In the execution of the contract alterations and additions were made, giving rise to a claim for extras. The amount truly due was disputed, but, in order to get delivery of the boats, M'Gregor and Alley & M'Leilan agreed to deposit £1589, 10s. to abide the issue of an arbitration. M'Gregor paid his half of this sum, viz., £794, 15s. to Alley & M'Leilan. The money was deposited in bank in the names of Russell & Company and Alley & M'Leilan. Eventually £139, 4s. only was found due, and M'Gregor called upon Alley & M'Leilan to repay him the balance of his deposit. They agreed to pay him all but a sum of £186, 8s. 2d., which they claimed as due to them in respect of expenses incurred by them in the arbitration. 2D DIVISION.
Lord M'Laren.
I.

No. 101.

Mar. 4, 1887.
M'Gregor v.
Alley &
M'Lellan.

Mr M'Gregor raised an action against Alley & M'Lellan for payment of £186, 8s. 2d. The latter averred that it had been arranged that the same arbiters should determine the amount of this claim.

The Lord Ordinary (M'Laren), on 20th November 1886, found that the defenders were bound to restore the deposit libelled, and decerned against them accordingly.*

The defenders reclaimed.

Counsel for the pursuer were not called on.

LORD JUSTICE-CLERK.—The object for which the deposit was made was satisfied, and the conditions on which it was made were purified. That being so, I think the Lord Ordinary was right.

LORD YOUNG.—I can see no interest that the parties have in bringing this question, unless there is a doubt about the pursuer's solvency. The defenders say that they are entitled to have the balance retained as a security for the payment of the amount which may be found due to them by an arbiter in adjudicating on their claim for £186. They have no right to have security for that undetermined claim. The whole balance must be given up, except what is needed for the object for which it was deposited.

LORD CRAIGHILL.—I concur. This was the view which was taken lately in the unreported case of *Foster, Alcock, & Company*. The Court found, and found without difficulty, that parties were not entitled to turn a deposit made for one purpose into a security to cover another.

LORD RUTHERFURD CLARK concurred.

THE COURT adhered.

J. & A. HASTIE, S.S.C.—FODD, SIMPSON, & MARWICK, W.S.—Agents.

No. 102.

Mar. 4, 1887.
Broddelius v.
Grischotti.

ALEXANDER EDWARD BRODDELIUS AND MANDATARY, Pursuers

(Respondents).—*D.-F. Mackintosh—Murray.*

RUDOLPH O. GRISCHOTTI, Defender (Appellant).—*Jameson—C. S. Dickson.*

Bill—Promissory-note—Sexennial limitation—Terminus a quo—12 Geo. III. c. 72, sec. 37.—In the case of a promissory-note payable three months after notice, the sexennial limitation does not begin to run till the lapse of three months after a demand for payment has been made.

Stamp—Promissory-note—Stamp Act, 1870, 33 and 34 Vict. c. 96, sec. 17, 54.†—In an action to recover the amount contained in a foreign promissory-note, which, at the date of the action, was properly stamped, held that an aver-

* "NOTE.—. . . There is another question, that Mr M'Gregor is responsible under his agreement for the reasonable costs of this reference; and I do not say that the sum claimed is unreasonable. But it does not appear to me to be a claim that can be set off against the precise obligation to restore the deposited money, when the purpose for which the deposit had been made was fulfilled. On behalf of Mr M'Gregor, Mr Dickson expressed a willingness, if I should favour that view, to have the account investigated in some way—taxed—and as a matter of concession dealt with in this action. But that proposal has not been accepted by the defenders, who maintain that this process ought to be sisted, and the pursuer kept out of his money till they shall somehow or other get it ascertained that the account is to go to arbitration. I do not think that that is a proposal to which anyone having a liquid claim can be expected to agree. Accordingly, I shall give decree in terms of the conclusions of the summons."

† Sec. 17.—"Save and except as aforesaid, no instrument executed in the United Kingdom, or relating, wheresoever executed, to any property situate, or

ment that, when originally presented for payment in the United Kingdom, it was unstamped, was irrelevant, since presentation without a stamp did not involve nullity. No. 102.

ALEXANDER EDWARD BRODDLIUS, of Gothenburg, Sweden, and his mandatary in this country, raised an action for payment of £460, 7s. 8d. in the Sheriff Court of Lanarkshire, at Glasgow, against Rudolph O. Grischotti. The pursuer was holder of a promissory-note for 6000 kroner granted by the defender, of which the following is a translation, viz. :—

"Three months after notice I promise to pay to Mr C. M. Grischotti or order the sum of six thousand kroner (6000 kroner), with interest of five per cent per annum until payment is made, value received.

"Gothenburg, the 1st May 1876.

RUDOLPH O. GRISCHOTTI."

This note was blank indorsed by Mr C. M. Grischotti. 6000 kroner are equal to £330, 15s. 2d., and the sum sued for was made up by adding to the principal interest since 1st May 1878, when the last payment of interest was made.

Formal notice requiring payment was made in Gothenburg on 8th June 1880.

The note, when produced in this action, bore a stamp, which was cancelled by the figures 2/3/86 being written over it.

The defender pleaded;—(2) The note is prescribed. (3) The note not being duly stamped is null.

In support of this latter plea he averred :—"The said document, if a note, is null, it not having been duly stamped before it was presented for payment, or indorsed, transferred, or negotiated in the United Kingdom. In particular, and without prejudice to said generality, it was not duly stamped when presented by the Bank of Scotland for and on behalf of the pursuer to defender for payment, on or about 9th March 1881, nor when it was negotiated and payment demanded by Huth & Company, London, Mr Gray, of J. Findlay & Co., Glasgow, both for and on behalf of the pursuer, and by the present agents of the pursuer." He further stated that a litigation was going on in Sweden between the pursuer and persons claiming right to the document, and that he (the defender) had been interpellated from paying to the pursuer.

The pursuer denied these averments, and pleaded that they were irrelevant.

On 14th April 1886 the Sheriff-substitute (Guthrie) repelled the defender's pleas of prescription and nullity, and decerned as craved.*

On 15th November the Sheriff (Berry) adhered.†

to any matter or thing done or to be done, in any part of the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

Sec. 54.—"Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory-note liable to duty, and not being duly stamped, shall forfeit the sum of ten pounds, and the person who takes or receives from any other person any such bill or note not being duly stamped, either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon or to make the same available for any purpose whatever."

* "NOTE.—1. *Prescription*. *Thorpe v. Coombe*, 8 D. and R. 847; *Stephenson v. Stephenson's Trustees*, 1807, M. Bill, App. 20.

"2. *Stamp*. 33 and 34 Vict. c. 97, secs. 51-54."

† "NOTE.—The only questions raised before me related to the defences under the second and third pleas, viz., that the note is prescribed, and that the note,

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2D DIVISION.

Sheriff of

Lanarkshire.

I.

No. 102.

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The defender appealed, and argued ;—(1) On the question of prescription. The only authority in Scots law¹ laid down that the limitation in the case of a bill payable on demand ran from the date of the bill, and were it otherwise the policy of the statute would be defeated, for by keeping up a bill like this the creditor might make it last for forty years. The authority of an English text writer supported the principle of this decision in the case of bills payable “at sight,” or “on demand.”² The difference between the rule of English law, referred to by the Sheriff, and that of Scots law arose from the difference of the expressions in the statutes. The English statute referred to “cause of action,” and no “cause of action” arose till a demand was actually made. The Scots statute referred to the date at which the note “becomes exigible.”³ There was a debt due here, and *certum est quod certum reddi potest*.⁴

On the question of stamping, it was maintained that a bill once presented without a stamp was null, and could never found an action. From the terms of the 54th section of the Stamp Act, 1870, it was clear that the presentation of an unstamped bill involved a penalty on the presenter. It was therefore not duly stamped at the time of its execution, and the 17th section imposed a nullity.

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK.—I do not think that it has been made out here that the bill is null under the statute. It is said to be vitiated because it was presented to the debtor by the Bank of Scotland without a stamp. The fact is not being duly stamped, is null. The question under the former of these pleas depends on whether the sexennial limitation of bills and notes, in the case of a note made payable a certain time after notice (which may be taken as equivalent to after demand), runs from the expiration of the stipulated period after the date of the bill, or from that period after the date of demand. This depends on the construction of section 37 of the Act 12 Geo. III. chap. 72, providing that ‘no bill or note shall be effectual to produce diligence or action, unless the diligence be raised, or action commenced, within six years from and after the terms at which the sums in the said bills or notes become exigible.’ I am of opinion that the sum in a bill or note like this does not become exigible till the expiration of the period after the date of demand, and therefore that the prescriptive period does not begin to run till then. It was contended that the present case is governed by the principle of the decision in *Stephenson v. Stephenson's Trustees*, 1807, Morr. Bills of Exchange, App. No. 20, where it was held that in a bill payable on demand prescription runs from its date. Without entering into the grounds of that decision, I think it enough to say that to make the period of prescription run from a certain time after the date of such a bill as that in the present case, and not from the expiration of that period after demand, would, in my opinion, be to make it run from a different date from that when the bill was exigible. The view I take is in accordance with the well-settled rule in England, and although I have proceeded simply on a construction of the Act of 1772, there is obvious expediency in having the rule in Scotland the same as in England.

“As regards the question of stamp, the note as produced in process is duly stamped, and the fact, if it be one, that at some period of its currency it was not duly stamped, would not render it null. If indeed the pursuer had received it in payment or otherwise not duly stamped, he might, under the 54th section of the Stamp Act, have been disabled from recovering on it, but no averment to that effect is made. The plea of nullity must therefore be repelled.”

¹ *Stephenson v. Stephenson's Trustees*, 1807, M. voce Bills of Exchange, App. No. 20.

² Byles on Bills, p. 347.

³ Cf. Bell's Comm. i. 418 in 7th ed. (393 in 5th ed.).

⁴ *Clayton v. Gosling*, 1826, 8 D. and Ry. 110.

that it was stamped subsequently, but it is said that the bill in all its stages after presentation without a stamp is a nullity. I am unable to find any words in the statute to justify that contention.

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On the question of prescription, the Sheriff says the period would run from the date of the demand for payment, and that that is the rule recognised in England. There is an old case in Morrison, which decides that the limitation, for it is a limitation and not a prescription, in the case of a bill payable on demand, will run from the date of the bill, but I observe that Mr Bell in his Principles, sec. 595, says that in the case of a bill payable at sight the *terminus a quo* of the limitation is still matter of question. My impression is that the limitation should not begin to run till the date of the demand for payment.

LORD YOUNG, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

THE COURT dismissed the appeal, and affirmed the judgment.

G. & A. S. DOUGLAS, W.S.—J. & J. ROSS, W.S.—Agents.

JOHN STUART M'CAlG (Inspector of Kilmore and Kilbride), Pursuer
(Reclaimers).—*J. A. Reid—G. W. Burnet.*

No. 103.

ARCHIBALD MAY SINCLAIR (Inspector of Ardochattan and Muckairn),
Defender (Respondent).—*J. C. Thomson—Low.*

Mar. 4, 1887.
M'Craig v.
Sinclair.

Poor—Relief—Poor-Law Act, 1845 (8 and 9 Vict. c. 83), sec. 70.—An Irishman having no settlement in Scotland, being found destitute in the parish of Ardochattan, was sent to the combination poorhouse for the parishes of Ardochattan, Kilmore, and others, at Oban, in the parish of Kilmore. After remaining some months in the house the pauper applied to the governor for leave of absence for a night to attend a wedding, and asked for his own clothes to go in. The governor told him that he could not give him leave of absence for a night, but in the belief that he wished to leave the poorhouse finally, gave him his clothes. The pauper then left the house, but returned the same afternoon. The governor refused to admit him without an order. Next morning the pauper applied to the inspector of Kilmore, who gave him an order form, with blanks to be filled up by the medical officer and by the inspector, and sent him to the medical officer. After seeing the medical officer, who filled up the blanks requiring to be filled up by him, the pauper returned to the poorhouse and was admitted, the inspector not having filled in any blanks. The governor made no new entry in the admission-book. *Held* that the pauper had not ceased to be an inmate of the poorhouse chargeable to the parish of Ardochattan, and had not become chargeable to Kilmore.

MARK POWER, an Irish tramp, was found destitute in the parish of 2^D DIVISION.
Ardochattan, in Argyleshire, in November 1884, and was sent, as a proper Lord M'Laren.
object of parochial relief, to the Lorn Combination Poorhouse, to which I.
the parish of Ardochattan is a contributor. That poorhouse is at Oban, in the parish of Kilmore. The pauper remained there till 19th January 1885, when he applied to the governor, George Sinclair, for leave of absence for a night to attend a wedding in Oban; he also asked for his own clothes to wear at the wedding. By the rules of the Board of Supervision the governors of poorhouses may give leave of absence occasionally for a few hours during the day, but not during the night unless for urgent reasons. The governor therefore did not give leave of absence, but, at the request of the pauper, gave him his clothes and let him leave the house.*

* The rules of the Board of Supervision as to the admission of paupers and leave of absence and dismissal are as follows, viz. :—

" 21. Every poor person who shall be admitted as an inmate into the poorhouse, either upon a first or any subsequent admission, shall be admitted by a written or printed order signed by an inspector, or by some other person duly

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It did not appear whether the pauper had been invited to a wedding or whether he was suffering from an insane delusion. He returned, however, to the poorhouse the same afternoon and asked to be readmitted. The governor, however, refused to admit him without an order, and early next morning the pauper, under the advice of the Roman Catholic clergyman, applied to the inspector of Kilmore, Mr M'Craig, for an order for admission. Mr M'Craig gave him an order form, which contained a number of blanks, some of which required to be filled up by the medical officer and some by the inspector of poor, and sent him to the doctor. The doctor filled up the blanks which it was his duty to fill up, and the pauper went with this form to the poorhouse and was re-admitted. The blanks which fell to be filled up by the inspector were not filled up. The governor made no new entry of the pauper's name in the list of inmates.

Some time afterwards the pauper became insane and was removed to an asylum. The cost of his removal was borne by M'Craig, inspector of Kilmore. For reimbursement of this sum, and to determine the liability for the pauper in the future, the inspector of Kilmore raised an action against the inspector of Ardochattan, concluding for declarator that the defender was liable to the pursuer for his advances for Power, and for payment.

The pursuer pleaded;—(2) The said pauper having been found destitute in the defender's parish, and having been continuously chargeable since November 1884, the defender is liable for his maintenance.

The defender pleaded;—(1) In the circumstances stated, the pauper ceased to be chargeable to the defender's parish when he left the poorhouse at Oban on 19th January 1885. (2) The pauper having been properly and regularly discharged from the poorhouse at Oban on the 19th January 1885, the defender's parish then ceased to be chargeable for his maintenance. (3) The defender should be assoilzied, in respect that the pauper was found destitute in the pursuer's parish, and was admitted to the poorhouse upon the pursuer's order.

At the proof the governor of the poorhouse deponed,—“On 19th January 1885 Power asked to leave the poorhouse to attend a wedding. He asked for his own clothing to enable him to attend the wedding. This would be about eleven o'clock in the forenoon. I asked him if to-morrow would

authorised by the house committee, or by a parochial board having a right to send poor persons to the poorhouse, to sign such order, and not otherwise.

“40. Twenty-four hours after having intimated to the house governor a desire to be dismissed from the poorhouse, or sooner if the house governor shall think fit, any adult inmate, not a dependant of any inmate, may quit the poorhouse; but no inmate shall carry away any clothes or other article belonging to the poorhouse without the express permission of the house governor or matron; and no poor person dismissed from the poorhouse, or so quitting it, shall again be received therein except in the mode prescribed in article 21 for the admission of poor persons.

“Appendix 12. . . . The board could not approve of a rule which would secure to all the inmates of a poorhouse, or to any class or section of them, leave of absence from the poorhouse on certain specified days recurring periodically, or what are called ‘liberty days.’ But they are of opinion that the house committee may authorise the house governor to give, if he shall see fit, to any inmate who shall state reasonable grounds for the request, permission to be absent from the poorhouse for a limited number of hours during any day; subject, however, to conditions and provisions similar to those above stated with reference to leave of absence for the purpose of attending divine worship; and provided, moreover, that leave of absence for any other purpose shall not be given to any inmate more than once in thirty days, or such other number of days as the house committee shall determine, nor during the night, unless in special circumstances and for reasons ascertained to be urgent.”

not suit him, giving me the twenty-four hours' notice required by the Board of Supervision. He said no; he wanted to get his clothing and leave the poorhouse to attend the wedding. He went. He came back the same day seeking readmission without an order. I refused till he produced an order. I always require an order for readmission. The Board of Supervision requires it. By the Court.—Paupers are sometimes allowed to leave for a few hours, but in this case Power got his clothing and dismissed himself. I look on that as a permanent leaving. Examination continued.—Next day, the 20th, he came back with the document No. 27 [the order form], and I let him in. I made no fresh entry of his name in the admission-book. (Q.) Why not? (A.) Because I considered him a pauper chargeable to the same parish as on the previous day. If he had been two nights absent I would have made a fresh entry. By the Court.—Though he brought an order from a different parish I considered him chargeable to the same parish as before. I noticed that the particulars were not entered at the foot of No. 27. This was necessary to complete it, but I had these particulars in the order from Ardchattan. (Q.) You thought the two together enabled you to let him in? (A.) Yes. If he had been two nights absent from the house I would have made a fresh entry in my book. The parish would have benefited a day by his being two nights absent. (Q.) If there had been one clear day of twenty-four hours during which he was not in the house, it would have been necessary to make a fresh entry? (A.) Yes; that was my reason for doing what I did.”

The pauper's health had not materially improved up to January; he was as much a proper object of relief then as when he was admitted.

On 25th November 1886 the Lord Ordinary (M'Laren) pronounced this interlocutor:—“Finds (1) that the pauper, Mark Power, was, on 19th January 1885, discharged from the combination poorhouse, into which he had been received on the order of the inspector of the parish of Ardchattan; (2) that he was so discharged on his own application, and in conformity with the rules made by the Board of Supervision in the exercise of their statutory powers; (3) that the pauper was readmitted to the same combination poorhouse on the order of the parish of Kilmore, represented in this action by the pursuer; (4) that the pauper had no settlement in either of these parishes; (5) that, in these circumstances, the parish of Kilmore has no claim of relief against the parish of Ardchattan: Therefore assolvies the defender from the conclusions of the summons,” &c.*

* “OPINION.— . . . The facts which I find to be proved are these:—That on the 25th of November the pauper Mark Power, who was an Irishman, was found in the parish of Ardchattan in a state of destitution, and was, upon his application, admitted to the combination poorhouse, to which that parish is a contributor, in the town of Oban. He continued in the poorhouse, being relieved at the expense of the parish of Ardchattan, until the 19th of January 1885—a period of nearly two months. Beyond all doubt he was in the receipt of relief under the 70th section of the statute. On the 19th of January he applied to the governor for leave of absence for a night. The governor, according to his own statement, with which I am perfectly satisfied in all respects, explained to the pauper that he could not be allowed leave of absence for a night, and offered him leave of absence for a reasonable period during the day. The pauper would not accept that offer. He wished to leave the poorhouse for a night, stating that he wished to attend a wedding that was to take place that evening, and insisted on having his clothes, although informed that, if he left the poorhouse, he would require to apply again for readmission. In these circumstances, the governor, exercising the discretion which the statute gives to him of dispensing with notice, gave the pauper his clothes and discharged him. I hold it proved that the pauper was discharged from the poorhouse *animo et*

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The pursuer reclaimed. He argued that the case of *Taylor v. Strachan*¹ was really in his favour, for the state of facts on which that case was de-

facto by the governor, and that he could not be received into the poorhouse again except by a new application under the 70th section of the statute.

"Then, on the following day, the pauper was desirous of being readmitted—[His Lordship here referred to the circumstances which led to the pauper's readmission to the poorhouse.] It is quite clear that the fact that Power had been admitted was brought to the knowledge of the inspector, and, in the circumstances, I cannot in the least doubt that he was admitted under an order issued by the assistant inspector, who is a person falling within the description of the 'other officer of the parish' in the 70th section; that he was rightly admitted under his order; and that under the statute the parish would be bound, if it is a case within the statute, to continue the administration of relief so long as the pauper continued to be an object of parochial relief.

"Then the man became insane in the month of February, and was—no matter upon whose application—sent to the County Lunatic Asylum. The question is, which parish is bound to maintain him? . . . If I were to interpret the statute without reference to decisions, I should say that a person once admitted to the poorhouse under the 70th section must continue to be chargeable so long as he shall remain in that state of bodily or mental infirmity which renders him a proper object of parochial relief. I should also hold that as soon as the pauper becomes able-bodied, and being in possession of intelligence to be at large, demands his discharge, he must be discharged; and, whether he demands it or not, he must be discharged, because it is no longer a proper application of the parochial rates to maintain him in idleness in the poorhouse. This, although not expressed in the statute, is to be read into it as an obvious and necessary qualification of its terms. But that, again, is not a case which occurs here; because I am quite satisfied that, during the interval of twenty-four hours which elapsed between the discharge of Power on the 19th of January and his readmission on the 20th, the man continued to be in the same state of infirmity which entitled him to be admitted, and that he never recovered, but, on the contrary, became more and more infirm until his mind became affected, and he had to be removed to the lunatic asylum.

"I must, however, consider how this statute has been interpreted, and I think that the case of *Taylor v. Strachan*, which has been referred to, is a direct decision upon this point, because in that case also a pauper had obtained relief, under the authority of the 70th section of the Act, from the parish of Urquhart, was maintained for a few days,—it does not matter in this question whether it is days or weeks or months,—and was discharged upon his own application. There was a question whether he had not been sent out by the inspector for the purpose of transferring him to another parish, but the Judges unanimously negatived the suggestion to that effect, and held that he was discharged on his own application, just as Power was discharged in this case. He then came to the parish of Huntly, just as this man came to Kilmore, and applied for an order of admission to the poorhouse in that parish. It was held that Urquhart was not bound to relieve Huntly. Now, the view upon which the Court proceeded there was that the 70th section of the statute must be taken to contain the implied condition, that the liability was only to continue so long as the pauper desired to remain in the poorhouse; that, if he left of his own accord, just as in the case where he becomes able-bodied, it would not be the duty of the parish to support him; being discharged on his own application and as of right, the obligation in that case equally comes to an end. There is no duty on the part of the parish to maintain a pauper unless he desires to obtain parochial relief. It is not an unconditional duty, but only a duty which subsists so long as the pauper desires it. That qualification of the statute, I think, was admitted in the case of *Taylor v. Strachan* (Nov. 8, 1864, 3 M. 34, 37 Scot. Jur. 16) very clearly; and accordingly the only question was whether the pauper

¹ Nov. 8, 1864, 3 Macph. 34, 37 Scot. Jur. 16.

terminated was that the pauper had become convalescent, and had ceased, temporarily, to be a proper object of relief. So long as the pauper continued to be a proper object of relief, the parish where relief was originally given continued liable. Further, this was a case of leave of absence, not of dismissal, and it had been so treated by the governor at the time. It would be an intolerable hardship if all the paupers in the house who had no settlement otherwise, if they left the combination poorhouse for a few hours, were to become chargeable to Kilmore.

Argued for the defender;—No doubt the existence of a poorhouse in a particular parish might be a source of hardship to that parish, *e.g.*, if young paupers were born there.¹ But the matter of fact alone must be considered; where was this pauper found destitute?—and undoubtedly that was in Kilmore. If any other rule than that of looking to the fact were applied the consequence might be, as was pointed out in *Taylor's* case, that where you were dealing with a tramp, you might have to inquire as to his health and the circumstances of his relief in half-a-dozen parishes.² What had happened here was truly a dismissal.

LORD JUSTICE-CLERK.—The impression on my mind is that this case is considerably too narrow to be brought within any of the categories mentioned in support of the reclaiming note. I must say, however, that it would be a very great boon if some more economical and less cumbrous method of settling such questions of liability could be devised.

I entirely accept the principle of *Taylor's* case. But what was there decided was, that when relief is given in respect that a person in need of relief is found in the parish, having no claim upon it otherwise, it does not follow that the liability continues if the pauper leaves that parish and wanders into another. That was decided under the reservation that there should be no collusion or unfair dealing in the matter.

The present case does not involve that principle in the least. The parish of Ardochattan, as was its duty, gave relief to the pauper, and gave it by sending him to the combination poorhouse in Oban, and there he remained till the 13th February, when he became insane and was sent to an asylum. The question is, who is to be liable for his support there? It is said that the parish of Ardochattan is liable till the parish of settlement is ascertained, and, as there is no such settlement, it must continue liable to the end.

had not been sent on to another parish for the purpose of evading liability. If that been held proved, the parish of Urquhart would not have been allowed to escape liability, because, under the authority of the previous case of *Brown v. Gemmell* (29th May 1851, 13 D. 1009, 23 Scot. Jur. 464), it was held that such a proceeding would have been an evasion of the statutory obligation of maintenance.

"Therefore, having regard to the case of *Taylor v. Strachan*, I come to the conclusion that when the pauper in this case was discharged on his own application, and, as I expressly find, not with any view on the part of the governor of relieving the parish of Ardochattan, then the obligation under the 70th section came to an end; and that the parish which thereafter admitted him to receipt of parochial relief admitted him under the obligation of section 70, and is therefore liable to maintain him so long as he remains a proper object of parochial relief. It is not disputed that from the time of this man's admission on the 20th of January 1885, he has been a proper object of parochial relief; and I hold that he must continue to be maintained by the parish of Kilmore."

¹ Russell v. Greig and Craig, Jan. 26, 1881, 8 R. 440.

² Cf. also Williamson v. Leslie, Dec. 17, 1850, 13 D. 335, 23 Scot. Jur. 151.

No. 103.

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Sinclair.

I shall not say what might have been the result if the circumstances of his leaving the house had been more important or significant. In point of fact I do not think that he ever left the house—that is, ever gave up his residence there. That comes out quite clearly to my mind in the evidence of the governor of the poorhouse as to his reason for not making a fresh entry in the admission book. It is clear that he did not consider that the rules of the poorhouse had been so infringed, or that the resolution of the pauper had been so clearly taken, as to involve a dismissal from the house altogether. I think that there was no break in the continuity of his residence by leaving the house as he did for a few hours.

LORD YOUNG.—I agree, and I think that the opinion just expressed by your Lordship is the opinion upon which the Lord Ordinary would have acted if it had not been for the view he took of *Taylor's* case. The opinion he expresses, but for his reference to that case, is exactly that which your Lordship has expressed and which I entertain, with this qualification only, that I cannot assume as a fact that this man was ever discharged from the poorhouse, so as to bring in the application of the 40th clause of the rules which have been referred to. I think that he did not apply for his discharge, and, in point of fact, was not discharged. I think that he applied for leave of absence to attend a wedding, and also asked leave to wear his own clothes during his temporary absence. I cannot interpret that request and the granting of it as asking a discharge from the poorhouse and getting it. I regard the case as one where the pauper continued to be chargeable as really as he could be, was absolutely destitute and helpless all the time, asked for leave of absence for a few hours and got it, and then came back and was readmitted, not that day but next day, without a new order, for I cannot call this form which was filled up by the inspector of Kilmore an order.

That being the case, I think the facts were quite different from those of *Taylor's* case.

LORD CRAIGHILL.—I think that there is no doubt that, interpreting the evidence of the governor in its natural way, there was no dismissal; that the pauper never took his dismissal; and that his discharge was never, in point of fact, effected. The true reading is, that he left the poorhouse simply to attend a wedding, and that is the view which the governor took at the time.

LORD RUTHERFURD CLARK concurred.

THE COURT recalled the Lord Ordinary's interlocutor, and decreed in terms of the conclusions of the summons.

MURRAY, BEITH, & MURRAY, W.S.—DAVIDSON & SYME, W.S.—Agents.

No. 104.

Mar. 4, 1887.
Owners of
"Afton" v.
Northern
Marine Insurance Co.
Limited.

DAVID HUNTER AND OTHERS (Owners of s. "Afton"), Pursuers
(Reclaimers).—*Balfour—Salvesen.*

NORTHERN MARINE INSURANCE COMPANY, LIMITED, AND OTHERS, Defenders
(Respondents).—*Asher—C. S. Dickson.*

Harbour—Insurance—Marine insurance—River—Fairway of navigable channel—Private graving dock.—In a marine policy of insurance the term "in port" must be construed according to the meaning put on the term by persons resorting to or doing business in the port.

Held (diss. Lord Shand, aff. judgment of Lord Trayner) that in a policy of insurance on a ship for the voyage, and "while in port thirty days after arrival,"

the meaning of the term "port," as applicable to the port of Greenock, did not include the fairway of the navigable channel of the river Clyde *ex adverso* of the harbour works. No. 104.

Held (per Lord Trayner, Ordinary) that where a ship left a public dock in Greenock Harbour, and was laid up in a private graving dock, situated between two of the public docks belonging to the harbour trustees, for repairs, she had quitted the port of Greenock within the meaning of a policy of insurance for the voyage, and "while in port thirty days after arrival." Mar. 4, 1887.
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Opinions on the point reserved by the Lord President, Lord Mure, and Lord Adam.

Opinion contra (per Lord Shand).

By policy of insurance, dated at Dundee 20th September 1884, granted by the Northern Marine Insurance Company, Limited, in favour of David Hunter and others, registered owners of the barque "Afton," the company, in respect of premiums therein stipulated, insured the "Afton" to the amount of £500. Under the policy it was agreed that the insurance should be upon the cargo, hull, materials, &c. of the ship, "lost or not lost, at and from port or ports, ^{and/or} place or places, in any order, in Java, to any port or ports of call ^{and/or} discharge in the United Kingdom, or France, or United States, and while in port during thirty days after arrival, including all risk of docking while in dock, and undocking and shifting docks, as might be required at any time during the currency of the policy."

1st Division.
Lord Trayner.
B.

There were two other policies on the ship, which contained clauses similar to that above quoted. These policies were both underwritten by various underwriters.

The "Afton" sailed on the voyage covered by these policies, and arrived at Greenock on her return journey on 22d January 1885, where she was berthed in the Victoria Harbour, and discharged her cargo there.

On 6th February she left the Victoria Harbour and was put into Caird's Graving Dock for repairs. That dock was a private dock, and was not part of the public works of the port, though it was locally situated between two of those works.

Her repairs having been executed, she left Caird's Dock on 12th February, being towed out by a tug, and started for Glasgow, where she was to get a new cargo.

While being so towed, and when she had reached the fairway of the navigable channel of the river (which at that point comes close to the shore to avoid the bank in the river known as Greenock Bank), exactly opposite Caird's Dock, she was struck by a squall, which caused her to capsize. She then drifted on to the bank, opposite the Custom-House Steamboat Quay. She was subsequently raised, but was found to be considerably damaged. The cost of raising her, and of the repairs executed on her, amounted to £5890, 16s. 3d.

On 19th February 1886 her owners raised an action in the Court of Session against the Northern Marine Insurance Company and the underwriters of the other two policies, in which they concluded for payment by the Insurance Company of the sum of £310, 0s. 11d., the proportion of the £5890, 16s. 3d. alleged to be payable by them under their policy, and for payment by the underwriters of their several proportions of that sum.

The facts above stated were not disputed.

The pursuers averred;—"The port of Greenock, in the ordinary commercial sense of the term, and as known in mercantile and maritime custom and usage, embraces that part of the river Clyde, or estuary

No. 103.

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Sinclair.

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LORD YOUNG.—I agree, and I think that the opinion just expressed by your Lordship is the opinion upon which the Lord Ordinary would have acted if it had not been for the view he took of *Taylor's* case. The opinion he expressed, but for his reference to that case, is exactly that which your Lordship has expressed and which I entertain, with this qualification only, that I cannot assume as a fact that this man was ever discharged from the poorhouse, so as to bring in the application of the 40th clause of the rules which have been referred to. I think that he did not apply for his discharge, and, in point of fact, was not discharged. I think that he applied for leave of absence to attend a wedding, and also asked leave to wear his own clothes during his temporary absence. I cannot interpret that request and the granting of it as asking a discharge from the poorhouse and getting it. I regard the case as one where the pauper continued to be chargeable as really as he could be, was absolutely destitute and helpless all the time, asked for leave of absence for a few hours and got it, and then came back and was readmitted, not that day but next day, without a new order, for I cannot call this form which was filled up by the inspector of Kilmore an order.

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THE COURT recalled the Lord Ordinary's interlocutor, and decerned in terms of the conclusions of the summons.

MURRAY, BRITH, & MURRAY, W.S.—DAVIDSON & SYME, W.S.—Agents.

No. 104.

DAVID HUNTER AND OTHERS (Owners of s. "Afton"), Pursuers
(Reclaimers).—*Balfour—Salvesen.*

Mar. 4, 1887.
Owners of
"Afton" v.
Northern
Marine Insurance Co.
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NORTHERN MARINE INSURANCE COMPANY, LIMITED, AND OTHERS, Defenders
(Respondents).—*Asher—C. S. Dickson.*

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Her repairs having been executed, she left Caird's Dock on 12th February, being towed out by a tug, and started for Glasgow, where she was to get a new cargo.

While being so towed, and when she had reached the fairway of the navigable channel of the river (which at that point comes close to the shore to avoid the bank in the river known as Greenock Bank), exactly opposite Caird's Dock, she was struck by a squall, which caused her to capsize. She then drifted on to the bank, opposite the Custom-House Steamboat Quay. She was subsequently raised, but was found to be considerably damaged. The cost of raising her, and of the repairs executed on her, amounted to £5890, 16s. 3d.

On 19th February 1886 her owners raised an action in the Court of Session against the Northern Marine Insurance Company and the underwriters of the other two policies, in which they concluded for payment by the Insurance Company of the sum of £310, 0s. 11d., the proportion of the £5890, 16s. 3d. alleged to be payable by them under their policy, and for payment by the underwriters of their several proportions of that sum.

The facts above stated were not disputed.

The pursuers averred;—"The port of Greenock, in the ordinary commercial sense of the term, and as known in mercantile and maritime custom and usage, embraces that part of the river Clyde, or estuary

No. 104. thereof, which lies between White Farland Point on the west and Garvel Point on the east, and from the shore or south bank of the Clyde on the south to and including the said sandbank on the north, and at all events it embraces and includes the place where the 'Afton' capsized."

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The defenders denied that averment, and explained that "at the time of the accident the 'Afton' was not in the port of Greenock, but in the navigable channel of the Clyde. She had left the port of Greenock, and she was on a voyage from Greenock to Glasgow, and was not covered by the policies founded on. Explained further, that the pursuers themselves all along understood that the place where the 'Afton' capsized was not within the port of Greenock, and that the pursuers made no claim on the defenders at or for a considerable period after the date of the accident, but claimed from other underwriters who had insured said vessel for the pursuers on a risk commencing on the expiry of the defenders' policies. In so claiming, the pursuers acted on their understanding that the place where the 'Afton' capsized was not within the port of Greenock, and that the defenders' policies had expired before the accident. There is no such custom or usage as alleged."

The pursuers pleaded;—2. The loss sustained by the pursuers being a loss by a risk insured against by the said policies, the pursuers are entitled to decrees as concluded for, with expenses.

The defenders pleaded;—2. The pursuers having sustained no loss insured against by the policies founded on, the defenders should be assolized. 3. The vessel not having been covered by the policies founded on when the loss occurred, in respect (1) she was not then in the port of Greenock, *et separatim* (2), whether in the port of Greenock or not, she had entered on a new voyage from Greenock to Glasgow, the defenders should be assolized.

Proof was led on 13th July 1886, the evidence being directed to the question, what, in the popular or commercial sense (*i.e.*, as understood by ship-owners, seamen, underwriters, and merchants), were the limits of the port of Greenock. The following facts appeared from the proof:—The bay of Greenock is shut in by White Farland Point on the west and Garvel Point on the east, the distance between the points being about two miles. These points have become in later years less apparent, as the artificial works in the harbour have brought the receding land of the bay almost into a straight line between these projecting points. Opposite Greenock a long bank extends down the river at a few hundred yards' distance from the shore. The navigable fairway of the river runs between the Greenock shore and the bank. The westmost termination of this bank is a well-known anchorage for large ships, and is known as "the Tail of the Bank." The river at this point is about three miles broad, Roseneath being opposite Greenock on the northern bank. The result of the evidence of the pursuers' witnesses, who were men engaged in a business capacity in the port, or merchants, &c. who did business in the port, may be thus summarised: They all agreed that in the commercial sense of the term the navigable fairway opposite and between White Farland and Garvel Points was in the port of Greenock. Some stated that on the north the port was bounded by the bank, and included the Tail of the Bank, while others (*e.g.*, Mr Walker, shipbroker, Greenock) said that it extended as far northwards as the buoy at Roseneath, *i.e.*, nearly to the north bank of the river. The defenders' witnesses, who were also business men, merchants, and underwriters, all stated that in their opinion the use of the words "port of Greenock" was confined to the artificial docks, harbours, and works on the Greenock shore, vested in the Greenock Harbour Trustees

under the Greenock Port and Harbours Act, 1866. From the evidence No. 104. it was apparent that in the earlier parts of the century ships were in the habit of loading and unloading in the fairway off Greenock, but the practice had been discontinued of late, only one witness, Mr Campbell (who had for sixteen years been a member of the Greenock Harbour Trust, and had been acquainted with Greenock all his life), deponing that he had seen ships discharging and unloading there within "the last few years," but it has not been frequent since the deeper harbours were made." There was evidence that ships were even now in the habit of wholly or partially unloading at the Tail of the Bank.

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ance Co.
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The evidence on the question whether the port of Greenock authorities exercised jurisdiction over the fairway is summarised in the note of the Lord Ordinary, at p. 549. As both parties admitted that the term "port" fell to be construed according to the popular meaning of the word, it is sufficient to refer to the opinion of the Lord President with regard to the evidence to be gathered from the terms of the "Greenock Port and Harbours Act, 1866 (29 and 30 Vict. c. clvi.)," and the exhibition of the regulations contained in it on placards on various parts of the harbour. As to the levying of rates on ships using the port and harbours, it may shortly be stated that no rates could be exacted under that statute except from ships actually using the artificial works in the harbour. The limits of the "port and harbours," according to that Act, are defined in sec. 44, quoted in note, p. 552.

On 29th October 1886 the Lord Ordinary (Trayner) assoilzied the defenders from the conclusions of the summons.*

* "OPINION.—The pursuers, who are owners of the barque 'Afton,' seek under this action to recover the amount of damage sustained by their vessel in February 1885 from the defenders, who are the underwriters on certain policies of insurance effected over the 'Afton,' and said to be current when the damage was sustained. It is admitted that the 'Afton' suffered damage in the circumstances set forth in the record, but the amount of the damage has not been ascertained, the parties having agreed (in the event of the defenders being held liable) that that should be determined by the average staters named in the joint minute, No. 96 of process. The defenders, however, deny liability for the damage sued for, on the ground that the 'Afton' was not covered by the policies at the date of the damage; and this question falls to be determined partly by a consideration of the facts, and partly by the construction of the policies.

"The policies (which are all set forth on the record) are expressed practically in the same terms. They purport to insure the 'Afton' from the Tyne to Java, and 'thence to any port or ports of call, and/or discharge in the United Kingdom, or France, or United States, and while in port during thirty days after arrival, including all risk of docking, while in dock and undocking, and shifting docks as might be required, at any time during the currency of the policy.' Having regard to the voyage actually made by the 'Afton,' the policies may be read thus,—*'To the port of Greenock and while in port thirty days after arrival, including all risk,' &c.* The words I have emphasised are the words on which the controversy hinges.

"The facts (so far as material) may be shortly stated. The 'Afton' arrived in Greenock on the 22d January 1885, and completed the discharge of her homeward cargo in the Victoria Dock on 4th February following. She was then under charter to proceed to Glasgow to take a cargo from that port to Brisbane (Queensland), but some repairs being necessary before proceeding on her new voyage, the 'Afton' was on 6th February taken into Caird's Dock at Greenock for repairs. On the 12th February, the repairs being completed, she left Caird's Dock in tow of a steamer to be taken to Glasgow to fulfil said charter, and on the same day, while in tow, she capsized at the place marked on the

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The pursuers reclaimed, and argued;—It was admitted, and must on authority be admitted, that the test of what was the "port" must

plan produced, and sustained the damage now sued for. The *locus* of the accident may be described generally as being a place in the fairway of the river Clyde opposite, and within a short distance from Greenock Harbour. So far the parties are agreed. But the defenders maintain that the place where the damage was sustained is not within the 'port of Greenock,' while the pursuers maintain that it is. The pursuers' averment with regard to this is as follows:— 'The port of Greenock in the ordinary commercial sense of the term, and as known in mercantile and maritime custom and usage, embraces that part of the river Clyde, or estuary thereof, which lies between White Farland Point on the west and Garvel Point on the east, and from the shore or south bank of the Clyde on the south to and including the sandbank on the north, and at all events it embraces and includes the place where the "Afton" capsized.'

"The parties were agreed that the words 'port of Greenock' must be taken in their popular commercial or business sense, i.e., the meaning and sense in which they are understood and used by persons resorting to or doing business in the port. A proof was accordingly led before me as to what was included in the 'port of Greenock' in the sense I have explained. The pursuers' witnesses, speaking generally, supported the pursuers' averment above quoted; some of them indeed went beyond the averment, and carried the port of Greenock very nearly as far north as Roseneath. That, I think, is extravagant; it throws, however, some doubt on the value of the testimony which these witnesses gave. On the other hand, the witnesses for the defenders, again speaking generally, confined the port of Greenock to the works constructed by the Harbour Trustees—and all agree in excluding from the 'port' the fairway of the Clyde between the harbour of Greenock on the south and the sandbank on the north, in which fairway the 'Afton' was at the time she capsized. The result of the evidence was to satisfy me that there was no general or undivided opinion among mercantile or nautical men as to what was meant by or included in the words 'the port of Greenock.' This matter, however, had never before been considered by the witnesses; there had been no occasion for considering it. While, therefore, on the evidence I cannot affirm the averments of the pursuers, I am not simply on that ground prepared to find for the defenders. It is of importance to inquire whether, mere opinion of witnesses apart, the *locus* in question presents those features which mark a port. Is it a place where vessels usually load or unload cargo? Is it a convenient or suitable place for loading or discharging cargo? Is it, in fact, used as a part of the port? Do the harbour or port authorities exercise any jurisdiction there?

"I think it will be admitted that the place where the 'Afton' capsized is certainly not a convenient place for loading or discharging cargo. In the fairway of the river Clyde, where so many steamers are constantly passing, it is obviously neither a convenient nor suitable place for such operations. Nor can it be said that the place in question is one at which, in the present day, vessels usually load or discharge cargo. Formerly, indeed, it appears from the proof, vessels did load and discharge there, at least partially. The pursuers' leading witness, Mr Campbell, may be taken as the most favourable for the pursuers on this point, and his evidence is to the effect that, thirty or forty years ago, he saw vessels loading and unloading in the fairway; he has seen this done occasionally at a more recent period; he cannot say when he last saw it, but he has seen it within 'the last few years, but it has not been frequent since the deeper harbours were made.' No other witness speaks to the discharging or loading of vessels in the fairway at so recent a period, and although it may be true that Mr Campbell has seen this within the last few years, the rest of the evidence clearly establishes to my mind that the place in question has not been a usual place of discharge for at least thirty or forty years. But what was usual thirty or forty years ago, and not usual since that date, can scarcely be taken as entering into the meaning and intention of the parties who made the contract of

be settled by a reference to the opinion of such persons as merchants, No. 104.
underwriters, seamen, and others frequenting or using the port.¹ The

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insurance in 1884 or 1885. There is a good deal of evidence to shew that vessels have loaded and discharged their cargoes, or a part of their cargoes, at the Tail of the Bank from early time down to the present. That does not appear to me to aid the pursuers. The Tail of the Bank is not the *locus* in question. It is not in the fairway, and even if it had been proved to have been, in the mercantile sense (as I think is not proved), a part of the port of Greenock, that would not have aided in the solution of the question now to be determined. I come to the conclusion, therefore, that the *locus* of the accident to the 'Afton' was not a place where vessels were usually loaded or discharged.

"Did the harbour or port authorities exercise any jurisdiction there? Formerly at this place there were buoys, to which vessels sometimes moored, although the buoys were chiefly for the purpose of aiding vessels in warping into or out of the harbour. Vessels using these buoys for either purpose were sometimes charged anchorage and ring dues. The claim for these dues was always made,—was sometimes paid and sometimes not paid,—but the right to make the claim was always disputed. These buoys do not seem to have been used since 1868, if they were used so long, so that for about twenty years no dues have been even claimable. The evidence as to the exercise of any other power or jurisdiction is, I think, dependent on the evidence of one witness, who says that the harbour master of Greenock ordered vessels out of the fairway and 'pushed them further out to the Tail of the Bank so as to keep the fairway clear.' He states, however, that the harbour-master's right to give such orders was disputed. No special case of this kind is given, and the present harbour-master is not examined. I cannot regard this as evidence of the exercise of such jurisdiction as would fairly lead to the inference that the place concerning which it was exercised was within or formed part of the port; I should rather conclude that such acts on the part of the harbour-master as are above spoken to were acts performed under the authority of the 139th section of the Act of 1842,* a clause which appears to me rather difficult to reconcile with the idea that the fairway of the Clyde was part of the port of Greenock under the jurisdiction of the port authorities.

"All the marks or tests, to which I have alluded as indicating a port, are thus found to be wanting in the case of the *locus* in question. I am therefore of opinion that the pursuers have failed to establish that the 'Afton' was within the port of Greenock when she sustained the damage in question.

"Even had I been of opinion that the *locus* of the accident to the 'Afton'

¹ Garston Ship Co. v. Hickie, 1885, L. R., 15 Q. B. D. 580.

* Greenock Harbour Act, 1842.—"139. And be it enacted, That it shall not be lawful to station or anchor any vessel in the mouth or entrance to the said harbours so as to occasion any interruption to the free ingress and egress of vessels passing to and from the said harbours; and in the event of any vessel being anchored or stationed so as to occasion such interruption, it shall be lawful for the said trustees to require the master or other person in charge of such vessel to remove the same, in order to preserve at all times a free passage to and from the said harbours; and any master, owner, or other person in charge of any such vessel refusing to remove such vessel when required by the said trustees, or by any person acting under them, to a situation so as not to occasion such interruption, the said trustees are hereby authorised so to remove such vessel at the expense of the master or owner thereof, and such master, owner, or other person shall be liable in a penalty not exceeding five pounds for each offence, for refusing to remove such vessel when required by the said trustees: Provided always, that nothing herein contained shall be construed to interrupt or obstruct the free passage and navigation, and anchorage for temporary safety, of vessels passing up and down the channel of the frith or estuary of Clyde opposite to the harbours of Greenock, in such manner, however, as not to interrupt the said free access to and from the said harbours."

No. 104. evidence shewed that in their opinion the port extended at least as far north as the bank, and included the fairway of the channel where

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was within the port of Greenock, I would still have decided in favour of the defenders, on the construction of the policies. In my opinion the policies had expired before the accident had occurred or the damage been sustained.

"The 'Afton' was insured against damage on her voyage, 'and while in port thirty days after her arrival.' I think that must be read with this implied limitation, 'if she shall remain in port so long.' If she left the port before the expiry of the thirty days, the policy came to an end. The mere fact of her returning to the port still within the thirty days from the date of her first arrival would not, in my opinion, have the effect of continuing the policy in force or reviving it. I find this view stated by Mellish, L. J., in the case of *Gambles* (L. R., 1 Excheq. Div. 145), where the policy was in effect the same as we have here. He says,—'If the words had been simply "for fifteen days after arrival," then it might have been necessary to put some limitation upon them, because the underwriters could hardly have intended to be liable for a ship going out to sea within that time; but the express terms "whilst there," shew that the stipulation is that the underwriter is to run the risk of what may happen to the ship while she remains in the port.' In this case the underwriters took the risk of what might happen to the ship while in port (i.e. the port of discharge), thirty days after arrival. This, as I have said, implies continuance on the part of the ship in port. If she continues or remains there for thirty days after arrival, she is covered by the policy; but if she leaves sooner, the policy expires. By leaving the port the vessel enters upon a new risk, which the policy does not cover.

"Now, the facts bearing upon this view of the case are all admitted. The 'Afton' arrived on the 22d January. She discharged her cargo, in the Victoria Dock, by the 4th February, and on the 6th February she left the dock and went to Caird's Dock or shipbuilding yard for repairs. That dock or shipbuilding yard 'is not the property of the Greenock Harbour Trustees,' although it is locally situated between two of the Greenock docks. In my opinion, the 'Afton,' when she left the Victoria Dock on the 6th of February, left 'the port' in the sense in which these words are used in the policies of insurance. That the dockyard she went to was a Greenock dockyard does not appear to me to be of any moment. So far as the policy is concerned, and the risks covered thereby, it would have been the same if the 'Afton,' instead of going to Caird's, had gone to a shipbuilding yard at Ayr or Dumbarton. In Caird's she was as much out of the property of the Greenock Harbour Trustees as she could have been anywhere. She was not paying harbour dues. She was not under the protection nor the jurisdiction of the authorities of the harbour or port of Greenock. I put the case, whether, if the 'Afton' had gone to Ayr for repairs, and afterwards, on her way to Glasgow (still within thirty days of the 22d January), had met with her accident where she did, the pursuers could have recovered under the defenders' policies. I was answered that they could, because the vessel was in fact in the port of Greenock when the accident occurred, and the thirty days after her arrival had not expired, and I was referred to *Gambles*' case as an authority for this contention. The contention is, in my opinion, untenable, and not supported by authority. In *Gambles*' case the vessel had never left the port, but had merely shifted from one loading-berth to another. The question there was not as to the effect of leaving the port, but occupying the port continuously under different charters. The opinion by Lord Justice Mellish, already quoted, shews that he would have regarded the pursuers' contention as I have done; for, if the pursuers' contention was sound, the defenders' liability would have been quite the same if, instead of going to Caird's Dock, the 'Afton' had made a voyage to Ireland and returned to the place of the accident before the thirty days had expired.

"I am therefore of opinion that the defenders should be absolved—(1) Because the 'Afton' was not in the port of Greenock when the accident occurred out of which the damage in question arose; and (2) assuming that the

the accident occurred. The view of the Lord Ordinary was that Caird's No. 104. Dock, where the "Afton" went, being a private dock, could not be said to be in the port of Greenock, and that therefore when she quitted her berth in the Victoria Dock she began a new risk. But Caird's Dock lay between two of the artificial works of the trustees, and therefore was, in the strictest sense of the term, in the port. But if their witnessses were to be believed, the port included much more than that, viz., at least all the water between White Farland and Garvel Points, and the far side of the fairway, and until the vessel was fairly out of that water she could not be said to have left the port and commenced a new voyage in the sense of a voyage policy with a time policy adjoined, such as this.¹ In *Garston's* case² tests were given by which the limits of a port or harbour might be settled when they were not otherwise definitely laid down. (1) The place of the accident was in the natural port. It was in the bay of Greenock as it originally existed before the curve from White Farland to Garvel Point was straightened by the artificial works. The conformation of the land thus afforded protection from three sides, and the bank from the fourth. (2) The evidence shewed that thirty or forty years ago the *locus* of the accident was used as a place for loading and unloading ships, and even of recent years (which was hardly to be expected since the extended facilities for unloading had been afforded by the harbour works) such a thing was not unknown. [LORD PRESIDENT.—Then it comes to this, that every ship going up the river to Glasgow must pass through the port of Greenock?] Yes. [LORD PRESIDENT.—Then it is a question of law whether the fairway of the navigable channel of the Clyde can be called the port of Greenock?] Yes. Such a state of matters was not unknown, *e.g.*, the port of Leith extended to Inchkeith. [LORD PRESIDENT.—The harbour, not the port.] "Port" was a more extensive term than "harbour." The term was so understood in both the English cases cited. (3) The port authorities, prior to 1866, when the Greenock Port and Harbours Act was passed, levied anchorage dues there—(See Lord Trayner's opinion, p. 549). They always had asserted a right to dredge in the channel (Clyde Lighthouses Act, 1755, Act for deepening, &c. the Harbours of Greenock, 1773), and could prevent vessels throwing ballast into the channel, discharging firearms opposite the town, &c. (Greenock Harbour Act, 1842). (4) In a question of demurrage, the ship would have been regarded as arrived.³ There was no case where the meaning of the word "port" had been limited to artificial works in a harbour. The definition of "port and harbours of Greenock" in the Act of 1866 (quoted by Lord President, *infra*, p. 554), was a purely statutory definition, and could not be referred to, looking to the general rule of settling the limits of the port by reference to local understanding. The definition there given was simply for statutory purposes, and had nothing to do with the question whether the ship had arrived or not.

Argued for the defenders;—The case of *Gambles* was not in point here, as there the ship was admittedly in the port of Newcastle when the accident occurred. She had moved from one berth in the port to another,

'Afton' was in the port of Greenock when the damage was sustained, she was not then covered by the policies founded on by the pursuer."

¹ *Gambles v. Ocean Marine Insurance Co. of Bombay*, 1875, L. R., 1 Exch. Div. pp. 8 and (1876) 141; *Garston's Ship Co.*, *supra*, note 1, p. 549.

² *Supra*, note 1, p. 549.

³ *Hillstrom v. Gibson and Clark*, Feb. 2, 1870, 8 Macph. 463, 42 Scot. Jur. 217; *Dickinson v. Martini & Co.*, July 11, 1874, 1 R. 1185; *Holman v. Peruvian Nitrate Co.*, Feb. 8, 1878, 5 R. 657.

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and was loading her outward cargo, but it was never said that she had quitted the port for a moment. In a question of demurrage, it would depend on the wording of the special contract whether the ship here would have been held to have arrived. She might, for example, be held to have arrived so far as demurrage was concerned, though she was waiting outside the harbour to get in, all the berths being full. With regard to the test of unloading,¹ the evidence, such as it was, that unloading had been carried on opposite Greenock of late years, referred really to the Tail of the Bank, which was not the point here, being out of the fairway. And any evidence that before the artificial works were constructed to any extent the fairway was used for unloading, was irrelevant in an inquiry as to the mercantile understanding at the present day. As regarded the *locus* being in a natural shelter or port, could it be said that where the channel of a river was the recognised highway to another port, that could in any common sense view be said to be a place where ships went for shelter. The main point was, however, what were the limits of the port in the view of nautical men, merchants, seamen, &c. On the pursuers' own evidence there was no evidence conclusive on that point. No two of them agreed as to what the limits were, and the fact that one of them went so far as to say that the port extended to the other side of the river went far to detract from the value of his evidence. The defenders' witnesses, on the contrary, were clear in their view that only the artificial works were included. This view was strengthened by reference to the history of the port. Certainly, since 1866, when the Greenock Port and Harbours Act was passed, there could be no doubt what the Legislature understood by the term "port," and as the regulations under that Act had for twenty years been posted up on placards all over the harbour, it was probable that the general understanding was now the same as the statutory. The definition in that Act* clearly limited the port to the property vested in the trustees. With regard to the buoys set in past years in the channel, it was clear that they were placed there not to mark the port, but to assist vessels in warping out of harbour. The harbour only came into existence owing to the erection of artificial works, and after they were placed there the Statute of 1866 set forth the popular as well as the statutory meaning of the term.² On the point whether the risk intended to be covered included the ship being in a dry dock, and that a private one, that depended on the terms of the contract. There was no special provision to that effect, and it could not be denied that the risk was altered, and probably increased, thereby.³ It would, therefore, require a very special provision to cover that case.

At advising,—

LORD PRESIDENT.—This action is laid on three policies of insurance on the ship "Afton" belonging to the pursuer, and the question arises on the construction of certain words which occur in those policies. I shall take the case upon the first of the three, as they are all in the same terms, so far as the words to be construed are

¹ See Arnold on Mar. Ins. i. 408.

* Sec. 44 of the Act of 1866 enacts,—“The limits of the port and harbour shall extend to and include the whole works, lands, and property vested in and belonging to the trustees by virtue of this Act, or which shall, pursuant to the powers of this Act, be vested in and belong to the trustees.”

² Capper & Co. v. Wallace Brothers, 1880, L. R., 5 Q. B. D. 163.

³ Lowndes on Mar. Ins., 2d ed. p. 88; Houlder Brothers v. Merchant Marine Insurance Co., 1886, L. R., 17 Q. B. D. 354; Bremner v. Burrell & Son June 19, 1877, 4 R. 934.

concerned. The policy is on the cargo, hull, and material of the "Afton," "at and from port or ports, and/or place or places in any order in Java, to any port or ports of call, and/or discharge in the United Kingdom, or France, or United States, and while in port during thirty days after arrival." Thus, the policy is one on the voyage, to which is superadded a time policy after the voyage is completed, and while the vessel is in port for thirty days. It is not disputed that unless the loss occurred within thirty days of arrival the time policy is of no effect, and it is further not disputed that it would be of no effect unless the vessel was in port, i.e., in a port of discharge in the United Kingdom, France, or United States when the loss occurred. It must be kept in view that the parties in framing these policies did not contemplate that the ship should discharge in any special port, but used words which were applicable to any port in those kingdoms at which the vessel might elect to discharge.

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The facts relating to the loss are very fairly stated in the 5th article of the condescendence,—“The ‘Afton’ sailed on the voyages covered by the said policies, and arrived at Greenock on the 22d January 1885, where she was berthed in the Victoria Harbour, and discharged her cargo. On the 6th February thereafter she was put into Caird’s Dock in that port for repairs, which having been executed she came out of that dock on the 12th of that month, being towed by the tug ‘Lord Elgin.’ While being so towed on the said 12th February 1885 in the port of Greenock, and within thirty days after her arrival at said port, and when opposite Messrs Caird’s shipbuilding yard or thereabouts, she was struck by a gust of wind, which caused her to list heavily to port and to capsize. She thereafter drifted on to the sandbank opposite the Custom House Steamboat Quay and the entrance to the West Harbour, her yards first striking the said bank.” The pursuers’ case is then stated thus,—“The port of Greenock, in the ordinary commercial sense of the term, and as known in mercantile and maritime custom and usage, embraces that part of the river Clyde, or estuary thereof, which lies between White Farland Point on the west and Garvel Point on the east, and from the shore or south bank of the Clyde on the south to and including the said sandbank on the north, and at all events it embraces and includes the place where the ‘Afton’ capsized.” It is only necessary to add to this statement that the place where the accident occurred was in the middle of the fairway of the navigable channel of the Clyde opposite Greenock, and that the vessel was then in course of going up to Glasgow in ballast to take in a cargo of coal there. The contention on the one side is that though the “Afton” was in the fairway of the river and had commenced her voyage to Glasgow, she was still in the port of Greenock, and so was within the provisions of the time policy. The contention on the other side is that being in the fairway of the navigable channel, and in the prosecution of a new voyage, it is impossible to say that she was still in the port of Greenock. The Lord Ordinary has adopted the latter view, and has decided accordingly that the vessel was not at the time of the loss in a position to be covered by the policy. I agree in that decision, and shall give very shortly the grounds of my opinion.

In the first place, I think that the fact of the vessel being in the fairway of a navigable channel, which we all know to be somewhat narrow for the enormous traffic it has to accommodate, is quite inconsistent with the notion that she is still in port. It is a contradiction in terms to say that a vessel which is in the navigable channel of a river is still in port.

But it is contended, and I think justly, that in determining the limits of a

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port we must take into consideration what are held to be its limits by merchants, sailors, shipowners, and underwriters,—in short, that we should not give any technical meaning to the term, but should adopt the popular idea of what it comprehends. Now, a good deal of evidence has been laid before us on that point by both parties, but I am of opinion that the whole of it seems to be a good deal tainted with partisan prejudice. There has been a long standing jealousy between the Magistrates of Glasgow as Clyde Trustees and the Greenock Harbour Trustees as to what the privileges of Greenock on the river are. One set very naturally takes the one side and the other the other. The result is that the evidence now before us is of very little value. I must further say that an observation made by the defenders' counsel as to the pursuers' evidence on this point is well founded—viz., that there is scarcely any consistency between the pursuers' various witnesses. No two fix the same limit to the port. Some extend it to an extravagant extent, others are more moderate, but all, no doubt, maintain that the limits of the port embrace the whole of the navigable channel.

For these reasons I do not think it necessary to examine the evidence in any detail, nor do I suppose that any of your Lordships attach great importance to it.

There is, however, another class of evidence which appears to me to be equally valueless, that is, historical evidence. If we were to regard this as a matter of historical inquiry and so to determine it, we should be departing very widely from the rule which has been appealed to by both parties—viz., that the well-known understanding of underwriters, sailors, merchants, &c., is the only rule by which the matter ought to be decided. I think, therefore, the historical evidence is of little value. One part of it, however, does seem to me to be of importance—viz., an Act which was passed in 1866, and it does, I think, throw a good deal of light on the matter. That is an Act "to consolidate and amend the Acts relating to the port and harbours of Greenock." Now, among other things that Act undertook to define the meaning of the words "Port and harbours." The interpretation clause says that the term "shall mean the port and harbours of Greenock as herein defined within which this Act shall be carried into effect." The clause which defines what the port and harbours are is the 44th, which provides that,—“The limits of the port and harbours shall extend to and include the whole works, lands, and property vested in and belonging to the trustees by virtue of this Act, or which shall, pursuant to the powers of this Act, be vested in and belong to the trustees.” It must be observed that that definition applies to the port as well as to the harbours, and it defines the nature of the port and harbours as “the whole works, land, and property” vested in the trustees under the Act. That appears to me to be exclusive of the notion that any part of the navigable channel which is under the management of the Clyde Trustees under their Acts can be part of the works or property vested in the trustees under the Greenock Act. The definition then is entirely exclusive. But still further light may be extracted from that Act. Schedule B settles the rates on vessels. Now, as regards coasting vessels, we have this provision,—“When a coasting vessel shall not commence or terminate her voyage at the port and harbours, but shall only call at, enter, or use the port and harbours, docks, piers, or other works of the trustees on her way to or from Glasgow, or any other port on the river Clyde, or within the above limits, such vessel shall be entitled in the same voyage to call at, enter, and use the port and harbours, docks, piers, and other works of the trustees on return to the

original port from whence she started, without again paying any rates." There it is to be observed that though a vessel does not commence or terminate her voyage at a port or harbours belonging to the trustees, she may call at, enter, or use one of such ports or harbours. A vessel in mid-channel can hardly be termed to be "calling at or using" the port of Greenock on her way to Glasgow. She might "call" at the port of Greenock in this sense, that if she anchored at the Tail of the Bank she might have communication with Greenock. But the idea meant to be expressed in this section is that of a vessel coming within the artificial works of the port. But further, Schedule C enacts that,—“Goods shipped from the port or harbours to vessels in the stream, or at or below the Tail of the Bank, by steamer or otherwise, to pay full rates of their class, whether river craft, coasting vessels, or vessels foreign, according to the port to which such vessels are bound.” Now, what is contemplated and provided for here is the case of a vessel anchored outside the works in Greenock port taking in cargo, while anchored, by steamer or otherwise from the port or harbour. The charge made is for goods shipped from the port by steamer or otherwise. Is it not plain therefore that a ship lying in the stream is not in the port? I think, therefore, that the Act of 1866 leaves little room for doubt that the statutory limits of the port and harbour of Greenock are consistent with my view of the case, and inconsistent with the view that the port extends beyond the artificial works in the harbour.

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But it may be said that this is a departure from the rule to which both parties have appealed—viz., that we should consider the popular meaning that is given to the term, and not the statutory meaning. That observation might be of some force, if it were not for this, that these statutory regulations to which I appeal are publicly exhibited on placards in various parts of the harbour, and therefore I think it is quite impossible to dissociate the statutory meaning from the ordinary. On these grounds I have come without much difficulty to the conclusion that the Lord Ordinary is right, and that this vessel was not in the port when she was capsized, but was in course of prosecuting her voyage from Greenock to Glasgow towed by a tug.

It is not necessary for me to advert particularly to the other ground on which the Lord Ordinary has relied—namely, that when the vessel was put into Caird's Dock she ceased to be in the port of Greenock. There is a good deal to be said for the view, that that dock being a private dock, and not part of the public harbour works, it is not a part of the port; and, further, that as the object for which she was sent there could not be attained without taking the vessel out of the water, she could hardly be said to be "in port" in the ordinary sense of the term. But I only make these observations in passing, and not as forming my ground of judgment.

LORD MURR.—I also think that we ought to adhere. There is no doubt as to the place where the ship capsized. It was in the fairway of the navigable channel of the river Clyde, through which all vessels passing up and down between Glasgow and Greenock are navigated, whether they call at Greenock or not. As I understand the evidence and the plan furnished to us, the ship had come out of Caird's Dock and crossed into the channel and there met the squall while on her way up to Glasgow. Having regard to those facts, I think they go far to shew that the view of the defenders is correct, viz., that any vessel which is in the navigable channel of such a river cannot be said to be in port.

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The evidence of the witnesses who speak to the general understanding as to the limits of the port of Greenock is very contradictory, and I think that the *onus* lay on the pursuers to shew that this vessel was within the port at the time of the accident. But, even on the evidence adduced by them, I should have great difficulty in coming to that conclusion. Because as I read the evidence of the leading witnesses for the pursuers, they make the port to extend for two miles along the river, from White Farland Point on the west to Garvel Point on the east, and northwards from the Renfrewshire shore across to and beyond the Greenock Bank, and then on almost to Roseneath on the opposite side of the river. But it is impossible, in my opinion, to hold that the port extends over all that space. For the evidence of the defenders' witnesses, and, in particular, that of the three last witnesses examined, two of whom are pilots and Greenock men, is directly adverse to that view, and sufficient, I think, to shew that the pursuers' witnesses are not to be implicitly relied on as to the limits of the port.

In these circumstances it appears to me that the Act of 1866 solves the difficulty in favour of the defenders, as the Legislature, in the parts of that Act which have been referred to by your Lordship, has defined the port as lying within the narrower limit contended for by the defenders. I do not enter on the second ground of judgment stated by the Lord Ordinary, for in the view I take of the main question that is not necessary. On that question I think the decision of the Lord Ordinary is right.

LORD SHAND.—I am so unfortunate as to differ from the opinions which I understand are entertained by all of your Lordships, as well as from the Lord Ordinary, and I am unable to concur in the judgment to be pronounced.

Of course if it be rightly held that the port of Greenock—taking the expression in its ordinary commercial sense—is limited to the piers and harbour works of Greenock fronting the Clyde, there is an end of the question between the parties, for the pursuers' ship was capsized and stranded in the river at a short distance from and in front of these works. But I cannot agree with your Lordships in holding that the term "port or ports of discharge" in the policy was applied to the port of Greenock is to be taken in the very limited sense in which the defenders contend. If the expression "port of Greenock" relates to the port fixed for fiscal purposes, the limits of the port would extend over a large part of the river seaward from the town of Greenock. If, again, the expression were used with reference to the rating of goods and vessels—that is, to the charges or dues payable to the harbour trustees—it must be conceded that under the existing statute and regulations the port is limited to the docks, quays, and harbour works, for the use of which the dues are paid. But it appears to me that the term "port of discharge" in the policies in question refers neither to the port for fiscal purposes or dues, but must be taken in a larger sense; and that where the "port of Greenock" is referred to in a charter party or policy of insurance, then, according to the commercial sense of that term, the parties refer to that part of the river Clyde which the pursuers allege to be the port of Greenock, extending from White Farland Point on the west to Garvel Point on the east, and outwards from the shore so as to include at least the anchorage at the Tail of the Bank, and that part of the river and estuary which intervene between the bank and the southern shore, on which the harbour works are built.

If, therefore, the pursuers' vessel in sailing towards the Victoria Harbour, in which she was unloaded at the end of her voyage, had stranded and been injured at the place where she capsized, and was run aground as described in the minute admissions for the parties and relative plan, I am of opinion that the injury would have occurred in the port of Greenock, although the vessel had not been attached to a pier or reached the inside of a dock; and I shall deal with the case as if the loss had occurred in this way in the first instance. It is obvious that the vessel on her way to the Victoria Dock must have passed over the very ground in question, and the accident which afterwards befell her might have occurred there. I shall afterwards consider whether the fact that the vessel was afterwards taken to Caird's Dock for repairs, and sustained injury after having gone out of that dock when she had started to make the passage or voyage for Glasgow, can make any difference. It is to be observed that Greenock is one of the largest maritime or river ports in this country, having a very extensive shipping trade, and that a large number of sailing vessels and steam vessels, great and small, and engaged in home and foreign trade, resort to the port and use the harbour, and that in particular there is a large foreign traffic constantly going on. The harbour works consist of a long stretch of piers or quays facing the river, with breaks in the quays at different parts admitting of vessels going to different harbours and shipbuilding yards, the names of which are to be found on the plan. The case is one which I rather suppose must be regarded as unique amongst important shipping ports in the kingdom, if, notwithstanding the existence of a large expanse of natural bay in the estuary opposite the town and harbour works, with the admirable shelter which it affords, of which advantage is constantly taken by vessels anchoring for shelter and various other purposes, it shall be held that nevertheless a vessel has not reached the port of Greenock unless she has been attached to a pier or quay or has got inside the gates of a dock.

It has been laid down in several recent cases that the Court in construing the term "port" in a charter-party or policy of insurance must endeavour to reach that meaning which shipowners, merchants, and insurers would naturally attribute to it, taking the term in its ordinary commercial sense; and certainly in the ordinary and usual case such parties in using the term "port" do not mean to limit its signification to the piers, quays, and docks, or, in speaking of a vessel arriving in the port, limit the expression to the case of vessels becoming attached to a quay or getting inside of a dock. A port usually includes the ground in front of harbour works used for navigation, and for shelter and anchorage, as well as for loading and unloading, or for partially loading or unloading cargoes. And if the natural situation of a port be such that there is an expanse of water fronting the harbour works—it may be to some extent land-locked, or forming a bay suitable for shelter—shipowners and merchants understand that the space is included within the port in the business sense in which they use the term, particularly where vessels have been in use to anchor and partially to load or unload cargoes opposite a town which forms a large commercial centre.

It seems to me from the evidence in this case that the expanse opposite to the town and harbour of Greenock, which I have already described, falls within the description of a port which I have now given. The evidence shews clearly that the port of Greenock, extending out into the river at least to the Tail of the Bank,—and it may be even beyond that point to the north, though that question does not arise in this case,—has been in existence and been recognised.

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No. 104. by charters and statutes for upwards of a century—that so early as 1772 anchorage, shore, bay, and river dues were levied from ships resorting to the bay at a time when the harbour works were of a comparatively trifling kind.

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In 1816 a charter was granted to the bailies and town-council of Greenock of the sandbank "opposite the harbour of Greenock, from the point or part of the estuary of the river Clyde at the north-west side of the said harbour, called the Tail of the Bank, in a south-easterly direction across the bay, until it touches the point or opening at the east or Garvel Point called the Troughlet, for the purpose of building dykes upon said bank, and to that end of digging and gaining upon the same for the protection of the bay and harbour from the east and northwards, and for making it otherwise useful without destroying or injuring the navigation of the river Clyde." And in the same charter power is given to the magistrates to enlarge the harbour, "and to erect and build other harbours within the space above mentioned, and to reclaim land from the sea for that purpose, and to apply to their use the anchorage, shore, bay, and river dues, and the other taxes and customs foresaid, to be paid by all kinds of ships and vessels which may come to the said harbour, or other harbours to be built as aforesaid." These terms, read with reference to the locality shewn on the plan, to the large natural bay or estuary opposite the harbour, and with the light of the evidence as to the anchorage ground at the Tail of the Bank, and the long continued existence of buoys in the river for mooring vessels and warping vessels out and into the harbour, all go to shew that from a very early period the bay or estuary of the river at and opposite the town and harbour works of Greenock was recognised as a port possessing anchorage ground and shelter, which is the marked characteristic of a port. The evidence is clear and uncontradicted that down to the date of the Statute of 1866 not only were there harbour appliances in the river at and near the very place at which the "Afton" capsized or was run ashore, but that both at that part of the river and out as far as the Tail of the Bank there was a constant practice of loading and unloading vessels, until in more recent years dock and harbour accommodation with the requisite depth of water were provided. And even down to the present time there is a frequent discharge of part of timber cargoes and occasionally of sugar cargoes to lighten the ship. The witness James Marshall, a stevedore and lighter-owner, states that he is almost daily employed either in partially unloading cargo or filling up cargo for vessels in the bay out and towards the Tail of the Bank, and the witness James Neil speaks to a large fleet of vessels within the last eight or ten years having unloaded a considerable amount of timber cargo there, and to another vessel laden with coke and iron being also so unloaded. Even in the regulations, schedule C, appended to the Statute of 1866, the practice of loading up vessels at the Tail of the Bank is recognised as existing; for goods shipped from the harbour to vessels in the stream, or at or near the Tail of the Bank by steamer or otherwise, are subjected to certain rates there specified. It further appears from the proof that when vessels for the Port of Greenock arrive at the Tail of the Bank it is not unusual for the captain to discharge the crew and to employ stevedores, and it is his duty at once to report the arrival of the ship to the Custom House.

An important body of evidence to the effect I have now stated, adduced by the pursuers, would seem to leave no doubt that the bay of Greenock, outwards at least to the Tail of the Bank, must be held to be within the meaning of the "port of Greenock" in its natural and ordinary and commercial sense, unless

there be very strong evidence to overcome this. I do not think any such evidence has been adduced. The witnesses who were examined on behalf of the defenders were mainly gentlemen in Glasgow, most of whom were defenders in the case, having underwritten risk in these very policies. But there are two witnesses, men of experience and of weight, who were also brought and examined by the defenders, and I may observe upon their evidence that I think it goes a very little way indeed to weaken the evidence which has been adduced by the pursuers. I refer particularly to the witness Mr Leitch, who had been for a large number of years a merchant and shipowner in Greenock, and Mr Carmichael, a merchant and shipowner in Greenock and chairman of the Chamber of Commerce. The first of these gentlemen undoubtedly says in answer to the direct question—"According to commercial and nautical understanding, what constitutes the port of Greenock? (A.) The quays and harbours." He is then asked this question,—“Is there any understanding, so far as you know, among commercial or nautical men that the fairway between the bank and the harbour is within the port?” And the answer is this very broad one,—“If the ‘Afton’ had anchored where she sank when she arrived with her cargo, and had tendered her cargo for delivery to the merchant, the merchant would not have taken delivery, but would have told the captain to bring his ship into the harbour.” So that the view upon which this gentleman proceeds, evidently, in the testimony which he has given as to what is the port of Greenock, seems to be this, that the port of Greenock means some special port at which delivery must be taken by the consignee of cargo. Of course if that view were sound, one must immediately arrive at the conclusion that you cannot be in port till you have reached a quay or berth, and if that is the view on which Mr Leitch proceeds, it goes very little way indeed to shake the general evidence to which I have alluded. Then, again, the chairman of the Chamber of Commerce is asked the question how long he has been in Greenock, and he says he has been in Greenock all his life. He says he is one of the defenders in this action, and one of the underwriters. Then he is asked what constitutes the port of Greenock, and his answer is,—“Where a ship can legally call upon a consignee of cargo to take delivery.” That is obviously unsound, for it simply amounts to this, that nothing can be a port which is not a loading or unloading place with a quay and harbour appliances, and I need not say that no one can possibly give countenance to that view of the meaning of the term “port.”

The point really most relied on in defence has reference to the provisions of the Act of 1866. If the question between the parties had arisen in the year before that statute was passed, the conclusion, I think, must have been inevitable that the port of Greenock could not be limited to the mere harbour works. Can it then be said that by virtue of that statute the port in its ordinary commercial sense no longer includes the sheltering or anchorage ground or expanse of water which it formerly did; that by virtue of the statute the port has shrunk within the limits of the harbour works either suddenly in 1866 or by degrees since that date? Can it be truly said that this port has been diminishing in its area or limits since 1866, as larger and deeper docks admitting of vessels of large draught of water were built; that in proportion as Greenock was increasing in its commerce, and growing in importance as a maritime port, the limits and extent of the port were diminishing, so that at the present day these include only the breastworks on the river side and the docks inside these? I am unable to reach that conclusion, and I think it a very strong and startling

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statement that the Act of 1866 has had any such effect. I cannot think that the effect of the provisions of that statute has been entirely to change and to limit the meaning of the term "port of Greenock," as that term was previously understood in its natural and ordinary commercial sense by business men in the making of their contracts of charter or insurance. In the case of a sailing ship (*Garston Company v. Hickie*) Mr Justice Wills preferred the expression "legal port" as the proper term to describe a port of departure of a vessel to the popular or ordinary or commercial or business sense in which the word is used by business men, and in this view attached very great weight—almost exclusive weight—to the elements of defined limits within which port dues were levied. But this view did not receive countenance in the Court of Appeal, for the Master of the Rolls, now Lord Esher, for reasons which strongly commend themselves to my mind, preferred what he called the "very good working definitions" given by the other terms in ordinary use above quoted. His Lordship there said—"Shippers of goods, charterers of vessels, and shipowners, what do all those persons in their ordinary language mean by a port? What they understand by the word is the port in its business sense, in its popular sense, i.e., the popular sense of such persons. Therefore, with the greatest deference to Mr Justice Wills, it appears to me that all these phrases are quite good, and that they all in substance mean the same thing. He seems to have been inclined to substitute the words 'legal port,' but with all deference to him, in my opinion, that would not do. A 'legal port' might be fixed by an Act of Parliament about which nobody knows anything. It must mean a port which such persons as I have mentioned would be dealing with for the purpose of ships going to or from it carrying goods." And he goes on to enforce as the chief characteristic of a port so understood that the place be in itself a sheltered place, a place of safety, a natural port.

This passage appears to me to give the key to the fallacy which, I humbly think, pervades the argument for the defenders. They seek to set up a legal port as distinguished from a port in the ordinary business sense of the term, and they do so by reference to the provisions of the Harbour Act of 1866. Now, I do not doubt that the port as described in that statute is confined to the harbour works, and that the only dues which the trustees are entitled to levy are for accommodation at these works, and for the use of the harbour appliances. It even appears further that any jurisdiction which the trustees can exercise in the river and bay *ex adverso* of the works is of a very limited nature, though this last statement must be taken with the qualification that the Greenock harbour authorities are represented on the Clyde Lighthouse Board and Pilotage Board, who are concerned with the works necessary to secure the free navigation of the channel, and their harbour-master, as a member of one of these boards, does exercise a certain control over the shipping in what I call the port. But all this—and the knowledge of all this—while it may define a "legal port" for dues or rating purposes, will not, as it appears to me, alter or affect the ordinary or business meaning of the words "port of Greenock" as used in shipping and insurance contracts. The truth is that there is one circumstance which fully explains the legislation of 1866, and entirely accounts for the limitation of the port defined in that Act for dues or rating purposes, and that is the position of Greenock on the bank of the river Clyde, which is the great highway to another port of even greater importance, the port of Glasgow. It is notorious that by artificial operations which have gone on for many years the river for eighteen to

twenty miles above Greenock has gradually been made navigable for the largest No. 104
of sea-going steamers and sailing vessels. Vessels of very large burden have
always been in use, more or less, in waiting for the high tide, to anchor for Mar. 4, 1887.
time at the Tail of the Bank, and to pass through the port of Greenock on their "Afton" v.
way up the river, and the evidence shews that disputes from time to time arose Northern
between the Greenock authorities and the Clyde Navigation Board at Glasgow, Marine Insur-
who have large powers and important duties in regard to the river, and between ance Co.
the Greenock authorities and shipmasters and others anchoring at the Tail of Limited.
the Bank or unloading cargo, particularly as to the payment of dues. In the
interest of all parties it was desirable to settle all such questions on a practical
and permanent basis. Accordingly, about 1866, a sum of £20,000 was paid to
the town of Greenock by the Harbour Board to buy off their claim for the
anchorage, bay, and river dues which they had been previously in use to levy
from time immemorial, and these dues were to be no longer exacted. The
Harbour Trustees obtained power to make large additional docks and works,
and their dues or rates were by statute raised and enlarged, and at the same
time limited to charges for the use of their quays, docks, or harbour works and
appliances, while the Clyde Trustees undertook the responsibility of main-
taining the river channel and navigation. In this way the "legal port" in the
sense of the port in which dues are charged simply for the use of harbour
accommodation arose, and was defined by the statute, and such an arrangement
was not only the natural, but probably the only practical one with a port like
Greenock in an estuary of the river Clyde, having Glasgow higher up. The
Greenock traffic paid dues as before, for though the anchorage, bay, and river
dues were no longer levied, the harbour rates were raised. And even the traffic
from Glasgow in this way produces a very large revenue, for the steamers for
local, coasting, and foreign trade, and passengers constantly call in great numbers
at the Greenock quays, and must produce a large revenue to the Greenock
Harbour Trust.

All this, and the public notices of dues payable as port dues for the use of
harbour accommodation and appliances on the quays and elsewhere, seem to
me, however, to be beside the question as to what is the port of Greenock in a
charter-party of a vessel coming from abroad or a policy of insurance of a vessel
to "the port of Greenock, and while in port during thirty days after arrival."
In short, I think the statutory port for payment of dues or rates on goods or
ships is not the port of Greenock in the sense in which I think merchants and
business men use the term in their contracts, for that term refers not to quays,
docks, and piers only, but to the large expanse of water having shelter and
anchorage in the natural port which exists opposite or near the harbour in
Greenock, as in all other important maritime ports or places.

Two of the unquestionable marks of a port are no doubt the levying of dues,
and the unloading and loading of ships, and it may be that in the majority of
cases the area within which dues are levied will be found to be co-extensive
with the limits of the ports, using the term in a particular sense. But this
cannot be stated as an invariable rule, and though there must be in every port
a place of loading and unloading goods, in very few places indeed can it be
said that the port does not extend greatly beyond such a place as, *e.g.*, take the
case of the Cardiff Dock where the artificial cut and part of the river Taff—a
long way from the place of loading—is part of the port.

Accordingly, I am of opinion that the place in question where the "Afton"

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was injured was in the port of Greenock in the commercial and natural sense of the term. That place is directly opposite the centre of the town and the steamboat quay, which is much frequented, and on which the Custom House of the port is built, and apparently about 500 feet from the breast of the quay. I attach no importance to the fact that the place is in the fairway of the river. If the expanse of water forming the bay and extending out to the bank be within the port in the natural sense of the term, you cannot cut out the navigable channel and say that it is not part of the port though the land and water on each side of it is so. The river for miles higher up is within the port of Glasgow from bank to bank, and it would be absurd to say of a part in the centre buoyed off, it might be, as fairway or navigable channel, that this was not in the port. A similar illustration might be taken from the port of Newcastle, which, I understand, extends for miles from bank to bank of the river, with navigation going on higher up, and the Cardiff case is another illustration, for there a great part of the port seems to have been fairway. On this point it may further be observed that the policies cover the ship while in port during thirty days after arrival, including all risk of shifting docks. I put the case that after the "Afton" had partially discharged in the Victoria Harbour she had been required by the harbour authorities or the charterers to move to the west harbour or Albert Harbour to complete her discharge, what in that case becomes of the defenders' argument? Can it be maintained that as soon as the vessel got out of the Victoria Dock into the river or fairway of the river she was out of the port of Greenock although merely on her way from one dock in the port to another, and if so, what meaning is to be given to the words "including all risk of shifting docks" in the policy. I should suppose that the very use of the term "shifting docks" in such a policy would convey to the mind of anyone thinking of a port on any river that the vessel must be taken out of one dock into the river and along the channel or fairway of the river into the other dock, and if so, it is to me inconceivable that the parties should mean that the risk ceased and the vessel was unsecured in the river between the two docks because she was not in port, but that the policy should again revive as soon as she was taken inside of the stone breastwork of the harbour. This, however, is involved in the defenders' argument. Such changes of dock must occur daily in the port of London, and I cannot suppose that it has ever occurred to anyone that the vessel is out of the port when she sails along the fairway of the river from one dock to another. I have, on the grounds now stated, come to the conclusion that if the vessel had gone aground as she passed over the place in question on her way to the Victoria Dock, where she was discharged, the occurrence would have taken place in the port of Greenock. But she completed her discharge, was taken into Caird's Dock for repairs, took in ballast, and had emerged from the dock, starting on the passage to Glasgow to take in cargo there, when she capsized and went aground. It appears to me she was still insured, and that the defenders are liable under the policies. Engrafted on the voyage policy there is a time policy, "to any port of discharge in the United Kingdom, . . . and while in port during thirty days after arrival, including all risk of docking while in dock, and undocking and shifting docks, as might be required at any time during the currency of the policy." The Lord Ordinary expresses the opinion that the taking of the vessel into Caird's Dock destroyed the policy in the same way as if the vessel had gone to Ayr, or had made a voyage to Ireland and returned to the place of the accident before

the thirty days had expired. In my view that is not so. It is true that the vessel when in Caird's Dock was not in a dock the property of the Greenock Harbour Trustees, nor paying harbour dues, but the question under the policy is, was she in the port of Greenock? If so, then the policy in its language covers the case. The parties must, I think, be taken to have had in view that the vessel might encounter severe weather, in which case repairs might be necessary, or the copper on the vessel's bottom might require to be cleaned, and if this were done in port within thirty days after arrival, I can see no ground for thinking that the risk did not continue. There are docks and shipbuilding yards in Greenock as in all other ports. Are not these in the ordinary sense of the term in the port if locally within the limits as generally understood? Caird's Dock is in the very centre of the harbour. It is, as it seems to me, a dock or yard of and in the port of Greenock, so I hold the taking of the ship there for repairs did not bring the policy as a time policy to an end.

Finally, it is said that as the vessel left Caird's Dock on her passage to Glasgow, again the risk ended. That observation would be true if the vessel had left the port of Greenock, but not otherwise. In the case of the *Garston Company*, the vessel, which had cleared out at the Custom House and had proceeded towards the sea on her voyage to Bombay from Cardiff, had got down an artificial channel leading from the docks to the river Tarff, and about 300 yards beyond the junction of the channel with the river, when she came into collision with another ship. Lord Escher there said, referring to the case of *Rocklands v. Harrison*,—"The final sailing from the port is not at the time when the vessel starts from the rivermost end of the port; it is not till she gets to the outer end of the port. Till then she has not sailed from the port; she is sailing in the port." So here, the parties in charge of the vessel had it in view to take her out of the port, and in a very short time, if no accident had occurred, she would have been out of the port, but she took the ground and was injured while she was still in the port, if I be right as to the meaning of that word in the policies. The loss occurred within thirty days after arrival. The vessel was still "in port," and the risk was therefore covered by the policy. It would be to add a new term to the policy, for which I see no warrant in its language, to hold that the risk terminated as soon as the vessel was unloosed and started from the dock to go to Glasgow though she was still sailing in the port of Greenock.

Accordingly, I am of opinion that the pursuers are entitled to succeed in their demand, and that the case should be remitted to the average-stater to ascertain the amount of loss, under the minute of agreement of the parties.

LORD ADAM.—I concur in the opinions of your Lordship and of Lord Mura.

THE COURT adhered.

BOYD, JAMESON, & KELLY, W.S.—J. & J. ROSS, W.S.—Agents.

GEORGE SHEPHERD (Skinner's Trustee), Appellant.—*D.-F. Mackintosh—Kennedy.* No. 105.

ALEXANDER KEITH AND OTHERS, Respondents.—*Asher—Ure.*

Bankruptcy—Process—Appeal against trustee's deliverance sustaining preferential claim—Competency—Duty of trustee.—Where an appeal is taken against the deliverance of a trustee in a sequestration, it ought to be served upon the creditor, whose interest it is to oppose it, and it is not the trustee's

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duty to defend his deliverance by appealing against the interlocutor of a Sheriff recalling it, when the result of that appeal, if successful, would be injurious to the interests of the general body of creditors.

A trustee in a sequestration sustained the claim of certain creditors to a preference. The unsecured creditors appealed to the Sheriff, who ordered service of the note of appeal upon the trustee only. The Sheriff recalled the trustee's deliverance—the trustee alone appearing as respondent. The trustee then appealed to the Court of Session. In a question as to the competency of the appeal, *held* that the Sheriff ought to have ordered service of the original appeal upon the secured creditors, and that the trustee ought not to have appealed to the Court of Session, but that in the circumstances the secured creditors whose claim to a preference the Sheriff had disallowed might be sisted as appellants instead of the trustee on condition that they paid the whole expenses incurred and to be incurred in defending their interests.

1ST DIVISION.
 Sheriff of
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GEORGE SHEPHERD, farmer, trustee upon George Skinner's sequestrated estate, pronounced a deliverance admitting the claim of Daniel M'Intosh and Charles Caie to a preferable ranking. The amount of their claim was £1854, 13s. 8d., less £284, 17s. 9d. previously paid to account.

The ordinary creditors appealed against that deliverance to the Sheriff of Aberdeenshire, and on 14th September 1886 the Sheriff (Dove Wilson) pronounced this interlocutor:—"Appoints a copy thereof and of this deliverance to be served upon the therein designed George Shepherd; and appoints parties or their procurators to be heard thereon before the Sheriff-substitute, within the Sheriff Court-house here, on the 22d day of September current." He subsequently, on 6th December following, recalled the trustee's deliverance, and remitted to him to rank the claim of Messrs M'Intosh and Caie as an ordinary claim.

The trustee thereupon appealed to the Court of Session.

When the case came on for hearing a minute was put in for Messrs M'Intosh and Caie craving to be sisted as appellants.

The ordinary creditors objected to the competency of the appeal, and argued;—A trustee in bankruptcy represented the general body of creditors, and it was not for him to defend the interests of an individual creditor who had obtained a preferential ranking against the interests of the general body of creditors and at their expense.¹ A creditor who did not himself appeal could not take advantage of an appeal presented by the trustee.² The trustee was in the position of a pursuer who found he had no title to sue, and in that case a new pursuer could not be sisted without the consent of the defender.³ It was the invariable practice in the Sheriff Court not to serve an appeal against a trustee's deliverance upon the creditors. The creditors always knew of the presentation of the appeal, and it was in their power to take advantage of it if they pleased. But they had not done so. Besides, Messrs M'Intosh and Caie might have appealed against the Sheriff's interlocutor to the Court of Session.

The appellant argued in support of the competency;—The answer to the question which was now raised depended on whether the trustee had a good title to appear to defend his deliverance in the Sheriff Court.

¹ Bell's Comms. (M'Laren's edn.) ii. 319; Mann v. Sinclair, June 20, 1879, 6 R. 1078; Corbet, &c. v. Waddell, Nov. 13, 1879, 7 R. 200; Maxwell Witham v. Teenan's Trustee, March 20, 1884, 11 R. 776 (Lord Shand, p. 783).

² Forbes v. Manson, July 2, 1851, 13 D. 1272, 23 Scot. Jur. 599.

³ Anderson v. Harboe, Dec. 12, 1871, 10 Macph. 217, 44 Scot. Jur. 133; Morison v. Gowans, Nov. 1, 1873, 1 R. 116; M'Ritchie's Trustees v. Hiskov, Dec. 17, 1879, 7 R. 384 (Lord Young, p. 394), revd. June 23, 1881, 8 R. (H. L.) 95.

This was a review of the Sheriff's judgment under section 170 of the Bankruptcy (Scotland) Act, 1856. Where a trustee's deliverance was appealed to the Sheriff there was no provision in the statute for intimation to the creditors, and in this case none had been asked for. The trustee was recognised by the statute as the party respondent to each appeal, and he was the proper person to defend his own deliverance.¹ But if there had been intimation to Messrs M'Intosh and Caie in the Sheriff Court they would have asked to be sisted—as they now applied to be sisted here. The fact that they had not been parties to the *lis* in the Court below prevented them from bringing the case under review. It would be a hardship if they were shut out from their right of appeal by the fact that the trustee had been accepted by the respondents as their contradictor. They were willing to relieve the trustee of his expenses. In any case, a judgment against the trustee would not be *res judicata* against Messrs M'Intosh and Caie.

No. 105.
Mar. 4, 1887.
Skinner's
Trustee v.
Keith.

At advising,—

LORD PRESIDENT.—An objection has been taken to the competency of this appeal, founded on circumstances which require careful consideration. The claim which was presented to the trustee in the sequestration by Messrs M'Intosh and Caie was for £1854, less a sum of £284 paid to account. They claimed to be ranked preferably, and their claim was sustained, and the preference for which they contended given effect to by the deliverance of the trustee. The unsecured creditors, or at least some of them, appealed to the Sheriff against the trustee's deliverance, and, the appeal having been presented, an interlocutor was pronounced by the Sheriff on 14th September last appointing a copy of the appeal and of the trustee's deliverance "to be served upon the therein designed George Shepherd," who was the trustee, and parties were appointed to be heard thereon on 22d September following. In the prayer of the note of appeal nothing is said about service, and we are told that under such circumstances it is common to pronounce a first interlocutor in the terms I have read, appointing service to be made upon the trustee. That may be a convenient course, and such service may be sufficient in certain circumstances, because in the general case where the effect of a deliverance by a trustee is to reject a claim to a preference, it may serve every purpose that the trustee should be called upon to defend his own deliverance. But it might be requisite even in these circumstances that further service should be ordered. But where the party interested in maintaining the deliverance is not the trustee, but the particular creditor who has got a preference, it appears to me that such service as was made here is wholly inadequate, and is even not applicable. The service ought to be made on the party whose interest it is to maintain the deliverance, and that is the creditor who claims the preference. The trustee has no office to defend his own deliverance where that deliverance is against the interests of the general body of creditors, as it necessarily is where it establishes a preference. The proper office of a trustee is to cut down preferences as far as possible. I do not, of course, mean that he should not sustain a preference when he thinks that there are sufficient grounds for so doing, but when he issues a deliverance

¹ Baird & Brown v. Stirrat's Trustee, Jan. 26, 1872, 10 Macph. 414 (Lord Kinloch, p. 416), 44 Scot. Jur. 232; Russell v. Taylor and Nicholson, Nov. 26, 1869, 8 Macph. 219 (Lord Benholme, p. 221), 42 Scot. Jur. 96; Robertson v. Robertson's Trustee, Dec. 19, 1885, 13 R. 424.

No. 105. sustaining a preference, he has done all that a creditor claiming a preference can call upon him to do. It is not his duty to defend that deliverance. That duty falls upon the creditor himself.

Mar. 4, 1887.
Skinner's
Trustee v.
Keith.

The difficulty of the present case arises from the circumstance that the Sheriff or Sheriff-clerk did not advert to the fact that it was the duty of the creditor and not of the trustee to defend the deliverance. I think the creditor who was maintaining the preference was the only proper contradictor of the appellants, who were ordinary creditors, but the case proceeded before the Sheriff without the preferential creditor making appearance, and without any one being in Court except the appellants and the trustee, the result being that the trustee's deliverance was recalled by the Sheriff, who held that there was no sufficient ground for sustaining the preference. Against the Sheriff's interlocutor an appeal has been brought to this Court in name of the trustee only. I am of opinion that the trustee ought not to have brought that appeal. But it is a different thing to hold the appeal to be incompetent. The Sheriff's judgment was pronounced against the trustee, who is now the appellant, and accordingly there seems to be no incompetency in his bringing an appeal in the interests of whomsoever it may concern.

But the real reason why I think the trustee ought not to have undertaken an appeal to this Court is that if he is to be allowed to litigate as a trustee he must do so at the expense of the bankrupt estate. But the estate is interested upon the other side, and it would therefore be made to pay the expenses of an appeal, the successful issue of which would be injurious to the unsecured creditors themselves, and would reduce the amount of the fund available for division among them.

The question, therefore, is whether the appeal may not be sustained as competent, and the process put into a different shape by sisting as appellants the creditors who claim a preference. Upon consideration I have come to be of opinion that these creditors may be sisted if they consent to relieve the trustee of all the expenses which he has incurred, and to pay the whole charges of the appeal,—the trustee himself standing aside and taking no further part in the appeal. The creditors' minute craving to be sisted must contain an undertaking to pay past expenses, and also full expenses for the future.

LORD MURE and LORD SHAND concurred.

LORD ADAM was absent.

The minute for Messrs M'Intosh and Caie having been amended so as to include an undertaking by them to pay the trustee's expenses,

THE COURT accordingly pronounced this interlocutor:—"Sist Daniel M'Intosh and Charles Caie as parties to the appeal in room of the appellant, the trustee on the sequestrated estate of James Skinner, in terms of the minute for them, No. 16 of process, as now amended, and appoint the cause to be put to the Summar Roll for discussion on the merits."

WILLIAM OFFICER, S.S.C.—ALEXANDER MORISON, S.S.C.—Agents.

PETER GLASS, Petitioner (Appellant).—*W. G. Miller.*
JOHN CARRICK (Master of Works of the City of Glasgow) AND OTHERS,
Respondents.

No. 106.

Mar. 5, 1887.
Glass v. Glas-
gow Master of
Works.

Burgh—Dean of Guild—Free space for air—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 370.—Plans of buildings proposed to be erected in Glasgow which were held not to comply with the provisions of the 370th section of the Glasgow Police Act, 1866, requiring a certain amount of free space in front of the windows of sleeping apartments.

PETER GLASS, builder in Glasgow, presented this petition in the Dean of Guild Court there for a warrant to erect buildings on subjects belonging to him in North Street, Springburn, Glasgow. The plans produced shewed two kitchens, each with a window on the ground floor to the back. These kitchens, the petitioner proposed, should be used also as sleeping apartments. Had the elevation to the back been unbroken, a line drawn at right angles to the plane of either of these windows would not have shewn the free space required by section 370 of the Glasgow Police Act, 1866,* in consequence of the proximity of buildings belonging to another person. To obviate this objection the back elevation was broken up into three parts—the centre part, i.e. that between the two windows being thrown back several feet, and the windows placed at such an angle that a line drawn at right angles to the plane of either would pass through the requisite amount of free space.

The petitioner called the Master of Works for the City (who alone appeared to oppose) and the two coterminous proprietors.

On 19th February 1887 the Dean of Guild pronounced this interlocutor:—"Finds that the petitioner's plans do not shew in front of the windows of the sleeping apartments on the ground flat to the back of the proposed tenement the amount of free space required by section 370 of 'The Glasgow Police Act, 1866,' and therefore refuses to grant the lining craved until said objection has been removed, either by an amended plan giving the said required free space in front of said apartments, or by the petitioner undertaking that the same shall not be used as sleeping apartments, and decerns."†

The petitioner appealed, and argued;—At common law a Dean of Guild Court could not prevent a proprietor from building to the very edge of his property;‡ and the Court would construe a statute such as this strictly

* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 370, enacts:—"Except as after mentioned, it shall not be lawful for any proprietor to let, or for any person to take in lease, or to use or suffer to be used for the purpose of sleeping in, any apartment, unless one-third at least of its height is above the level of the turnpike road, or public or private street or court adjoining or near to it, and unless there be in front of at least one-third of every window in such apartment, including any turnpike road or public or private street or court, a free space equal to at least three-fourths of the height of the wall in which it is placed, measuring such space in a straight line from and at right angles to the plane of the window, and measuring such wall from the floor of the apartment to where the roof of the building rests upon such wall."

† "NOTE.—The angling or placing of the windows in the corner of the two kitchens (to be occupied as sleeping apartments) on the plan of the ground floor, instead of normally in the line of the back wall, is clearly an attempt to evade the provision of section 370 of the Police Act, and as the free space in front of one of said kitchens is about a fifth less than that which the Act provides for, while in front of the other of said kitchens the free space is much less, the Court cannot consent to pass the plans in their present state."

Smellie v. Struthers, May 12, 1803, M. 7588.

No. 106. in favour of the proprietor.¹ Consequently, it was enough if the plans complied with the letter of the statute, which they did here.

Mar. 5, 1887.
Glasgow v. Glasgow Master of Works.

On the appeal no appearance was made for any of the respondents.

THE COURT, without delivering opinions, dismissed the appeal.

F. J. MARTIN, W.S., Agent.

No. 107.

Mar. 5, 1887.
Andrews v. Drummond & Graham.

JAMES ANDREWS, Pursuer (Appellant).—*Young—Gardner.*

DRUMMOND & GRAHAM, Defenders (Respondents).—*Strachan—Watt.*

Reparation—Slander—Publication of decrees of Court of Justice.—A private firm instituted an agency which they described in a prospectus as “a medium for interchange of information, by enabling the trading classes to communicate one to another their knowledge of doubtful and habit and repute bad payers.” The prospectus stated, “A book is issued to subscribers containing upwards of 1000 names and addresses of people against whom decree in absence has been obtained.” The firm issued to their subscribers a list headed “List of Names,” Edinburgh, 1885, and containing simply names and addresses. The list in point of fact contained the names (to a certain extent selected) of persons against whom decree in absence had been granted in the Small-Debt Court of the county during several months previous to publication. Prefixed to the list was a leaflet headed “Caution,” which stated, “It is possible that there are names contained in this list of people to whom credit under certain circumstances might be given, but it is recommended that use be made of the inquiry department of the agency before the entailing the risk.”

In an action of damages for slander, raised by a person whose name appeared in the list, against the firm, held that the defenders, by means of the list of names and “caution” circulated by them, had slandered the pursuer, and were liable in damages. Damages assessed at £5.

1st Division.
Sheriff of the Lothians and Peebles.
M.

DRUMMOND & GRAHAM, accountants, Edinburgh, instituted an agency, which they called “The Shopkeepers’ Mutual Protection Agency.” The objects of the agency were thus described in the prospectus which was circulated with a view to obtain subscribers:—“In consequence of the abolition of imprisonment for debt, the Wages Arrestment Act, the effect of the law of hypothec, and the facilities afforded the unscrupulous by the Married Women’s Property Act, it is admitted on all hands, that to give credit means simply to be cheated by a large and growing section of apparently respectable people. How to counteract this evil is a problem of the greatest importance to every person giving credit; existing trade protection offices—useful enough to wholesale houses—fail to cope successfully with it. This agency has been established with a view to remedy this state of matters by affording the opportunity of organisation on mutual principles to all classes of shopkeepers. It is intended to be a medium for interchange of information by enabling the trading classes to communicate one to another their knowledge of doubtful and habit and repute bad payers, and thus effectually to ‘Boycott’ them. The full advantages of the agency will be readily seen in the following departments.” The prospectus then had four paragraphs headed respectively “The Directory,” “The Defaulters’ Register,” “Status Enquiries,” and “Debt Recovery.” Under the heading “The Directory” it was stated, —“A book is issued to subscribers containing upwards of one thousand names and addresses of people against whom decree in absence has been obtained; the arrangement is alphabetical, and it is believed that it will prove as valuable as it is easy of reference. This will be supplemented at intervals by a ‘cyclostyle’ list of current information.” A directory of this

¹ Blakeney v. Rattray’s Trustees, July 10, 1886, 13 R. 1157.

kind was issued to subscribers to the agency on 6th April 1885. It was headed "List of Names," Edinburgh, 1885, and contained only names and addressees. It had prefixed to it a leaflet headed "CAUTION," and containing this statement,—**"It must be clearly understood that the information contained in this is intended solely for the personal use of the subscriber, and is under no circumstances to be shewn or divulged to a third party, and the subscriber will be held entirely responsible for the breach or nonobservance of such understanding. It is possible that there are names contained in this list of people to whom credit, under certain circumstances, might be given, but it is recommended that use be made of the inquiry department of the agency before the entailing the risk."** This "list of names" included that of James Andrews, North St David Street.

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Mar. 5, 1887.
Andrews v.
Drummond &
Graham.

James Andrews, 34 St Andrew Square, formerly at 7 North St David Street, Edinburgh, raised an action, on 15th January 1886, in the Sheriff Court of the Lothians and Peebles against Drummond & Graham, to interdict them from publishing or distributing any lists containing his name, and also concluding for £500 damages, alleging (what was not disputed) that he was the party named in the list.

He averred,—(Cond. 2) "In connection with said agency the defenders had got printed, and they have circulated amongst their subscribers in Edinburgh and elsewhere during the last twelve months, . . . and they are daily exhibiting to others as an inducement to become subscribers, a list of names, amongst others that of the pursuer, representing thereby that the persons whose names are in that list are in debt; that they refuse to pay their debts; that debts are irrecoverable from them; and that on these grounds they are unworthy of credit, or at least persons to whom credit should not be given unless under certain circumstances, and after use had been made of the agency department of said 'agency.' Said list is intended to represent, and does represent, that those whose names are in it are unscrupulous in the contraction of debt, are doubtful and habit and repute bad payers, to whom to give credit is to be cheated, and that while ordinary trade protection offices fail to cope successfully with such parties, that established by the defenders is designed to do so, and 'thus effectually to Boycott' the parties whose names are in said list. In it parties' names are given against whom no decrees have ever been pronounced in absence, and many hundreds are not in it against whom decrees have passed in absence." (Cond. 3) "The pursuer has been thereby falsely and maliciously slandered, and without a probable cause, and he has been thereby greatly injured in his feelings, reputation, and credit, as well as in his business as a solicitor, and by which it is calculated to be further injured. He is a solicitor in the active practice of his profession. In said list his designation is given as 'North St David Street.' He left that address at Whitsunday 1884. There was at that time no decree against him, and he has hitherto paid 20s. a pound."

He pleaded;—(4) The pursuer having suffered greatly in his feelings, reputation, and credit, as also in his business, by the illegal and unwarrantable publication and distribution of said list containing his name, and by his name being groundlessly and unjustifiably inserted therein, and by his being represented to the extent and effect condescended on, he is entitled to *solatium* and reparation, and decree should be pronounced as craved.

He did not found in the record on the terms of the caution.

The defenders averred;—(Ans. 2) "The said agency is a private medium for interchange of information, facilitating the subscribers, who pay 10s. 6d. per annum, in ascertaining the financial position of persons with whom they have to deal. The said list, which is merely headed

No. 107. 'List of Names,' contains names and addresses of people against whom decrees in absence have been pronounced." (Ans. 3) "Decrees in absence have been obtained for debt on several occasions against the pursuer, notably on 18th June 1884, in the Sheriff Small Debt Court at Edinburgh, . . . for the sum of £6, 7s. 3d., also on 10th June 1885 in said Court . . . for the sum of £8, 2s. 11d., which has not yet been paid. The said list of names is strictly confidential, and is used solely for the protection of the subscribers to the defenders' agency. It is not used maliciously, recklessly, or oppressively, and it cannot be construed as containing, and in point of fact does not contain, any imputation against the character or reputation of the persons named therein."

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They pleaded ;—(1) The statements of the pursuer are irrelevant, and insufficient to support the prayer of the petition. (2) The list of names founded on by the pursuer not being calumnious or defamatory, the defenders are entitled to absolvitor. (4) In any event, the issuing of the said list of names is privileged.

The defenders founded also on a copy of the prospectus, in which, under the heading "Directory," this statement appeared :—" It must be clearly understood that there is not the least intention on the part of the agency to insinuate or imply that the parties mentioned are unworthy of credit, the information is given as a matter of fact and without prejudice; however, in cases where credit is given or likely to be extended to parties therein named the advantage of the inquiry department is obvious."

It appeared, however, in the course of the proof allowed by the Court, that this was a revised prospectus, differing in several respects from that originally circulated.

On 10th February 1886 the Sheriff-substitute (Rutherford) sustained the defenders' first plea in law, and dismissed the action as irrelevant.

The pursuer appealed to the Sheriff (Crichton), who, on 6th April 1886, adhered.

The pursuer appealed to the Court of Session, and obtained leave to amend the record, by setting forth and founding on the "Caution," and thereafter the Court allowed the parties a proof.

The proof was led before Lord Shand, and in addition to the above established the following facts :—There were about 2000 subscribers to the agency, who paid 10s. 6d. each. There was nothing "mutual" in it, but it was conducted for the profit of the defenders. The list included only the names of those against whom decrees had been obtained in absence in the Small Debt Court, Edinburgh, and consisted simply of names and addresses, without any reference to the amount for which decree had been granted, or the date, or the Court in which it had been obtained. It was compiled from "Stubbs' Gazette" (a publication of a similar kind), but the latter contained many more names than the defenders' list, which was confined chiefly to persons resident in Edinburgh and Leith, and omitted firms, wholesale houses, companies, and shopkeepers. A decree in absence had been granted against the pursuer on 18th June 1884 in the Small Debt Court for £6, 7s. 3d., but he had paid the account sued on on the 17th July following, and no other decree had been obtained against him until 10th June 1885, after the issuing of the list complained of. As to the latter decree, the pursuer deponed that he had not paid the sum sued for, because he had not the means. No special damage was proved to have resulted from the publication of his name in the list. The pursuer was quite unknown to the defenders.

Argued for the pursuer ;—The case differed from *Fleming v. Newton* :

¹ *Fleming v. Newton*, Feb. 17, 1848, 6 Bell's App. 175.

There the parties alleged to have published the slander were an association of merchants, who collected and circulated the information among themselves, so that the case was one of privilege. Further, they published exactly what appeared in the judicial records. Here, however, the defenders were carrying on the business for their own profit, and they had not simply transcribed the names from the records. The names undoubtedly were selected. In some weeks more than one-half of the persons against whom decrees in absence had been granted were omitted from the defenders' list. Further, the date and the sum contained in the decree were omitted, and the only information beyond the name was to be gathered from the prospectus and the caution. It did not even appear that the decree was in the Small Debt Court. The Directory was a means of carrying out the objects described in the opening paragraphs of the prospectus, and the insertion of the pursuer's name implied that he was a person answering the description of those who rendered such an agency necessary. The "Caution" further implied that some of the parties in the list might be entitled to credit, but the mass were not, and that there was risk in dealing with any of them. Moreover, the decree had been obtained ten months before the pursuer's name was published in the list, and had been implemented by payment nine months before. The case fell, therefore, under the principle of *M'Nally v. Oldham*,¹ where it was held that if a judgment has been satisfied by payment, a party thereafter publishing it as an existing liability is guilty of slander. As to the defenders' argument founded on "*veritas*," there was neither pleading nor evidence to warrant it.

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Argued for the defenders;—The leading object of the agency was to procure information from shopkeepers, to be communicated to other shopkeepers. The opening paragraphs of the prospectus were merely a disquisition on recent legislation, and could be no slander on the pursuer. The "Directory" was mentioned simply as containing the names and addresses of people against whom decrees in absence had been obtained. The pursuer was only represented as falling under that description, which was certainly true. A slander must be both false and calumnious, and the statement here was neither. No doubt the list did not contain the names of all against whom decree in absence had passed, but it contained several hundreds of them, and it was a strong thing to say that there was here a slander because the list did not contain still more. It was absurd to say that the defenders intended to slander some hundreds of people. No malicious motive could be suggested. As to the "Caution," it amounted to no more than a fair and legitimate comment on the effect of decrees in absence as a rule. Even if there were such an innuendo to be drawn from the "Caution" and prospectus as was contended for by the pursuer, the defenders had proved "*veritas*," for the pursuer himself admitted that he had not paid the sum in the decree of 10th June 1885, because he had not the means. Further, no damage had been proved. Any harm to the pursuer's credit by such a publication had been previously done by the publication of his name in "Stubbs' Gazette," from which the defenders' list was a mere compilation.

At advising,—

LOED PRESIDENT.—This is an action of damages for slander brought in the Sheriff Court of this county by the appellant, and the case was decided against him by the Sheriff-substitute on the ground that the record was irrelevant, and that no ground of action was divulged. As the record then stood, I should be

¹ *M'Nally v. Oldham*, 1863, L. T., N. S. 604.

No. 107. quite disposed to agree with the Sheriff-substitute, but it has now been amended by a minute which alters the complexion of the case a good deal. The defenders are a firm of accountants, and have set up an agency which they call a mutual protection agency, and which is intended to give information to shopkeepers with a view to protect them against parties who are not likely to pay their accounts. The object seems quite a legitimate one, and if prosecuted in a legal manner no one could object to it. The pursuer founds on the prospectus, but I think we have very little to do with the prospectus, because the only thing he has complained of is that his name is in the list circulated by the defenders. The prospectus describes quite distinctly what that list is intended to represent. The pursuer has founded on the opening statement of the prospectus, which sets out that shopkeepers are apt to be imposed upon, that "to give credit means simply to be cheated by a large and growing section of apparently respectable people" who would not pay their accounts, and the shopkeepers were thus cheated. That may be perfectly true or the reverse; we have no reason to inquire. It is not alleged that this pursuer answers the description of persons mentioned in that opening part. The part in which the pursuer's name does appear is that under the head "The Directory." There is there this statement,—"A book is issued to subscribers containing upwards of one thousand names and addresses of people against whom decree in absence has been obtained; the arrangement is alphabetical, and it is believed that it will prove as valuable as it is easy of reference. This will be supplemented at intervals by a 'cyclostyle' list of current information." This Directory is the list complained of, and we gather from the statement of the prospectus, what does not appear on the face of this list, that it is a list of persons against whom decrees in absence have been obtained. Now, turning to the list we find the pursuer's name there. That means, of course, that decree in absence has been obtained against the pursuer. But that is true, and if the matter went no further than that, of course the defender would plead justification, if indeed it is necessary to plead anything of the kind, because a mere statement that a decree has passed in a Court of Justice open to the public is not a thing that requires any justification. It is a public fact that anyone is entitled to state, and therefore the list itself would be of no value at all for the purposes of this action if it were not that the list is accompanied by a note which is entitled "Caution," and which is pinned on or pasted into the pamphlet, and this "Caution," which was not set out on record in the inferior Court, or founded on, is now made part of the record, and we must see whether the "Caution," taken in conjunction with the list and the appearance of the pursuer's name in the list, amounts to a slander against him. The first paragraph of the "Caution" appears to me of no consequence, but the second is in these terms:—"It is possible that there are names contained in this list of people to whom credit, under certain circumstances, might be given, but it is recommended that use be made of the inquiry department of the agency before the entailing the risk,"—I suppose that means incurring the risk. Now, an innuendo is put on that by the pursuer which I think it will not bear. He carries the innuendo a great deal too far in the record as now stated. It appears to me that the true meaning of this second paragraph is this: First, that there are some of the persons named in the list who may on inquiry be found worthy of credit notwithstanding that a decree in absence has been obtained against them; in the second place, that the remainder, being the majority, are unworthy of credit; and in the third place, that as regards the

whole persons named in the list, there is risk in dealing with them. If that be the true meaning, it certainly contains something that in law amounts to slander as against any party whose name is in that list, because it manifestly means that he is a party who cannot be dealt with by shopkeepers without the shopkeepers incurring a risk, which means that he is not in good credit. It also contains the insinuation that he is a party in such bad credit that he is unworthy of credit at all, or if he be worthy, that it will require some inquiry and examination to justify that opinion. This is undoubtedly a reflection on the credit of a person whose name is found in the list. If the list had stood alone without the "Caution," I do not think that would be implied by the mere statement that a decree in absence had passed against him; but coupled with that second paragraph of the "Caution," it appears to me that there is enough to amount to slander. But still I am bound to say that I think it is a very mild slander, and as no damage is proved to have resulted, I should not be disposed to recommend to your Lordships to award a large amount of damages. I think any damage or inconvenience that the pursuer may be supposed to have sustained will be very fully represented by a sum of £5; and if so, the only other question is that of expenses. Now, if the pursuer is to have £5, it will seem to follow that he must have expenses; but we must take into account that as this case came originally before us it certainly could not be entertained as giving ground for an action of damages, the only real ground of complaint, which I propose to sustain, not being set out in the original record at all. Probably the most just thing would be to disallow the expenses in the inferior Court, and to give expenses here.

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LORD MURE concurred.

LORD SHAND.—I am entirely of the same opinion. It seems to me that if people will carry on a business of this kind, in which they profess to deal with the credit of others who are engaged in daily business, or who may for any reason in the course of their ordinary transactions in life desire credit, they must be very careful not to go beyond what the law strictly allows. It is, no doubt, lawful to publish the fact that decrees of Court have gone out against members of the public. I think it would be fairer if that were not put in general terms, and that there should be some specification of the amounts and dates, so that there should be some protection to the defenders against the possible implication that matters are very much worse than they really are. But it may be within the power of a party simply to publish the names, and the fact that a decree or decrees have been obtained. But I think this is the furthest point to which such publication can be allowed. If it had been shewn that the prospectus in setting out the purpose for which this agency was founded and stating that "to give credit means simply to be cheated," had a direct application to the pursuer of this action, I should have held that a very serious calumny. But I think the prospectus does not come into the case so as to have any bearing. I am of opinion with your Lordship, however, that there is enough in the "Caution" to warrant this action, and I agree in your Lordship's statement of the innuendo therein contained, to which this must be added, that the persons named are not only generally unworthy of credit, but should only get credit under certain circumstances,—that is, under peculiar circumstances, where probably some sort of security could be given by them. Having no doubt that that goes beyond what anyone is entitled to say,—in the absence of a plea of *veritas*,—I think that damages must be given. Having regard to the fact that

No. 107. the decree had been already announced to the public in another publication of the same kind, and that there has been no real damage,—I think £5 will be enough. I think it desirable that expenses should be given to mark the sense of the Court of the impropriety of which the defenders have been guilty, in going beyond what parties are entitled to do in cases of this kind.

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Drummond &
Graham.

LORD ADAM concurred.

THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of the appeal with the proof, recall the interlocutors of the Sheriff and Sheriff-substitute complained of: Find that the defenders, by means of the list of names and 'Caution' circulated by them, libelled the pursuer; therefore find them liable in damages: Assess the same at the sum of £5, for which sum decern against the defenders for payment to the pursuer: Find the pursuer entitled to expenses in this Court, but not to expenses in the inferior Court," &c.

ROBERT BROATCH, L.A.—ALEXANDER CLARK, S.S.C.—Agents.

No. 108. ALEXANDER MUNRO AND OTHERS (Munro's Trustees), First Parties.—*Jameson—C. J. Guthrie.*
GEORGE YOUNG AND OTHERS, Second Parties.—*D.-F. Mackintosh—Ure.*

Mar. 9, 1887.
Munro's Trustees v. Young.

Trust—Assumption of new trustees—24 and 25 Vict. c. 84 (Trusts Act, 1861), sec. 1.—By an antenuptial contract of marriage, dated in October 1860, the spouses provided that, in the case of the death, or resignation, or legal incapacity of the trustees named in the deed, it should be competent to them, the spouses, or to the survivor, to appoint new trustees, and also that the trustees should have power after the death of the survivor to assume new trustees.

Held that this trust could not be held, during the lifetime of the survivor of the spouses, to include a power of assumption by the trustees nominated, the provisions of the deed being to the contrary.*

2D DIVISION.
M.

MR WILLIAM PRINCE MUNRO AND MISS ANN GRAY were married in October 1860, an antenuptial contract of marriage, of date 30th October, being executed by them. Mr Munro had little or no property at the time of his marriage. Mrs Munro had an interest in her father's and mother's estate. There was a conveyance of this interest to trustees, and a general conveyance by Mr Munro of all property he should possess at his death. He died in June 1885, survived by his widow, and leaving estate to the value of about £10,000.

The contract contained the following provisions as to the assumption of trustees:—"And in case of the death or resignation or legal incapacity of any of the said trustees, it shall be competent to the said William Munro and Ann Gray by any joint deed, or to the survivor of them, to nominate and appoint new trustees in the place of those dying or resigning or becoming incapacitated, . . . with power to the trustees before-named or appointed, after the death of the survivor of the said William Munro and Ann Gray, to assume other trustees in the place of

* The Trusts Act, 1861 (24 and 25 Vict. c. 84), by its first section provides,—"All trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated shall be held to include the following provisions, unless the contrary be expressed; that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees."

such of their number as shall die or resign or become incapacitated, who shall have the same powers as the original trustees." No. 108.

At the time of Mr Munro's death three of the original trustees survived. ^{Mar. 9, 1887.} Two of them proposed to resign, and accordingly in December 1885 the trustees were requested by Mrs Munro to assume Messrs George Young and James Flett. They did this by a deed of assumption dated 11th February 1886, but by the same deed they assumed two other trustees, Messrs John Thomson and John Munro. ^{Munro's Trustees v. Young.}

Mrs Munro and the trustees having differed in opinion as to the power of the trustees to assume, a special case, to which the original trustees and the two gentlemen assumed by them were the parties of the first part, while Mrs Munro and the two trustees assumed on her suggestion were the parties of the second part, was presented to the Court. The question of law was,—“Do the terms of the said antenuptial contract of marriage exclude the statutory power of assumption vested in gratuitous trustees, so as to invalidate the assumption of the said Messrs John Thomson and John Munro?”

Argued for the first parties;—The assumption here was good, for the contrary was not expressed by the deed. The point was concluded by authority, for in *Hairsten's* case¹ a power in the deed to assume new trustees in room of those that might resign or become incapacitated was held not to exclude the Act, and in *Maxwell's* case² it was held that “the fact that a limited power of resignation was conferred by the trust-deed could not possibly prevent the application of the subsequent enactment, which conferred an unlimited power of resignation.”³ For “resignation” let assumption be read, and that case was directly applicable. It might be very necessary to have the power to assume here against the chance, e.g., of Mrs Munro becoming insane.

Argued for the second parties;—In a deed executed before the Trusts Act of 1861 it was not to be expected that the assumption of new trustees should, in so many words, be prohibited, for it was at that time prohibited at common law. The law of *Hairsten's* case had been destroyed by the subsequent case of *Miller's Trustees*,⁴ where the doctrine of *expressio unius exclusio alterius* had been adopted as the rule. In the present case the trusters had adopted a particular kind of assumption as the law of their trust, and that had an object, viz., that the lady should have control of the trust, which would be defeated if the statute were allowed to operate. Besides, by the first section of the Trusts Act of 1884,⁵ the Acts of 1861 and of 1867 were to be read together, and the 19th section of the latter Act was fatal to the contention of the first parties.*

At advising,—

LORD JUSTICE-CLERK.—The question which is presented to us in this special

¹ *Allan's Trustees v. Hairstens*, Jan. 23, 1878, 5 R. 576.

² *Maxwell's Trustees v. Maxwell*, Nov. 4, 1874, 2 R. 71.

³ *Per* Lord Deas in *Maxwell's Trustees*, at p. 74.

⁴ *Thomson, &c. v. Miller's Trustees*, Dec. 22, 1883, 11 R. 401.

⁵ 47 and 48 Vict. c. 63.

* 30 and 31 Vict. c. 97, sec. 19.—“Nothing in this Act contained shall be construed as innovating, revoking, or restricting any express powers or directions given to trustees acting under any trust-deed, . . . and none of the powers and incidents conferred by this Act shall take effect or be exercised if it is declared in the trust-deeds that they shall not take effect; and when there is no such declaration, then if any variations or limitations of any of the powers or incidents by the Act conferred or annexed are contained in such trust-deed, such powers or incidents shall take effect or be exercised only subject to such variations or limitations.”

No. 108. case depends on a state of facts substantially to the following effect. The question arises out of the marriage-contract of Mr and Mrs Munro, of whom
 Mar. 9, 1887. *Munro's Trustees v. Young.* Mrs Munro is the survivor. The contract nominates certain trustees, and then it contains the following clause :—"In the case of the death or resignation, or legal incapacity of the said trustees, it shall be competent to the said William Munro and Ann Gray, by any joint deed, or to the survivor of them, to nominate and appoint new trustees in the place of those dying, or resigning, or becoming incapacitated."

As I have said, the husband predeceased, the widow survived, and a question has arisen as to the nomination of certain new trustees in place of certain apprehended resignations. On the one hand Mrs Munro exercised the power reserved to her, and nominated two trustees, Messrs George Young and James Flett. Now comes the question whether the other trustees have power to nominate trustees at their own hand founding on the terms of the Statute of 1861.

The terms of that statute have more than once been the subject of interpretation. The terms of the statute are that the trusts to which it refers "shall be held to include the following provisions, unless the contrary be expressed ; that is to say, power to any trustee so nominated to resign the office of trustee ; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees," and certain other provisions. The deed is to be held to import these powers, unless the contrary is expressed in the trust-deed. The question substantially is whether the nomination by the old trustees of new trustees in their own right is sanctioned by the Act of Parliament, or whether that is not clearly contrary to the terms of the marriage-contract.

I think that it is desirable to refer to what has already been decided by the Court with regard to the somewhat curt provisions of the Act of Parliament. The questions raised have been questions as to the powers of trustees to resign and their power to nominate new trustees. In one case the question was whether a limited power to deal with resignations in the trust-deed, in the other a limited power to assume new trustees, was to be held to be contrary to the Act of Parliament. In both cases it was held that the powers given were not sufficient to exclude the operation of the statute, and it was held to be necessary to have some plain and unequivocal exclusion of such powers as were afterwards conferred by the statute. In the former of the two cases, *Maxwell's* case (2 R. 71), the question was as to resignation, and the limited power conferred by the deed was "in case any trustee should become incapable of acting as such, or should desire to be relieved of the said trust, it should be in the power of the other accepting and surviving trustees therein named or to be assumed, if they should deem it expedient, to discharge and exoner him of the said trust upon his denuding thereof in favour of the others."

It was contended that there was there an expression of intention contrary to the provisions of the statute, and derogating from it, but that contention was rejected. The Lord President says,—“Any hypothetical inference as to the intentions of the truster can never prevent the application of the statute” ; and Lord Deas, although he had some doubt, says,—“I am very clear that there is nothing in the first objection. The fact that a limited power of resignation was conferred by the trust-deed could not possibly prevent the application of the subsequent enactment, which conferred an unlimited power of resignation.”

In the case of *Allan's Trustees* (5 R. 576), this Division of the Court proceeded

on precisely the same lines in a question as to assumption, and there is an important and valuable opinion of Lord Gifford, who takes the same view as the Lord President in the former case, and enlarges and illustrates it in some very cogent sentences. No. 108.
Mar. 9, 1837.
Munro's Trustees v. Young.

These cases I use by way of contrast, not as analogies. In them a limited power was held not to derogate from the provisions of the statute, but to be within it. This case is quite different, and is entirely outside the statute. The power is not so much granted as reserved. There is a reservation to the survivor of the spouses to nominate new trustees. It is quite clear that that cannot stand along with a power to the trustees to do the same. That being so, it would be manifestly contrary to the deed to give the trustees the same power as the spouses had declared was reserved to them. What may happen after the death of the survivor it is not necessary to consider.

LORD YOUNG.—I agree. It is very necessary to attend to the facts of this particular case, and it is not necessary to pronounce any general opinion on the provisions of the Act of Parliament beyond the exigencies of the present case.

The first observation I make is that this is a case on a contract; trustees are to be nominated by the husband and wife, and they were at liberty to make such contracts as they pleased for the transaction of their own business. One of the contracting parties is dead, the other, the wife, now the widow, is alive. Two trustees have failed, one by death, the other by resignation. That is the very case for the widow to exercise the power given to her by the contract. I do not look upon it as a case of assumption at all, it is a case of one of the surviving parties desiring to nominate trustees. Without any formal deed she may make such an appointment by a simple statement in writing that two trustees have failed, and that she appoints A and B in their place.

But what has happened is this. The surviving trustees, hearing of her intention, proceeded themselves to execute a deed of assumption, giving effect no doubt to her desire by assuming the two gentlemen whom she favoured, but assuming at the same time two gentlemen nominated by themselves.

The first result of this judgment will be to put that deed in the fire, for there is no right in the other trustees to assume at all. The body of trustees was complete according to the contract, and they are not entitled to increase it. The widow may nominate if she pleases, or she may abstain; that is her contract right, but the trustees have no right of assumption.

LORD CRAIGHILL.—The question of law put to the Court, Mrs Munro being still alive, ought I think to be answered in the affirmative. The clauses of the marriage-contract quoted in the special case make it plain that while both spouses were alive, or while the survivor was alive, the exclusive power of nominating new trustees was vested in them, and that the trustees named by them were to have the power of assumption only upon the death of both. This seems to me to bring the case under the operation of the condition set forth in the clause of the Trusts (Scotland) Act, 1861 (24 and 25 Vict. c. 84), also quoted in the special case, by which it is provided that the power of assumption thereby conferred is not to come into operation if the contrary be expressed. I think that the contrary has been expressed, for were the power claimed by the trustees to assume new trustees in the lifetime of Mrs Munro to be recognised, that would be in the contrary of the power of nomination conferred on Mrs

No. 108. *Munro.* The question which we have to decide is not in any way affected by the decision in the case of *Allan's Trustees*, 5 R. 576, because in that case there was no power of nomination in Mrs Allan after the trust came into operation, the only parties entitled to nominate at any time being the trustees named in the deed, and the survivor of those trustees. The facts being as they are, I have no difficulty in coming to the conclusion that the exercise of the power conferred by the Act while Mrs Munro is in life is plainly excluded.

LORD RUTHERFURD CLARK concurred.

THE COURT answered the question in the affirmative.

BOYD, JAMESON, & KELLY, W.S.—GEORGE ANDREW, S.S.C.—Agents.

No. 109. *THOMAS GIBSON, Pursuer (Reclaimer).—Rhind—Murray—Ferguson.*
THE WEST LOTHIAN OIL COMPANY, Defenders (Respondents).—
R. Johnston—G. W. Burnet.
 Mar. 9, 1887.
Gibson v.
West Lothian
Oil Co.

Expenses—Scientific witnesses—Certificate—A. S., 10th July 1844, sec. 4—
 The Division before whom a proof has been brought upon a reclaiming note cannot certify the expenses of scientific witnesses under the Act of Sederunt of 10th July 1844,* even in cases where the judgment of the Lord Ordinary has been reversed and the party found liable in expenses by him has been found entitled to expenses by the judgment of the Inner-House.

2D DIVISION.
 Lord M'Laren.
 I. IN an action raised by Thomas Gibson, a farmer, against the West Lothian Oil Company to recover damages for injury to his stock and crops caused by the fumes from the defenders' works, the Lord Ordinary assailed the defenders, and found them entitled to expenses. No application was made to his Lordship for a certificate to cover the expenses of scientific witnesses.

On a reclaiming note, the Second Division, on 3d March, recalled the Lord Ordinary's judgment, and gave decree for a sum of damages, finding the pursuer entitled to expenses. The pursuer then made this application, craving the Court to certify the expenses of certain scientific witnesses who had dissected his sheep and inspected his crops. He argued that the Act of Sederunt had been held to apply to proofs as well as to jury trials.¹ It might quite fairly be said that the Division was "the Judge who tried the cause." In the two cases which would be cited on the other side,² there was this important distinction from the present, viz., that in them the pursuer had been found entitled to expenses in the Outer-House, and that finding was affirmed by the Division; here the pursuer had been found liable in expenses by the Lord Ordinary, and it would have been a mockery therefore for him to apply for a certificate.

Argued for the defenders;—There was no warrant save the Act of

* Sec. 4, subsec. 2, provides that in cases where it has been found necessary to employ scientific witnesses to make certain investigations previous to the trial, in order to qualify them to give evidence, fair and reasonable additional charges may be allowed, "provided that the Judge who tries the cause shall, on a motion made to him, either at the trial or within eight days thereafter if in session, or if in vacation, within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance."

¹ *Tough's Trustees v. Dumbarton Water Commissioners*, May 14, 1874, 1 R. 879.

² *Tough's Trustees, ut supra*; *M'Callum's Trustees v. M'Nab*, March 19, 1868, 6 Macph. 647, 40 Scot. Jur. 334.

Sederunt for awarding any such expenses,¹ and the procedure must therefore be in strict accordance with its provisions. It was matter of everyday practice in the Outer-House that both parties, winner and loser, applied for such a certificate.

No. 109.

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Oil Co.

LORD JUSTICE-CLERK.—My impression would rather have been to deal favourably with the party making this application. It was not unnatural that he should not have made application to the Lord Ordinary, although he might have done so.

LORD YOUNG.—The pursuer must bring himself within the Act of Sederunt. Now, the Act of Sederunt allows no one to certify for such expenses but the Judge before whom the proof is taken, and that within a limited time. His refusal to certify would be conclusive, for I never heard of the case of a reclaiming note against a refusal to certify. It may be that there is a defect in the Act of Sederunt, and it might be quite safe to allow this Court in deciding the case on the merits to certify for these expenses. But that is not in the Act of Sederunt, and is contrary to practice.

Whether there might not be another ground for the pursuer to take, viz., that a party should be allowed all his reasonable expenses in the case, I do not know.

LORD CRAIGHILL.—I agree. The Act of Sederunt may be a good or a bad Act as to its policy—and its policy seems to be that this question should be determined in a short time after the proof—but there is no doubt as to its terms, and it is binding on us.

LORD RUTHERFURD CLARK.—I also agree, but I confess it may very well be that the Act of Sederunt, which was originally intended to apply to jury trials only, might be improved.

THE COURT refused the motion.

THOS. DALGLEISH, S.S.C.—LOCKHART THOMSON, S.S.C.—Agents.

THE ASSESSOR FOR LANARK, Appellant.
ANDREW SELKIRK AND ANOTHER, Respondents.

No. 110.

Mar. 9, 1887.
Assessor for
Lanark v.
Selkirk.

Valuation Acts—"Consideration other than the rent"—*Goodwill*—*Obligation by landlord not to commence rival business*—*Valuation of Lands Act, 1854* (17 and 18 Vict. cap. 91), sec. 6.—A sum of money paid by a tenant to his landlord in name of "goodwill" on obtaining a lease of premises previously occupied by the landlord, is in the general case to be regarded as "a consideration other than the rent" named in the lease paid for the occupation of the premises, and as such is to be divided by the number of years for which the lease is to run, and the quotient added every year to the rent.

In addition to a rent of £48 yearly named in the lease of a hotel for seven years, the tenant agreed to pay to the landlord a sum of £220 in name of goodwill, the landlord who had previously been in occupation of the hotel becoming bound not to commence business as a hotel-keeper in opposition to the tenant. Held that this obligation by the landlord was a valuable consideration, apart from the occupation of the premises, for which compensation was due by the tenant, and consequently that a proportion was to be deducted from the sum of £220 before making any addition to the rent named in the lease in terms of the above rule. Determination of the Magistrates deducting one-half from the £220 on this principle affirmed.

¹ Tough's Trustees, *ut supra*; M'Callum's Trustees, *ut supra*.

No. 110.

Mar. 9, 1887.
Assessor for
Lanark v.
Selkirk.

Lands Valua-
tion Appeal
Court.
Lord Lee.
Lord Fraser.

ANDREW SELKIRK, the proprietor, and James Blackwood, the tenant and occupant of the Station Hotel, Lanark, appealed to the Magistrates of the burgh against a valuation of the hotel at £79 made by the Assessor.

Blackwood held the subjects under a lease granted by Selkirk for seven years, from Whitsunday 1886, at a rent of £48 yearly.

In addition to this rent, a sum of £220 was paid by Blackwood to Selkirk in name of goodwill, Selkirk, who had previously carried on business in the hotel, becoming bound not to commence business as a hotel-keeper in opposition to Blackwood. No part of this sum was paid for furniture, fittings, and utensils, a separate valuation of these having been made and payment made accordingly.

Case No. 77.

The Assessor reached his valuation by taking the whole of this sum of £220 as a consideration for the occupation of the premises other than the rent, and then adding one-seventh of the amount, or £31, to the yearly rent of £48, stipulated in the lease.¹

Blackwood and Selkirk argued that no part of this £220 should be taken into account in fixing the annual value of the subjects, on the ground that the obligation by the proprietor (who had made the business) not to open a rival hotel was the consideration for the payment; and maintained further, on the authority of the case of *Drummond*,² that in any event only one-half of the said sum should be taken into account.

The Magistrates held "that a payment for goodwill being a consideration other than the rent, fell to be taken into account when fixing the annual value, but that the obligation on the landlord not to carry on business in opposition to the tenant fell also to be taken into account, and sustained the appeal in so far as to restrict the value to be entered in the roll to £63, being the actual rent, £48, plus the one-half of the sum paid for goodwill divided by the number of years of the lease."

The Assessor took a case.

There was no hearing before the Judges.

LORD LEE.—I think that the Magistrates, in dealing with the payment for goodwill as in part a payment for the proprietor's obligation not to enter upon a competing business, took a sound and discriminating view of the transaction, and I see no reason to doubt that the sum of £63 which they fixed is as much as could reasonably be expected for the premises by the year. The Assessor is mistaken in supposing that the statute requires that the whole payment should be distributed over the different years of the lease. The effect of finding that there was a consideration other than rent is that the stipulated rent cannot be taken as fixing the annual value.

I think that the determination of the Magistrates was right.

LORD FRASER.—It has been decided that where a sum of money is paid to the landlord which is said to be for goodwill, this is to be taken in the general case as simply a payment in advance of rent. At all events it is a consideration other than the rent which the parties insert in the lease (See *Drummond v. Assessor for Leith*, Feb. 5, 1886, 13 R. 540, and *Wilson*, May 20, 1884, 21 S. L. R. 545). I have had occasion repeatedly to point out the distinction between the payment of a sum of money called "goodwill" to the landlord on the occasion of a lease, and a payment made by an incoming tenant to the outgoing tenant during the currency of the lease. In the former case, the payment for

¹ Glasgow Iron Company, March 24, 1873, 11 Macph. 989; Dickson, April 2, 1877, Valuation Cases, No. 128, old series.

² Drummond v. Assessor for Leith, Feb. 5, 1886, 13 R. 540.

"goodwill" is taken into account in entering the value in the Valuation-roll; No. 110. in the latter case, it is not. The way in which the goodwill money ought to be allocated when the money is payable to the landlord is to divide the sum by the number of years of the lease and to add the quotient every year to the sum called "rent" in the lease. It is a mistake to suppose that the case of *Drummond* was a decision to the effect that only one-half of the sum payable for "goodwill" was to be taken as the sum to be divided. No doubt in that case the assessor did take the one-half; and as both parties acquiesced in this being the right sum to be divided, we did not think it fell within the case that was submitted to us to interfere in this matter.

Mar. 9, 1887.
Assessor for
Lanark v.
Selkirk.

In the present case the Assessor would have been quite right but for a specialty to which, with discrimination, the Magistrates have given effect. The sum of £220 which was paid to the landlord Andrew Selkirk was paid not for goodwill merely, but in return for a most important obligation come under by him in favour of the tenant, viz., that he, Selkirk, who was in the trade, should not commence business as a hotel-keeper in opposition to his tenant. This was a valuable consideration in favour of the tenant, for which compensation was due; and therefore I think the Magistrates were right in holding that this ought to be taken into account in ascertaining the sum to be entered as annual value. I am therefore of opinion that the determination of the Magistrates in this case was right.

THE JUDGES were of opinion that the determination of the Magistrates was right.

THE ASSESSOR FOR KILMARNOCK, Appellant.
WILLIAM ALLAN, Respondent.

No. 111.

Valuation Acts—"Consideration other than the rent"—*Goodwill*—*Former tenant also joint proprietor*—*Valuation of Lands Act, 1854 (17 and 18 Vict. cap. 91), sec. 6.*—A sum paid by the incoming to the outgoing tenant in name of goodwill is not to be taken into account in reaching the value of the subjects, even when the outgoing tenant is one of the joint proprietors of the subjects.

Mar. 9, 1887.
Assessor for
Kilmarnock v.
Allan.

WILLIAM ALLAN, tenant and occupant of a public-house in Kilmarnock, appealed to the Magistrates and Town-Council of the burgh against the valuation of £48 put by the Assessor on the public-house for the year ending Whitsunday 1887.

Lands Valuation Appeal Court.
Lord Lee.
Lord Fraser.

Prior to 1886 the public-house was occupied by Mrs Morton, one of its two joint proprietors, at a rental of £14. It was taken by Allan at Whitsunday 1886 at a rental of £18, he also paying Mrs Morton £150 for goodwill.

Case No. 78.

The assessor, who stated that he understood that there was a lease for five years, or at all events that a lease for five years had been promised as a condition of the payment of the £150, had arrived at his valuation by dividing the £150 by the number of years of the lease, and adding the result (£30) to the rent.

Allan contended that the goodwill was paid to Mrs Morton as outgoing tenant, and not as proprietor, and therefore that it could not be taken into consideration in arriving at the annual value of the subject, in proof of which he stated that the other joint proprietor received no portion of the £150, but only participated in the increase of rent from £14 to £18. He also stated that he had no lease of the premises.

- No. 111. The Magistrates and Town-Council, by a majority, held that the rent of £18 could alone be considered in reaching the value of the house.
 Mar. 9, 1887. The Assessor took a case.
 Assessor for Kilmarnock v. Allan. There was no hearing before the Judges.

LORD FRASER.—I am of opinion that this case is governed by the decision in *Nicolson and Others v. Assessor for Port-Glasgow* (March 12, 1886, 23 S. L. R. 603). No doubt there was here a sum of £150 paid by the tenant to the outgoing tenant, who happened to be one of the joint proprietors; but there was another joint proprietor besides the one who received this sum of money. That other proprietor received no part of this £150—all that she can claim is the half of the £18 stipulated as rent. The fact that she does not participate in the £150 leads to the conclusion that that sum was not paid to Mrs Morton *qua* proprietor, but really and truly for the goodwill of the tenant; and so this case is taken out of the rule laid down in *Drummond, &c., v. Assessor for Leith* (Feb. 5, 1886, 13 R. 540). I am therefore of opinion that the determination of the Magistrates was right. I adhere to the principle of the decision in the case of *Nicolson*.

LORD LEE.—I concur in that opinion.

THE JUDGES were of opinion that the determination of the Magistrates and Town-Council was right.

- No. 112. THE ASSESSOR FOR KILMARNOCK, Appellant.
 JAMES M'NALLY, Respondent.
 Mar. 9, 1887. *Valuation Acts*—"Consideration other than the rent"—Goodwill—Payment by outgoing tenant to proprietor—*Valuation of Lands Act, 1854* (17 and 18 Vict. cap. 91), sec. 6.—M offered to take the premises of which Mrs B was tenant, under a lease of which three years were yet to run, and to pay her £400 in name of goodwill, provided the proprietor would cancel her lease and grant him a new one for seven years. The proprietor would consent only if he received £50 from M and £70 from Mrs B. M and Mrs B agreed to these terms, and a new lease for seven years was granted at the old rent. Held that both the £50 and the £70 so received by the proprietor were considerations other than the rent to be taken into account in reaching the valuation of the subjects.
- Lands Valuation Appeal Court.
 Lord Lee.
 Lord Fraser.
 Case No. 79.

JOHN M'NALLY appealed to the Magistrates and Town-Council of Kilmarnock against the following valuations in the Valuation-roll of the burgh for the year ending Whitsunday 1887, viz., the public-house, No. 4 King Street, of which he was the tenant and occupant, at a value of £70, 10s., and the house, No. 6 King Street, of which he was the tenant, and Robert Neilson the occupant, at a value of £14, it being explained that the appeal was truly against the first entry only.

Both premises were occupied prior to Whitsunday 1886 by Mrs Brown at a rental of £70, she having a lease of the premises, of which three years were then still to run. M'Nally offered to take the premises from Mrs Brown at Whitsunday 1886 and pay her £400 of goodwill, provided the proprietor would cancel her lease, and grant him a fresh lease for seven years. The proprietor would consent to do this only if he received a sum of £50 from M'Nally, and a sum of £70 from Mrs Brown. This was ultimately agreed to; the old lease was cancelled, and a new one granted to M'Nally for seven years at the old rental of £70.

The Assessor reached his valuation by adding the annual value of the

sums received by the proprietor (which he understood at the time of making his valuation to amount together to £100, not £120 as came out in evidence) to the rent, making £84, 10s. in all, from which was deducted £14 for the house sublet and entered separately (as to which there was no dispute), leaving £70, 10s. for the public-house, the entry appealed against.

No. 112.
Mar. 9, 1887.
Assessor for
Kilmarnock v.
M'Nally.

M'Nally contended that the £70 paid, not by him but by the outgoing tenant to the proprietor, could in no view be regarded as a consideration which the Assessor was entitled to take into account; and that as regarded the £50 which he himself paid, that also ought not to be taken into account, as it was not a grassum, but the consideration received by the landlord for granting a new lease and accepting a stranger as tenant.

The Magistrates and Council, by a majority, decided that only the £50 paid by M'Nally direct to the proprietor could be regarded as a consideration within the meaning of the Act, and reduced the valuation accordingly to £62, 13s. 4d.

The Assessor took a case.

There was no hearing before the Judges.

LORD FRASER.—In this case I am of opinion that the two sums of £50 and £70 must be taken as considerations other than the rent paid by the tenant to the landlord, and that the contention of the Assessor must be upheld. When the real character of the transaction is looked to, it is just a payment by the tenant of both sums to the landlord of the nature of rent; and therefore the determination of the Magistrates was wrong.

LORD LEE concurred.

THE JUDGES were of opinion that the determination of the Magistrates and Town-Council was wrong.

THE EDINBURGH GAS-LIGHT COMPANY, Appellants.—*D.-F. Mackintosh—W. C. Smith.* No. 113.

Mar. 9, 1887.
Edinburgh
Gas-Light Co.
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THE ASSESSOR FOR LEITH, Respondent.—*J. G. Smith—Thorburn.*

Valuation Acts—Principle of valuation—Gas-works belonging to gas company.
—Gas-works, the property of a gas company, were valued by the Assessor on the principle of taking the cost of the company's works, less an allowance for depreciation, and assessing the annual value at a percentage on the balance. The company maintained that the works ought to be valued on the principle of taking the revenue of the company for their preceding financial year, and deducting therefrom the expenses (excluding capital expenses), and also deducting 5 per cent on the expenses in name of tenants' profits—the balance being taken as the value of the subjects.

The Magistrates confirmed the Assessor's valuation. The company appealed.

The Judges being divided in opinion (in accordance with their respective opinions in the *Falkirk* case, Feb. 24, 1883, 10 R. 651), the valuation stood.

At a Court of the Magistrates of Leith, held on September 14, 1886, the Edinburgh Gas-Light Company, incorporated under the Act 58 Geo. III. cap. lxvii., appealed against three entries in the Valuation-roll for the burgh of "gas-pipes under ground," of which they were the proprietors and occupiers, in the parishes respectively of South Leith, North Leith, and St Cuthbert's, the total values as entered being £598, and craved that these values should be reduced to £317 in all.

The undertaking of the company lay in the city of Edinburgh, the county of Edinburgh, and the burgh of Leith. From the passing of the

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Court.
Lord Fraser.

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No. 113. Valuation Act of 1854 until and including the year 1886-87, the following mode was adopted in fixing the valuation of the company's undertaking:—The Assessor for the burgh of Edinburgh obtained from the manager of the company a return shewing, 1st, The amount of revenue drawn by the company for the supply of gas (including the sale of coke, gas-tar, &c.), for the year ending at the date of the company's last annual balance; 2d, The amount of expenses incurred by the company in earning said revenue, exclusive of erection of works, laying of pipes, interest on borrowed money, and landlord's taxes; and 3d, The total amount expended by the company in erecting works and laying pipes in the parishes in which they are situated respectively. The Assessor then deducted the amount of expenses from the amount of revenue, thus ascertaining the nett income of the company from its business, and from this nett income he allowed a further deduction of 5 per cent on the amount of expenses in name of tenants' profits, and a fixed sum of about £700 for risk; and the balance was then taken as the rental of the whole undertaking of the company. The expenses deducted in ascertaining the nett income of the company did not include interest on working capital or insurance of gas-holders, retorts' house and contents, condensing and washing apparatus, and piping throughout works. The rental thus fixed having been divided among the three districts in proportions corresponding to the amount expended by the company on works in each, the proportions applicable to their respective districts were communicated by the Assessor for the burgh of Edinburgh to the other assessors, and were accepted by them.

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The rental of the whole undertaking thus ascertained for the year 1885-86 was £25,142, of which the proportion effeiring to the burgh of Leith was £598; for the year 1886-87 the corresponding figures were £13,477 and £317.

The Assessor for Edinburgh, requiring more explanation of the cause of so serious a diminution of rental than could be given to him at the time, entered (by arrangement with the company) the rental in the Edinburgh Valuation-roll at the same figures as in the previous year and at the same time sent their former figures to the Leith and the County Assessors, who entered them in their respective rolls, but prior to the sitting of the Valuation Court for Edinburgh it was explained to the City Assessor that the decrease in the revenue of the company was due to—1st, a reduction of 2d. per 1000 feet in the price of gas, which affected the revenue to the extent of about £6000; and 2d, a fall in the prices obtained for residual products, amounting to £9054, making a total loss of £15,054, which, however, had been reduced by increase of business to £11,782, 7s. 4d. It was also explained that these causes of decrease in the revenue were in all probability permanent. After receiving this explanation the Assessor for Edinburgh agreed to accept the figures in the company's return. An appeal by the company was accordingly sustained, and the reduced value entered in the Edinburgh Valuation-roll.

At the Leith Appeal Court, which was held on the day after that of Edinburgh, the company in like manner appealed against their property in the burgh being valued at the old figures, maintaining that the old principle of valuation already explained ought to continue, in accordance with which the *cumulo* values would be only £317. The Assessor, however, refused to consent to this. He contended that the principle of valuation ought to be to ascertain the capital value of the company's undertaking, less an allowance for depreciation, and to assess the annual value at a percentage on the balance, which percentage he fixed at 8½

per cent; but he stated that the result (£666) was so little above the valuation of last year (£598) that he had allowed last year's valuation to remain for this year. He reached the figure £666 by taking £7844 as the value of the company's pipes in Leith. The total amount expended by the company down to 31st May 1886, as set forth by the secretary under head 3 of the return sent (as already explained) to the Assessor for Edinburgh, was £350,865, of which £8266 was stated as the amount expended within the burgh of Leith. The difference between this last figure and that stated by the Assessor for Leith as the value of the company's property in the burgh was his allowance for depreciation, but the company did not admit the accuracy of his calculation, and there was no evidence on the point.

The Magistrates dismissed the appeal. The company obtained a case. The foregoing facts were stated in the case.

Argued for the company;—In accordance with the practice of the parties during the last thirty years the undertaking had been valued by the city of Edinburgh Assessor, in whose district nearly the whole undertaking lay. It could not be valued in any other way, because a separate valuation of outlying gas-pipes was meaningless. The Leith Assessor was not entitled to defend the entries on a principle of percentage upon cost, which was admittedly inconsistent with the principle on which the entries themselves had been reached. He had not himself valued the undertaking, and had not produced any evidence of the present value, or the proper rate of depreciation, of the pipes in Leith. In order to ascertain the probable annual rent of gas-works, in their actual state from year to year, the legitimate course was to look at the state of the business, ascertain the gross profits, and make a fair deduction for tenants' profits. The practice in Scotland had been in favour of the company's view,¹ which also was that adopted by the Assessor of Railways and Canals when called on to value a gas company, under section 23 of the Act of 1854. It was also the rule in England;² and the same principle had been adopted in Scotland in cases more or less analogous to gas-works.³ Business premises, even agricultural farms not under lease, were valued by reference to the state of the business; thus agricultural depression had been allowed for,⁴ and goodwill as well as rent had been included as part of the annual value.⁵ In the case of collieries, linen factories, and distilleries, the Court had sanctioned a valuation upon the output, number of looms, &c. This was the only sound principle, because the rent to be given must depend not on what the landlord had spent, most

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¹ Glasgow Gas-Light Co. v. Adamson, March 23, 1863, 1 Macph. 727, 35 Scot. Jur. 410; Falkirk Joint Stock Gas Co., May 11, 1864, 4 Macph. 1133, 38 Scot. Jur. 591; Inverurie Gas-Works, March 21, 1872, 11 Macph. 986, 44 Scot. Jur. 432; Renton Gas Co., March 29, 1873, 11 Macph. 989, 44 Scot. Jur. 585; Leven Gas-Light Co., March 29, 1873, 11 Macph. 990, 44 Scot. Jur. 585; Dundee Gas Commissioners, Jan. 12, 1881, 9 R. 1240; Assessor for Falkirk v. Falkirk Gas-Light Co., Limited, Feb. 24, 1883, 10 R. 651.

² Reg. v. Sheffield United Gas-Light Co., May 22, 1863, 4 B. & S. 135, 32 Law Jour. Mag. Cases, 169; Rex v. Birmingham Gas Co., April 23, 1823, 1 R. & C. 506.

³ Vale of Clyde Tramways Co. v. Assessor of Railways and Canals, Sept. 28, 1883, 12 Poor-Law Mag. (N. S.) 254; Clyde Navigation Trustees, March 31, 1868, 11 Macph. 979; Hunter's Trustees v. Assessor for Argyll, March 11, 1882, 10 R. 36, and Feb. 24, 1883, 10 R. 666; Local Authority for Dalbeattie v. Assessor for Kirkcudbright, March 1, 1882, 10 R. 23.

⁴ Maxwell, Feb. 23, 1881, 9 R. 1243.

⁵ Glasgow Iron Co., March 24, 1873, 11 Macph. 989.

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unwisely it might be, but on what profit could be made from the premises in their actual state. The principle of a percentage on cost had been sanctioned only in the case of newly erected premises, and then only along with other elements of value.¹ Even if a percentage on cost were a sound principle, it had not been properly applied here by the Leith Assessor, as he should have taken the cost of the whole undertaking, and then ascertained the proportion for Leith, on the principle of the Dundee and the Glasgow Water-Works cases.²

Argued for the Assessor;—This gas company was a private concern, entitled to make profits, and thus it was in a different position from that of corporation gas-works or water-works, which could not earn profits and could not be let, and in which therefore the Court had to reach the annual value of the works on some other principle than that which might be applied to ordinary undertakings. The *onus* was on the company to shew why a less value than that of the preceding year should be taken, and was not discharged by shewing that if the Assessor had followed the same method of arriving at results as in former years, the value would have been smaller. Different methods might produce substantially the same results, as the *Falkirk*³ case illustrated, and so long as a practically fair result was produced, the Assessor was not bound to scrutinise the theoretical soundness of the method; but when a method of valuation produced a sudden and unexplained fall in the apparent value of the property, the Assessor became bound to inquire into the soundness of the method, for the presumption was against it. The Assessor's method was the sound one. He took the cost, made an allowance for depreciation, and so arrived at the capital value. That was of course on the assumption that the works had not been unnecessarily constructed, and that they were still useful. The Assessor had to consider what interest on his outlay an owner constructing such works would expect—that was evidently at a higher rate than in the case of ordinary buildings—and the Assessor took 8½ per cent, which was the rate suggested by Lord Lee in the *Falkirk*³ case. The system advocated by the company made the annual value depend on the profits for the year, which, owing to bad management, might be *nil*, whereas a tenant would be influenced by the amount of profit realisable if the business were properly managed. The proposal to deduct 5 per cent on the gross expenditure in name of tenants' profits was clearly wrong, because in that view the larger the expenditure the greater would the tenants' profits be. If the company's principle was to be applied at all, it ought to be applied not only to the valuation of the undertaking, but to the allocation of the value between the several districts. The company, however, in allocating took the cost of construction as the principle, not the profits earned in each district. The earlier cases in Scotland laid down no principle, and in the *Falkirk*³ case the Court was equally divided. In England Judges had expressed themselves dissatisfied with the existing practice, but had felt themselves bound by authority.⁴ Besides, the English rule was not that advocated by the company. For although in England they ascertained the annual

¹ Annandale, March 14, 1867, 11 Macph. 977; Stirling & Sons, July 13, 1869, 11 Macph. 981, and June 9, 1873, 11 Macph. 992.

² Dundee Water Commissioners v. Dundee Road Trustees, Dec. 21, 1883, 11 R. 390; Magistrates of Glasgow, Oct. 3, 1884, 12 R. 3.

³ Assessor for Falkirk v. Falkirk Gas-Light Co., Limited, Feb. 24, 1883, 10 R. 651.

⁴ Reg. v. Churchwardens and Overseers of Mile-End, Old Town, June 26, 1847, 16 L. J. Mag. Cas. 184; Reg. v. West Middlesex Water-Works, Feb. 25, 1859, 28 L. J. Mag. Cases, 135.

value of the whole undertaking by finding the profits of the whole and then deducting a sum for tenants' profits in allocating the amount between the different districts, they valued separately the works, such as gas-meters, stations, main-pipes, in each district, assigned an annual value to them, which they appropriated to the particular district, and, deducting the values of such structural works from the value of the whole undertaking, distributed the balance according to the profits made in each district.

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At advising.—

LORD LEE.—I remain of the opinion which I expressed in the case of the *Falkirk Gas Company*, that earnings do not enable the assessor to fix the annual value of a factory in accordance with the rule laid down by clause 6th, and I think that the proposal of the appellants in this case brings out very distinctly the impossibility of reconciling their method of arriving at the annual value with the rule laid down by the statute. For what the statute requires is, that the yearly value shall be taken to be the rent at which, "one year with another," the subjects might in their actual state be reasonably expected to let by the year. What the appellants demand is that the Assessor shall accept for the ensuing year a return of the income and expenditure for last year under deduction of tenants' profits. The business of manufacturing and supplying gas is not said to have fallen off. On the contrary, the business of the company admittedly has increased; and although the profits are said to have been reduced during last year, it is not suggested that the business has ceased to be a very profitable one. If the amount of profit earned in each year were to determine the valuation for the year following, it would be necessary to ascertain the actual amount of the divisible profits; and the profits earned in Leith would require to be distinguished.

I do not find that any ground has been stated for holding that the lettable value of the subjects has diminished since last year; and as the assessor of Leith is not bound by the mistake of the Edinburgh Assessor, my opinion is that the determination of the Leith Magistrates is right.

It is certainly anomalous and unfortunate that a different principle of valuation should be applied to that part of the works which is situated in Leith from that which has been applied in Edinburgh. I am disposed to think that it would have been better had the appellants applied to have the whole subjects valued by the Assessor of Railways and Canals. It was in their power to obtain this under the 23d section of the statute, and in that case a different rule of valuation would have applied. But that is not before us. We are bound to dispose of the case now stated according to the statute, and as a case for valuation under clause 6th. It is, however, not out of place to point out that if the appellants desire it, they have it in their power to avoid in future any want of uniformity in the principles of valuation applied in different parishes.

LORD FRASER.—In this case we have an appeal from the Magistrates of the burgh of Leith by the Edinburgh Gas-Light Company complaining of the valuation put by the Assessor, and affirmed by the Magistrates, of a portion of their undertaking lying within the burgh of Leith. The Assessor has fixed the annual value at £598, and the appellants maintain that it ought only to be £317.

The pipes of the Edinburgh Gas-Light Company run through Edinburgh city

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and county, and also through a portion of the burgh of Leith. The mode of valuation adopted by the Assessor is by taking the cost of laying the pipes within Leith, and having ascertained that to be £7844, he then takes $8\frac{1}{2}$ per cent of this sum and declares that to be the annual value. That percentage would bring out a sum of £666, but he was contented to take the lesser sum of £598. This mode of ascertaining the value is, in my opinion, erroneous. The pipes within the burgh of Leith have in themselves only the value of old iron, unless they are considered as part of the undertaking of the Edinburgh Gas Company, whose works for the manufacture of gas are situated in Edinburgh. The Assessor's proceeding is directly contrary to the rule laid down in the 23d section of the Valuation Act, which deals with the case of gas companies when the valuation is made by the Assessor of Railways and Canals. The mode of valuing is there stated as follows:—The assessor shall “inquire into and fix *in cumulo* the yearly rent and value, in terms of this Act, of all lands and heritages in Scotland belonging to or leased by such water or gas or other company, and forming part of its undertaking, and shall also inquire into and fix the just proportions of such *cumulo* yearly rent or value applicable to each parish, county, and burgh in Scotland in which such water or gas or other company is liable to be assessed as aforesaid; and such assessor of railways and canals shall include in the Valuation-roll to be made up by him under this Act all the water companies, gas companies, and other companies whose lands and heritages shall be valued by him as aforesaid, and shall set forth in such Valuation-roll, in columns, the yearly rent or value, in terms of this Act, *in cumulo*, of the whole lands and heritages in Scotland belonging to or leased by each such water, gas, and other company respectively, and forming part of its undertaking, the names of the several parishes, counties, and burghs in which its said lands and heritages or any part thereof are situated, and also the yearly rent or value, in terms of this Act, of the portion in each such parish, county, and burgh, separately and respectively, of the lands and heritages belonging to or leased by each such water, gas, and other company respectively, and forming part of its undertaking.” Thus, therefore, he is to value the whole undertaking and fix *in cumulo* the proper sum, and then he is to fix a just proportion of such *cumulo* value applicable to each parish, county, and burgh. The mode of allocating among the parishes the *cumulo* value was settled in this Court in the case of the *Dundee Water Commissioners v. Dundee Road Trustees, &c.* (Dec. 21, 1883, 11 R. 390), and by the Lord Ordinary on the Bills (Lord Kinnear) in the case of the *Magistrates of Glasgow, &c.* (Oct. 3, 1884, 12 R. 3). This is the first time that any attempt has been made by a parish or burgh to have the valuation of a portion of an undertaking like the Edinburgh Gas Company, valued without reference to the *cumulo* value of the whole undertaking. The Edinburgh Gas Company's undertaking must be held to be a *unum quid*, which cannot be split up into fragments, and valued according to the cost of construction within the parish or burgh—upon which an arbitrary percentage is then to be put. It is quite plain that such a proceeding is contrary to the rule laid down by the statute, and is, in my opinion, utterly senseless, in respect that an *unum quid* may be so split up as to be valued according to different rules, according as it goes through a number of parishes.

In the case of the *Magistrates of Glasgow v. Hall* (Jan. 14, 1887, 14 R. 319) the Court had under consideration the judgment of Lord Kinnear in the case to which I have referred, and I find these remarks of the Lord Ordinary (Lord

M'Laren), which are pertinent to the present case,—“It is plain enough, and it is known to the profession, that the application of the Valuation Act to public undertakings is difficult, and that the value of such concerns is arrived at by a highly artificial system of rules, which, as I have said, are not strictly obligatory, but are used as guides to the ascertainment of a reasonable value. In ascertaining the rent to be given by the hypothetical tenant, every element is taken into account which a tenant would consider preparatory to making his offer. Amongst these, repairs, insurance, maintenance, rates, and taxes, are of course considered, because no tenant in considering what rent he could afford to give would omit to take account of such outgoings. The larger the outgoings the less rent would the tenant be able to give, other circumstances being supposed equal, and therefore outgoings are rightly and necessarily allowed for in making the valuation, as deductions from the gross income of the hypothetical tenant.” I concur entirely in these remarks. There is a very great difficulty in fixing a sum as the yearly rent of great public undertakings; but difficult as it is, it must be faced according to the rule laid down by the statute, viz., What rent shall a tenant give for it? I have explained my views upon this subject in the case of the *Falkirk Gas Company* (Feb. 24, 1883, 10 R. 651), and I do not mean to repeat the views which I there expressed. It is quite plain that no tenant would take a lease of the subject without knowing what were the returns; and a very striking illustration of the prudence of such a course is to be found in contrasting the income of the year 1885 and the year 1886, there being no less a sum than £15,054 of diminution in the latter year as compared with the former. This would certainly be an important matter for consideration on the part of the intending tenant; and it would not affect his judgment in considering what rent he could afford, that the expenditure in the construction of the works was the same in the second year as in the first.

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THE JUDGES being divided in opinion, the decision of the Magistrates stood.

DAVIDSON & SYME, W.S.—IRONS, ROBERTS, & LEWIS, S.S.C.—Agents.

THE PRESTONGRANGE COAL AND FIRE-BRICK COMPANY, LIMITED,
Appellants.—*D. Dundas.*

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THE ASSESSOR FOR HADDINGTONSHIRE, Respondent.—*Party.*

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Prestongrange
Coal and Fire-
brick Co.
Limited v.
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shire.

Valuation Acts—Lease of Minerals and of Harbour—Duration of lease.— Question, whether a lease of minerals for thirty-one years, and of the harbour dues of a harbour adjacent to the minerals and belonging to the same proprietor for twenty-one years with right to use, but not to use exclusively, the harbour for the purposes of the mineral workings, was to be construed as a lease of the harbour for thirty-one years, entitling the Assessor to enter the tenants on the Valuation-roll as proprietors of improvements which they had executed on the harbour.

Opinion per Lord Lee that it was not; *per Lord Fraser contra.*

Valuation Acts—“Consideration other than the rent”—“Power” to make improvements—*Valuation of Lands Act, 1854 (17 and 18 Vict. cap. 91), sec. 6.*—Terms of a lease conferring “power” on the tenant to make improvements on a harbour which was the subject of the lease, which were held to provide for a consideration other than the rent in the sense of the *Lands Valuation Act, 1854, sec. 6.*

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By lease dated 27th August and 4th September 1874, Sir George Grant Suttie, Baronet, of Prestongrange, let to Richard Kitto and others, All and Whole the coal and other minerals in and under the lands and barony of Prestongrange, and also, *inter alia*, the dues leviable by the lessor at the harbour at Morrison's Haven (the lessor, his heirs, tenants, and servants, being entitled to use the harbour without payment of any dues), the minerals for the space of thirty-one years from 11th November 1874, and the harbour dues for the space of twenty-one years from the said term, with full power to the lessees "to use, but not to use exclusively, the harbour or haven called Morrison's Haven, for transporting and carrying away the said minerals, or importing any and all necessary materials and things for the purpose of the said works or otherwise in relation thereto; as also power to make improvements on the said harbour by converting the site of the existing dam, or part thereof, into a wet dock, and by extending the piers and otherwise, all according to plans and specifications to be submitted to the said Sir George Grant Suttie, and to be approved of by him before the said improvements shall be commenced; but declaring that such improvements shall be at the sole expense of the said lessees, who shall have no claim for compensation or otherwise against the said Sir George Grant Suttie or his forebears, and the said improvements shall not be commenced until all the requisite notices shall be given by the said lessees to the Board of Trade and Admiralty or otherwise (should such notices be necessary); and it is further hereby stipulated that no one having a right to use the said harbour shall be interfered with or impeded by the lessees in the use of it; and the lessees shall further be bound to relieve the said first party and his forebears from all claims of damages in connection with the said improvements at the instance of any party or parties whomsoever." The rents payable under the lease included "a fixed rent of £20 for the dues at Morrison's Haven."

In the years 1875, 1876, and 1877 the lessees deepened and otherwise improved the harbour at a cost of £8000.

On 14th September 1886 the Prestongrange Coal and Fire-Brick Company, Limited, which had by assignation come into the place of the original lessees, appealed to Haddingtonshire Commissioners of Supply against the first of the following valuations in the Valuation-roll for the year ending Whitsunday 1887—there being no appeal against the second:—

Subjects.	Proprietor.	Tenant or Occupier.	Yearly Rent.
Harbour, Morrison's Haven.	Prestongrange Coal and Fire-Brick Company, Limited.	The Same.	£80.

Subjects.	Proprietor.	Tenant or Occupier.	Yearly Rent.
Harbour, Morrison's Haven.	Sir George Grant Suttie.	The Prestongrange Coal and Fire-Brick Company, Limited.	£20.

The Assessor had inserted the valuation complained of on the principle that the lease, not only as regarded the minerals, but as regarded the harbour, was to be construed as a lease for thirty-one years, which entitled

him to enter the lessees as proprietors of the improvements executed on the harbour, and these he valued at £80 annually, being the valuation complained of. The valuation in the other entry was the rent payable under the lease to the proprietor. He further maintained that even if the lease of the harbour was to be construed as for twenty-one years only, the power to make improvements on the harbour was a consideration other than the rent on the principle of the cases of *Gosnell* (No. 2) and the *Dundee Harbour*.¹

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The company maintained, —(1) There was here (a) a lease of minerals for thirty-one years, with the right, but not the exclusive right, to use the harbour for the purposes of the mineral workings, which right was a natural adjunct of a mineral lease,² and was included in the mineral rent; and (b) a lease of the right to levy harbour dues for twenty-one years. The lease, therefore, except in so far as it regarded minerals, or the adjuncts of minerals, was for twenty-one years only, and consequently the company could not be entered as proprietors. (2) The power to make improvements could not fairly be regarded as a consideration other than the rent.³

The Commissioners confirmed the valuation.

The company took a case.

At advising, —

LORD LEE. — The point raised in this case is attended with considerable difficulty.

By the lease the appellants enjoy (along with the minerals) the use of the harbour of Morrison's Haven for a period of thirty-one years. If they had the exclusive occupation of it as a distinct subject for that period, the Assessor would be clearly right in valuing that subject, irrespectively of the rent payable under the lease, in terms of the proviso attached to clause 6 of the statute. But this is not the state of the facts. For though they were also tenants of the harbour dues, tenancy of the harbour dues was only for twenty-one years. This is not sufficient, in my opinion, to make them lessees of the harbour under a lease, the stipulated duration of which is more than twenty-one years, and therefore liable to be entered in the Valuation-roll as proprietors of the harbour. I am unable, therefore, to sustain the Assessor's view, in so far as it is based upon the duration of the lease.

The question remains, whether, taking the lease as only a twenty-one years' lease, the power to make improvements was truly a condition of the lease, similar in character to that found to exist in the third case of *Gosnell* (12 R. 571), and in the case of *Stephen & Sons*, decided in March last year.

The Committee have affirmed the Assessor's view upon that subject, which is supported by evidence, that the harbour required to be deepened and repaired, in order to make it available for schooners of 90 tons burthen. I think that the determination of the committee must be taken as finding in fact that the harbour dues could not be earned without expenditure upon repairs and improvements, and that the harbour itself could not be used for ordinary coal-carrying

¹ *Gosnell v. Assessor for Edinburgh*, Jan. 27, 1885, 12 R. 571; *Dundee Harbour Trustees v. Assessor for Dundee*, March 19, 1886, 13 R. 829.

² *Leadhills Silver Lead Mining and Smelting Co., Limited, v. Assessor for Lanarkshire*, March 19, 1886, 13 R. 827.

³ *Coltness Iron Co., Limited, v. The Assessor for Linlithgowshire*, March 1, 1882, 10 R. 21; *Gosnell v. The Assessor for the City of Edinburgh*, Feb. 24, 1883, 10 R. 665; *Marr Typefoundry Co. v. The Assessor for the City of Edinburgh*, Feb. 9, 1884, 11 R. 563.

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traffic without such expenditure. In this view I think the necessary expenditure must be regarded as a condition of the lease, and as it had to be undertaken, and was undertaken, by the tenants in addition to the rent, my opinion is that this was a consideration other than rent, which would have justified the Assessor in disregarding the stipulated rent of £20, and that the annual value ought to have been fixed on this footing, both as against proprietor and tenant. This, however, is not what has been done. The entry of £20 as the yearly rent has fixed the annual value as between landlord and tenant. It is not appealed against, and the proprietor has had no opportunity of being heard against any increase.

Being of opinion that the tenants cannot, in the circumstances, be entered as proprietors of the harbour, I think that the valuation ought to stand for this year as fixed by the Assessor's entry of £20, and that, as regards the other entry, which is the subject of the appeal, the determination of the Committee was wrong.

LORD FRASER.—I am of opinion that the determination of the Commissioners of Supply was right, and that this case is governed by the decisions in *Gornell, &c., v. Assessor for Edinburgh* (27th January 1885, 12 R. 571), and the *Trustees of Dundee Harbour, &c., v. Assessor for Dundee* (19th March 1886, 13 R. 829). It is perfectly clear that although the improvements upon the harbour were made under what is called a "power" to, and not an express obligation by, the tenant, these improvements were resolved upon from the outset, and the rent adjusted accordingly. The expenditure of such a large sum as £8000 upon the improvements indicates plainly the character of this bargain, and leaves no room for doubt that the tenant got value for this expenditure in the adjustment of the rent. I think, further, that the appellants were rightly entered, in terms of the 6th section of the statute, as proprietors in the Valuation-roll, seeing that the right which they have obtained to use the harbour was practically a lease for thirty-one years.

THE JUDGES being divided in opinion, the decision of the Commissioners stood.

WADDELL & M'INTOSH, W.S.—PARTY—Agents.

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Mar. 10, 1887.
Filshill v.
Campbell.

JOHN FILSHILL, Pursuer (Respondent).—*Pearson—Ure.*
MRS C. M. H. P. BOUVERIE CAMPBELL AND HUSBAND, Defenders
(Appellants).—*D. F. Mackintosh—C. S. Dickson—Chisholm.*

Reparation—River—Liability of upper heritor in respect of operations in alveo.—A farm road, running midway along the steep face of a hill, was carried through the bed of a little burn upon an embankment or breastwork, built up by the proprietor so as to keep the road on a level, the burn running over the surface of the road. The embankment had been there for upwards of forty years, and had been repaired and strengthened from time to time. In 1884 the proprietor put sheep drains into his farm, and at the same time increased the breadth of the embankment. A lower heritor, who had been injured in the autumn of 1885 by an extraordinary flood in the burn, raised an action of damages against the upper proprietor, averring that the flood had been caused by the flood-water of the burn being obstructed by the stones and rubbish which had gradually gathered across its course upon the embankment, and so diverted out of its proper channel against his property. The Court held that in point of fact the overflow had not been caused in that way, and had

not happened at that point. *Opinions* (per Lord Justice-Clerk, Lord Young, No. 115. and Lord Craighill) that the proprietor would not have been liable even if the flood had been due to the embankment, the operations of the upper proprietor having been lawful and ordinary operations, involving no risk of damage except from some extraordinary cause. Mar. 10, 1887.
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JOHN FILSHILL was the feuar of a villa and garden ground on the sea-shore at Innellan. The ground behind the feu rises steeply, and a small burn runs down the hillside and through the property of Mr Filshill. The proprietor of the ground outside the feu was Mrs Campbell of Dunoon. After an extraordinary fall of rain the burn, on 12th September 1885, came down in spate, burst its banks at a point on Mrs Campbell's property, and flooded Mr Filshill's ground, doing considerable damage. 2D DIVISION.
Sheriff of
Argyll.
I.

Mr Filshill then raised an action in the Sheriff Court against Mrs Campbell to recover damages for the injury so caused. It appeared that a farm road ran along the hillside on the defender's land, and at the point where it crossed the bed of the burn it was embanked or built up so as to keep the level, the burn, which in general was a very small stream, running across the road and falling over the breastwork of the embankment. The road and embankment had existed from time immemorial, but in 1884 the embankment had been repaired by the defender's tenant, and two or three feet added to its breadth. About the same time the defender put sheep drains into the hill farm, which fed the burn.

The pursuer averred that a wire fence put up by the defender along the edge of the road caught rubbish that was carried down by the burn, and that stones and sand brought down by the burn in flood were washed on to the level of the road and heaped up, thereby causing an obstruction.

He pleaded;—1. An *opus manufactum* having been constructed by the principal defender, or with her knowledge and authority, in the bed or course of the burn in question, she is liable for any damage that may have been occasioned through its presence to the pursuer as a neighbouring proprietor. 2. The pursuer's property having been damaged by the diversion of the water caused by the *opus manufactum* in question, the principal defender is bound to make good the said damage to the pursuer.

The defender stated that the overflow took place at a point twenty-five yards or so above the road, and was not caused by the embankment. The pursuer's averments as to the accumulation of rubbish on the road were denied.

The defenders pleaded;—3. The overflow complained of having resulted from natural causes at a point removed from the said embankment, the defenders cannot be made responsible to the pursuer for any damage that may have resulted therefrom. 4. Even assuming that the said damage was connected with the existence and construction of the breastwork, the defenders are not liable in damages in respect (1) the flood on the occasion in question was unprecedented, and such as could not have been anticipated, and (2) the breastwork has existed in its present position, and of its present construction, from time immemorial, or at all events anterior to 1880, when the pursuer acquired his property, or otherwise, any changes effected on the breastwork since the pursuer acquired his feu have been executed in the full knowledge and with the acquiescence of the pursuer.

A proof was taken, in which the evidence to a large extent was directed to shew at what point, as matter of fact, the burst had occurred, the pursuer relying on the evidence of an engineer who visited the place two days

No. 115. after the flood, the defender leading evidence as to the levels, with intent to shew that the stoppage could not have been caused at the road, where a very slight rise would have sent the water away from the pursuer's property, but must have taken place at a point twenty-five yards up, just above a "throat" or little gully in the channel, where the banks fell away so as to lead the water on to the pursuer's property.

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The Sheriff-substitute (Campion), after detailed findings, found "that said damage was the result of the operations conducted by defenders or by persons for whom they are responsible, and that they are accordingly liable in the same; assesses the amount at the sum of £70 sterling."*

The defender appealed to the Court of Session, and argued;—First, on the facts, the flood did not occur at the road, but twenty-five yards above. There had not been shewn to be any barrier at the road that would dam the burn.

Second, on the law, the *opus manufactum* had been there for time immemorial, and was not of a kind to involve liability, for the erection of it was an act of ordinary management. That distinction took this case out of the rule of such cases as *Rylands v. Fletcher*¹ and *Kerr v. The Earl of Orkney*,² where it was laid down that a person who dammed up water and so created an extraordinary danger, thereby imposed on himself the duty of making his neighbours absolutely safe, just as one did who chained up a wild beast. The principle which ruled the present case was that laid down in *Mackintosh v. Mackintosh*,³ viz., that one executing a lawful and ordinary operation was only liable if *culpa* were proved. It had been said that in such cases where an operation was performed for the benefit, e.g., of agriculture, a very substantial amount of damage must be shewn,⁴ and the extent to which the Court had gone in giving damages for the result of ordinary operations even of damming⁵ had been regretted.⁶ [LORD JUSTICE-CLERK.—What do you say to *Pirie's* case, to which the Sheriff-substitute refers?] That case was decided on the ground that no *culpa* was proved against the defenders, and the Lord Justice-Clerk had taken the view that the extraordinary flood there was a *damnum fatale*. The result of that case, therefore, was favourable to the defender here.

Argued for the pursuer;—First, on the facts, it had been shewn that the flood took its origin at the road, or, in any event, it could not be denied that the road might have contributed to cause the flood.

Second, in law, that was sufficient; for a heavy responsibility attached to him who meddled with the course of a running stream.⁷ The present case was of the category represented by the case of *Kerr v. The Earl of Orkney*, the principle of which case had been affirmed in the House of

* "NOTE.— . . . The plea of the unprecedented nature of the flood, amounting to a *damnum fatale*, is disposed of by various decisions and *dicta* of Judges which may be briefly summed up in the words of Lord Gifford's interlocutor in *Pirie & Sons v. Town-Council of Aberdeen*, 18th January 1871, 9 Macph. 412. 'He who meddles with the ordinary course of a stream is bound to provide not only for ordinary but for extraordinary floods, even for those which are so rare that they may only happen once or twice in a century.'"

¹ 1868, L. R., 3 E. and I. App. 330.

² Dec. 17, 1857, 20 D. 298, 30 Scot. Jur. 158.

³ July 15, 1864, 2 Macph. 1357, 36 Scot. Jur. 678 (a case of muir-burning).

⁴ *Murdoch v. Wallace*, June 28, 1881, 8 R. 855.

⁵ *Jackson v. Marshall*, July 4, 1872, 10 Macph. 913, 44 Scot. Jur. 506.

⁶ *Per* L. J.-C. in *Murdoch v. Wallace*, 8 R. 855.

⁷ *Morris v. Bickett*, May 20, 1864, 2 Macph. 1082, 36 Scot. Jur. 529, *aff.* 1866, 4 Macph. (H. L.) 44, 38 Scot. Jur. 547.

Lords to be that it is the duty of one who throws a dam across a stream to provide in an efficient manner not only against usual occurrences and the ordinary state of things, but also against things which are unusual and extraordinary.¹ The same principle had been applied to the case of a man lighting a bing of refuse from ironstone.² The distinction was there laid down to be the distinction between the ordinary uses of property and the construction of an *opus manufactum*. No. 115.
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LORD JUSTICE-CLERK.—I had from the beginning of the argument considerable doubt whether the very foundation of the pursuer's case was not subject to reasonable observation. The defender is the proprietor of the land over which the stream in question flows, and for a considerable time a breastwork, built by the proprietor, had existed across this little stream for the purpose of levelling its bed, across which the farm road passed. The foundation of the action is that that is not a lawful proceeding on the part of the proprietor, unless precautions were taken to prevent regurgitation or damming back of the water in the event of a flood. That is the foundation of the claim by the pursuer; it is said that there was an obligation on the defender not to make or increase this breastwork unless he is careful to prevent the risk of damming back the stream in time of flood.

I am not prepared to affirm that as a proposition in law. I think there is an obligation on the proprietor to prevent the burn from straying on to his neighbour's ground owing to his operation; but there must be bounds to that obligation, and if the proprietor has only used his property in a legal and laudable way for the benefit of himself and his tenants, and of his neighbours too, he is not responsible for an unexpected result of his acts. I am not satisfied that there was any breach of that obligation by the defender. He was entitled to perform the operation, and the result was unexpected.

But, in the second place, I think it is open to the greatest possible doubt whether the breastwork had anything to do with the result. The stream, as it seems, burst its bounds twenty-five yards above the breastwork, altered its channel entirely, and did much damage. It is said that that was caused by the breastwork. I am not satisfied that that is so. It may to a certain extent have contributed to the result, though I am not satisfied that even so much is proved. In cases of wild upland streams like this, when an overflow takes place, the water meets obstacles at every point which alter its course, and it is impossible to say what particular obstacle is the cause of its deviation. But it is enough to say that it has not been shewn that the defender's breastwork was the cause of the damage.

LORD YOUNG.—I am of the same opinion. It is a pity that the pursuer, who undoubtedly suffered, did not attribute his suffering to the extraordinary rainfall rather than to the fault of his neighbour.

I agree with your Lordship in thinking that the grounds of action here are not established, and I differ from the Sheriff-substitute. I need not say that if anyone improperly introduces water into a stream and so causes it to overflow to his neighbour's damage, he will be responsible, or, if he makes an illegal erection in the bed of the stream to his neighbour's damage, he will again be responsible.

¹ *Per Westbury, C.*, in *Tennent v. Earl of Glasgow*, March 3, 1864, 2 Macph. (H. L.) at p. 26, 36 Scot. Jur. 400.

² *Chalmers v. Dixon*, Feb. 18, 1876, 3 R. 461.

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The two grounds on which the defender's responsibility is stated to be rested are, first, that she put sheep drains through the ground in 1884. I need not say that sheep drains are quite lawful, and as water must run down hill, the stream will take the water from these drains with it in the way it is going. But that is not an unlawful introduction of water into a stream.

The second ground is thus stated,—“At the point where this farm road meets the small burn the principal defender, or her tenants with her knowledge and consent, have built a stone breastwork across the bed of the said small burn, and have filled up the space behind the breastwork, and have thus carried the farm road as a solid structure across the bed of the said small burn. The burn is allowed to run across the said road and to fall over the breastwork, when it resumes its natural course towards the Newton Burn.”

Now, I do not say that the roadway may not be repaired in an illegal way, so as to impede the course of the stream. But, to begin with, this is a case of a little stream crossing the road, a road which has been there beyond the memory of man. In such a case the road requires constant attention to keep it up, for the stream is constantly engaged in wearing it away. But there can be no question that the defender is not responsible for the road being where it was, or for this stream crossing it. He might have repaired it in an unlawful way in 1884, but I am of opinion that he did nothing illegal in that respect.

The Sheriff-substitute, however, after affirming these two facts, says,—“The effect of these operations was to cause a silting up of mud or sand in the bed of the burn above this structure or breastwork; (6) that on 12th September 1885 there was an exceptionally heavy fall of rain, causing a flood in the burn; (7) that this silting up of the bed of the burn and the stones which, brought down by the flood, collected there, had the effect of damming back the water coming down the burn, so as to cause it to overflow a little distance above where said obstruction occurred”; and so considerable damage was done.

I am not of opinion with the Sheriff-substitute that the effect of the sheep-draining of the farm and the repairing of the road which the burn crosses was to cause or to contribute to cause the overflow which did the pursuer damage. That is quite enough, if it is not proved that the overflow was due to these operations.

But further, the import of the evidence is, that the flood was not caused by these things at all, but was caused by there being too much water for the channel of the burn to carry at the point where the ground descends on each side of it. That is quite irrespective of these operations; it is at a different part of the burn, quite above the defender's operations, to which it is attributed. I should therefore affirm not only that the overflow is not proved to be due to the defender's operations, but also that it is proved not to be due to them.

LORD CRAIGHILL.—I concur in thinking that the judgment of the Sheriff-substitute should be recalled. I think he is wrong in regard to the facts, and wrong in regard to the law which he has applied to the facts. I have sat here and listened as attentively as I could to the evidence which has been read and the observations of parties' counsel on both sides, but I am not yet in a position to say what caused the overflow. There are theories given on one side, and there are theories given on the other, but I am not satisfied that that which happened on 12th September would not have happened if that breakwater of which so much has been said had not been there. The Sheriff-substitute is of

opinion that the breakwater was the cause ; I am of a different opinion. I think it has not been proved to be the cause, nay, more, I think it has been proved not to be the cause, and I should concur in a finding to that effect, if such finding is proposed. No. 115.
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It is not necessary to go further, but I am of opinion that the erection of the breakwater was a fair exercise of her rights of administration of her property by the proprietor. All that was intended to be done, and all that was done, was to improve the road. If it could have been said that it was probable that injury would accrue to her neighbours from the erection, she might perhaps have been prevented, for she is not entitled to do injury to her neighbours that there might be greater facilities here for crossing the stream. But it does not appear to me that there was any risk to anyone from the exercise of this power by the proprietor.

LORD RUTHERFURD CLARK.—I think that the pursuer's case fails entirely in point of fact. I could not conceive that the operation of meddling with the bed of the burn, so as to make it level for a breadth of twelve feet or so, could have had any effect in obstructing the course of the stream. But the case of the pursuer is that upon this level there were deposited sand, stones, and rubbish, which had the effect of obstructing the course of the stream, and made it flow out over the pursuer's land. There is no proof of any such obstruction there, and there is proof of an obstruction much further up, which was not due to the defender's operations.

As regards the questions of law that have been raised, I prefer to reserve my opinion.

THE COURT found that the injury sustained by the pursuer was not attributable to any act or operation of the defender, and therefore sustained the appeal, recalled the Sheriff-substitute's judgment, and assoilzied the defender.

ADAMSON & GULLAND, W.S.—J. A. CAMPBELL & LAMOND, C.S.—Agents.

THOMAS WHITE AND ANOTHER (White's Trustees), Pursuers
(Respondents).—*Gloag—Low.*

No. 116.

THE DUKE OF HAMILTON AND OTHERS, Defenders (Reclaimers).—
Murray—Salvesen.

Mar. 10, 1887.
White's Trustees v. Duke of Hamilton.

Mines and minerals—Support to surface—Support to adjacent surface.—A proprietor of lands sold the surface, reserving the minerals and right to work the same “upon payment to the proprietors of the ground of what loss and damage they shall sustain thereby upon the land.” He then worked out the whole of an upper seam of coal by stoop-and-room. Subsequently he sold a lower seam to a person who worked out the coal therein, leaving, however, a solid mass of coal unworked beneath and fifty yards round a steading which belonged to the owner of the surface. That steading having been damaged by subsidence of the ground, caused by the withdrawal of the lateral support in the lower seam, the owner of the surface raised an action against the owner of the lower seam and his tenant, in which the defenders pleaded that they were not liable for the damage in respect that it was due to the previous working in the upper seam, and that the defenders had left the subjacent support entirely unworked, and were not bound to give support *a latere*.

Held that the pursuer was entitled to damages from the defenders on the ground that the original proprietor of the minerals after working out the upper seam could not have wrought the lower without being liable for the damage resulting therefrom, and could not transmit his right without that liability.

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Mar. 10, 1887.
White's Trustees
v. Duke
of Hamilton.

2D DIVISION.
Lord Fraser.
I.

THIS was an action at the instance of the testamentary trustees of Alexander White, proprietors of the surface of certain lands in Stirlingshire, against the Duke of Hamilton, proprietor of the minerals (other than whinstone and freestone), and his tenants, the Redding Colliery Company. The sole partners of the company were the testamentary trustees of Johan Theodor Salvesen. The summons concluded, first, for declarator that the defenders were not entitled to work the minerals so as not to leave support for the surface above and adjacent to the seams worked by them, and that they were bound to work the minerals so as not to alter the surface of the lands, and for that purpose were bound to leave sufficient stoops, dykes, and pillars to support the surface. There was, in the second place, a conclusion for interdict against working that would have the effect of breaking or altering the levels, "so as to endanger the said surface being injured or altered in level, or so as to injure or destroy any buildings, machinery, or erections on the pursuers' said lands." Finally, there was a conclusion for £5000 of damages in respect of injury done on the surface by subsidence.

The state of title to the property was as follows, viz.:—In 1818 the whole estate, surface and minerals, belonged to Livingstone of West Quarter. In that year a process of ranking and sale of his estate was brought, and under that process, in 1820, Mr Learmonth Mackenzie bought the surface. There was a reservation in his conveyance of the minerals excepting whin and freestone, and also of the right "of making holes and sinks, and setting down shanks, with roads and passages in and to the same, within any part of the foresaid lands, upon payment to the proprietors of the ground of what loss and damage they shall sustain thereby upon the land, according to the determination of two neutral men, one to be chosen by the proprietor of the coal, and the other by the proprietor of the land." Mr Alexander White, in 1863, bought the surface from Mr Mackenzie's trustees, and on his death, in 1870, his trustees came into possession of the surface.

Mr Livingstone, or the judicial factor in the process of ranking and sale, worked out the splint or upper seam of coal all over the lands before 1832, by stoop-and-room working.

In 1837 the whole minerals were acquired at a judicial sale by the Carron Coal Company. In 1854 the Duke of Hamilton, by contract of excambion recorded in 1857, acquired right to the Cocksroad seam, a stratum of coal lying under that which had been worked. In 1858, after working the coal for some years himself, he granted a lease for thirty-one years, and to that lease the Redding Colliery Company acquired right by an assignation in 1865, with consent of the Duke. Throughout the titles of the mineral owners there was an obligation as to payment of damages similar to that contained in the reservation in the conveyance of the surface to Mackenzie, already quoted, and this obligation was by the terms of the lease and the assignations laid upon the tenants also.

The defenders did not resist the conclusions for declarator and interdict. The only question in dispute was the amount due for damage done to the surface by subsidence. The defenders again admitted that some damage had been caused by their operations, and stated that they were willing to pay for it. A long proof was led as to the extent of the damage, but the only point of general importance and interest was the claim for damage done to a farm-steading. The buildings were extensively cracked, and it was alleged that this was due to subsidence caused by the operations of the mineral tenants or of the Duke. As already stated, the splint seam had been worked out by Livingstone, or the judicial factor on the estate, by stoop-and-room. The defenders had worked

the Cocksroad or lower seam by long-wall working, but under the steading No. 116. they had left a large mass of coal unworked to support it. There were no workings in the lower seam within fifty yards of the steading.

In these circumstances, the defenders maintained that the damage could not be due to their workings, but must be the result of bad foundations, while the pursuers maintained that by the withdrawal of lateral support the defenders had caused a "draw" in the upper seam by which the stoops were crushed, and the subsidence of the surface ensued.

On this point, and in the view that their theory as to bad foundations failed, the defenders pleaded;—(7) The damage which exists being to a great extent due to workings by the pursuers' own authors, and not to any workings by the defenders, they are not liable in such damage as is referable to these prior workings.

The Lord Ordinary (Fraser), on 13th November, as regarded the damage to the steading, adopted the theory of the pursuers, assessing the damage on this head at £200. On the whole matter, he, of consent of the defenders, found, decerned, and declared against them in terms of the conclusions for declarator and interdict, and in regard to the petitory conclusions gave decree against them for £1070.*

The defenders reclaimed.

They did not deny liability generally, but maintained that as regarded the damage to the steading, they were not liable, in respect that the damage done there was not due to their workings, but to the previous workings in the splint coal with which they had nothing to do, and also because they had left the subjacent support entirely unworked, and could not be held bound to give support *a latere*. A mineral worker was not bound to leave any further support than was necessary to support the land in its natural state; as regarded buildings, it had been held that the right to support depended not on the same considerations as the right of the surface owner to support for the natural surface, but on prescriptive possession.¹ That suggested a rule for the case where upper mineral workings required support, and if that suggestion were followed, there was no absolute obligation to support the splint workings here. The natural state of things having been destroyed, the right to support as an absolute right was gone. Damages could only be recovered so far as the injury was direct, but it was impossible to say that the subsidence was directly caused by the defenders. There was no obligation on persons working minerals under adjacent land to support the surface of their neighbours' property.² Every worker was entitled to work as if things around him were in their natural state, nor was his knowledge that they were not so of any moment. There was knowledge in the Birmingham case.² The pursuers would argue

* With regard to the defenders' plea on this point of the case, quoted *supra*, his Lordship said,—“An argument in point of law was submitted by the defenders against liability for damages on account of injury to the steading. The coal not having been removed by them underneath the steading, and consequently the subjacent support not being taken away, it is contended that there can be no liability for damages. It is said that injury arising from adjacent operations, which make themselves felt by a draw, is not a ground for a claim of damage. To some extent this might be admitted if the workings which set the strata in motion were at a considerable distance and not strictly adjacent. But the Lord Ordinary knows of no authority for holding that when the workings are immediately adjacent to the shattered building, liability does not exist, and accordingly he rejects this contention in point of law.”

¹ Dalton v. Angus, 1881, L. R., 6 App. Ca. 740; cf. also Rankine on Land-ownership, p. 403.

² Corporation of Birmingham v. Allen, 1877, L. R., 6 Ch. Div. 284.

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that they had an absolute right of support; if that were so, they could have prevented the stoop-and-room workings in the splint seam, for these, too, would in course of time bring down the surface. Their absolute claim to support was therefore gone, and that being so, they must shew fault or recklessness or an unusual mode of working, and none of these could be shewn from the evidence. The liability for the damage really rested on those who had worked the splint seam, and no conveyance of the subjacent minerals could carry with it a liability incurred in consequence of workings in the superincumbent seam.

As regarded the cases founded on by the other side, in the *Duke of Rutland's* case¹ an injunction was granted against a proprietor who proposed to derogate from his own grant by making the working of minerals in one seam difficult or impossible by reason of workings in another. *Brown v. Robins*² had been cited in the Birmingham case. In *Bald's* case³ the mineral worker had not only worked the subjacent stratum, but had taken the accumulated water out of the upper stratum, a proceeding which would have been paralleled in the present case if the defenders had, in addition to working their own coal, taken out the stoops in the upper workings. There was no such recklessness here, and therefore *Bald's* case was no authority.

Argued for the pursuers;—The mineral owner in acquiring his property acquired it with an obligation to support the surface as it stood,⁴ and he might be interdicted from bringing down the surface,⁵ i.e., from working by long-wall working; the practical result being that all working could be stopped, i.e., the mineral worker compelled to buy the surface. Long-wall working was therefore illegal in a question with the owner of the surface. That had been assumed to be good law in the general case in *Henderson v. Dimmack's* case,⁶ although interdict was refused there because of the express terms of the feu-contract between the parties. The form of injunction, which would in the ordinary case be granted in England, was to be found in the case of *Proud*.⁷ The obligation to support the surface lay upon the owner of the minerals, and he could not by dividing the ownership of the different seams contrive to shuffle off this liability,⁸ and it would require the clearest evidence to establish a contract involving such a result.⁹ If he could divest himself of this obligation by selling his minerals, he might thus obtain a full price from a purchaser for what was worth nothing to himself; which was absurd. In *Brown v. Robins*¹ there was a very clear precedent for the present case, for the subsidence there took place in similar circumstances, i.e., there were two series of excavations, and the second worker was found liable. *Bald's* case³ was also in point, for there was not due care in the working here; a prudent miner would have worked by stoop-and-room. The Birmingham case was not an authority, for, in the first place, there was an intervening

¹ *Mundy v. Duke of Rutland*, 1883, L. R., 23 Ch. Div. 81.

² 1859, 4 H. & N. 186.

³ *Bald v. Alloa Colliery Co.*, May 30, 1854, 16 D. 870, 26 Scot. Jur. 437.

⁴ *Caledonian Railway Co. v. Sprot*, Feb. 15, 1854, 16 D. 559, 26 Scot. Jur. 255, rev. 2 M'Q. 449, 19 D. (H. L.) 3, 28 Scot. Jur. 486, Paters. App. 633.

⁵ *White v. Dixon*, 1883, 10 R. (H. L.) 45, in Court of Session 9 R. 375; *Humphries v. Bryden*, 12 Ad. & Ell. 739.

⁶ *Buchanan and Henderson v. Dimmack*, March 10, 1873, 11 Macph. (H. L.) 13, 45 Scot. Jur. 172, rev. judgment of Court of Session.

⁷ *Proud v. Bates*, 34 L. J. Ch. 406; *Hext v. Gill*, L. R., 7 Ch. 699; cf. also *Mundy v. Duke of Rutland*, *sup. cit.*

⁸ *Siddons v. Short*, 1877, L. R., 2 C. P. Div. 577.

⁹ *Bell v. Love*, 10 Q. B. Div. 561, 9 App. Ca. 286.

territory belonging to a different owner, which had been worked by him, while here there was a right to demand support from a person who had been owner of both seams, and there it was admitted that the intermediate territory would have supported the complainer if left alone; *quomodo constaret* that that was so here.

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At advising,—

LORD JUSTICE-CLERK.—In this case the pursuers, who are proprietors of certain lands in the county of Stirling, sue the Duke of Hamilton, who is proprietor, and the Redding Colliery Company, who are lessees of the minerals below these lands, for declarator, interdict, and damages in respect of alleged injury done to the surface by reason of certain mineral workings.

In regard to the Duke of Hamilton and his lessees, the Lord Ordinary has of consent of these defenders decerned in terms of the declaratory conclusions, and of those for interdict, and on the conclusions for damages he has sustained the claim of the pursuers to the extent of £1070. In this way the case presented to the Lord Ordinary, and as dealt with by him, was simply an assessment of damages, in which, as he explains, no question of law was raised by either side.

I am not surprised that the Lord Ordinary should have so treated the questions in dispute, because in substance no other contention was raised on the record. It is admitted by the defenders that in several instances the injuries complained of were caused by mineral workings. It is alleged as to some of these grounds of complaint that they had been paid for; in regard to others, that these defenders were ready to arbitrate; but nowhere do I find any allegation that they were not due more or less to the operations of mineral working.

I think this course was an honest one; for if I read the titles aright the defenders were working under a title which expressly bound them to compensate the owner of the surface for all damage which their workings might occasion. It may tend to clearness if in a few words I explain how the titles stand.

The property now in dispute belonged to Livingstone of West Quarter, and in 1818 a process of ranking and sale of his estate of Parkhall was raised, which embraced both surface and minerals. The surface was purchased by Mr Learmonth Mackenzie from the judicial factor in 1820, but the minerals continued to be worked by the judicial factor, or a lessee from him, down to 1837, when Carron Company purchased them. At that time it appears that the whole of the upper or splint seam had been worked out, chiefly by the mode of working called stoop-and-room.

It is stated in the defences to this action that when the surface was purchased in 1820 it was under reservation of the coal and other minerals, and the right "of making holes and sinks, and setting down shanks, with roads and passages in and to the same, within any part of the foresaid lands, upon payment to the proprietors of the ground of what loss and damage they shall sustain thereby upon the land, according to the determination of two neutral men, one to be chosen by the proprietor of the coal, and the other by the proprietor of the land." The titles are very scantily produced, but I have looked into a crown charter, which is in process, expedited by Carron Company in 1856, including the whole minerals under Parkhall, and a very complete narrative of the titles since the middle of last century. This charter contains an obligation on the crown vassal in the same terms as the above. By a contract of excambion, recorded in 1857, Carron Company conveyed to the Duke of Hamilton the Cocksroad seam, part of these minerals, which was

No. 116. worked by himself till 1858, when he granted a lease of them for thirty-one years. It is stated in the defences that this lease was assigned to the late Mr Salvesen in 1865, and that the assignation contained "an obligation to settle claims for surface damage caused by workings prior to these dates" (art. 4).

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I conclude, therefore, that the obligation to make compensation for surface damage ran through all these conveyances. In this state of matters it seems clear that Carron Company could not, in a question with the owner of the surface, have so worked the lower or Cocksroad seam as to cause either vertical or lateral disturbance in the worked out waste above, so as to damage the surface, and that they could not confer on their disponent any higher or other right than they had themselves, either at common law or under the stipulations I have referred to. I am therefore prepared to hold, with the Lord Ordinary, that the defence raises no legal question, if it be admitted or proved that damage to the surface has resulted from the operations of the defenders, and that there is no room in this case for the application of the principle on which the case of the *Birmingham Gas Company* (6 Ch. Div. 284) was decided.

On the real merits of the case I concur without difficulty, though with one exception, with the Lord Ordinary's views. The conflict of opinion is no doubt troublesome, but I am the less disturbed by it on account of one element too common in these cases, and of which the present is an unprofitable example. I have already said that the defenders admit in several instances, and do not on their record vehemently dispute in any, that the mineral workings have caused or tended to cause the results complained of. But when it comes to the experts they at once discover entirely other causes for the appearances in question. Thus the drainage is said to be affected, not by mineral disturbance, but by a weed called puddock pipes. The brick-kiln has simply been overheated, and thus were caused the cracks. The steading, it is said, was badly built on a bad foundation. The Lord Ordinary has without hesitation discarded these theories, and of the last of them he says,—“This suggestion has been clearly disproved, and may be dismissed from consideration.” But in weighing the conflicting testimony I cannot lay out of view that such was the case which these men of character and experience came to support.

But my coincidence with the conclusions of the Lord Ordinary is not, as I have said, absolute. He thinks, and in that I agree with him, that the pursuer's claim is exaggerated. It is my opinion that it should be farther reduced. I propose that we should reduce it from £1070 to £800. With that alteration, I am in favour of adhering to the interlocutor of the Lord Ordinary.

LORD YOUNG and LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—The only difficulty which I have felt in this case is whether the defenders are liable for the injury done to the steading. That the steading has been injured by the mineral workings I hold to be proved as matter of fact; but it is equally certain that if the upper seam had been entire the steading would not have been damaged. For, on that supposition, it is admitted that the defenders left a sufficient quantity of coal to give all necessary support to the steading, and that it was injured only because the upper seam had been previously worked.

The defenders contend that they are not concerned with the previous workings in the upper seam, and that they were within their legal rights if they did so

more than work the seam belonging to them as far as they were entitled to do, No. 116. on the footing of the upper seam being untouched.

I was much impressed by the argument of the defenders and the authority on which it is based, but I have come to be of opinion that it is not well founded. Mar. 10, 1887.
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The upper seam had been worked when the whole minerals belonged to Mr Livingstone, or to trustees for his creditors. I think that he could not give a higher right to any disponee than he himself possessed. If he had continued to be sole proprietor of the minerals, and had worked them as the defenders have done, I am of opinion that he would have been liable to the pursuer for the damage done to the steading. It is said that this liability would have arisen from his working of the upper seam, and not from the working of the lower seam. I cannot adopt that view. It seems to me that a limitation would be put on his right to work the lower seam by having worked the upper seam, and I further think that the defenders, as his disponees, are under the same limitation. If it were otherwise the lower seam would have been more valuable to him for sale than for working. This is, I think, impossible, and hence I hold that his disponees were under the same limitations by which he was himself affected.

THE COURT adhered to the interlocutor of the Lord Ordinary, except to the extent and effect of substituting the sum of £800 for £1070.

DRUMMOND & REID, S.S.C.—TODD, MURRAY, & JAMIESON, W.S.—Agents.

JAMES LAMONT AND OTHERS (Cruickshank's Trustees), First Parties.— No. 117.

D.-F. Mackintosh—Goudy.

LORD PROVOST AND MAGISTRATES OF GLASGOW, Second Parties.—

Balfour—G. W. Burnet.

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Writ—Succession—Holograph unsigned document—Revocation by pencil marking—Proof of intention to cancel.—Unsigned pencil alterations made by a testator on his testament written in ink will be presumed to be deliberative merely, but if there is evidence, parole or otherwise, to shew that he intended them to be final they will receive effect.

A trustor in his trust-deed directed his trustees to give effect to "any codicil or separate writing under my hand or signed by me, from which my trustees may be satisfied as to my wishes and intentions, notwithstanding the same may be defective in the solemnities required by law." By holograph codicil written in ink and signed he bequeathed £10,000 to the Magistrates of Glasgow, with directions how it was to be applied in charity. In his repositories these documents were found along with two other holograph pencil documents, which were both undated and unsigned. In one of these, headed "Notes as to settlement and alterations," he stated that he had "now meantime cancelled" his bequest to the Magistrates of Glasgow, "owing to losses on investments." The other was a list of charities to which he had left bequests, but that to the Magistrates was not mentioned. Through the bequest and instructions relative thereto in the holograph codicil were drawn perpendicular pencil lines, and along its margin was drawn in ink a bracket. It was admitted that a few months before his death the testator had called upon his law-agents and informed them that, having lost £30,000, he had resolved to make some alterations on his settlement and codicil, and that he got possession of these documents, which were at that time free from deletions and interlineations. *Held* that it had been proved that the bequest had been effectually cancelled by the trustor.

Question, whether the first unsigned holograph writing was a valid testamentary writing of the deceased.

No. 117. JAMES CRUIKSHANK, builder, Glasgow, died suddenly at Harrogate on 9th October 1884.

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1st Division.
M.

After his death there were found in his repositories along with other business documents the following testamentary writings:—(1) Trust-disposition and settlement, dated 7th October 1874; (2) Separate holograph codicil or letter, written in ink and signed, bearing dates 9th October 1878 and 27th November 1879; (3) Holograph document written in pencil and headed "Notes as to settlement and alterations," unsigned and undated; and (4) Holograph document written in pencil, with one correction in ink, containing list of charitable institutions, &c., with certain sums set opposite their names, unsigned and undated.

Questions having arisen as to the effect of these writings, a special case was presented to the Court, in which James Lamont and others, the trustees under the first mentioned deed, were the first parties, and the Lord Provost and Magistrates of Glasgow, who maintained that they were entitled to a legacy of £10,000 under the codicil of 1878-79, were the second parties.

The deceased left property to the value of about £120,000. The following facts relative to the execution of the deeds in question were stated in the case. The original trust-deed was prepared by Mr Cruikshank's law-agents, and remained, after execution, in their custody till 1879, when the testator consulted them as to a holograph codicil which he had prepared, being the document second mentioned above. That document was at Mr Cruikshank's request put up along with his trust-deed, and left in the custody of his agents.

In April 1884, Mr Cruikshank again called on his agents and informed them that having lost about £30,000, he had resolved to make some alterations on the legacies in the holograph codicil. That deed was handed to him and he took it away with him. It was then free from deletions and interlineations.

In July 1884, Mr Cruikshank again called, and, after stating again that owing to losses he wished to make some alterations on his settlements, he took away the original trust-deed, which was also at that time free from deletions and interlineations.

Both these documents remained in his possession till his death.

When Mr Cruikshank's testamentary writings were inspected after his death, it was found that large alterations had been made upon them in ink and pencil, and that the holograph documents mentioned 3d and 4th had been placed along with the others in his repositories.

The question submitted to the Court depended on the following passages in the documents.

The second purpose of the trust-deed was as follows:—"In the second place, I direct and enjoin my trustees to pay and deliver any legacies or bequests, and fulfil all such directions or instructions respectively, as may be contained in any codicil hereto, or separate writing under my hand, or signed by me, from which my trustees may be satisfied as to my wishes and intentions, notwithstanding the same may be defective in the solemnities required by law."

The codicil of 1878-79 contained the following entry:—"To the Lord Provost and Magistrates of Glasgow Ten Thousand pounds in trust, the Revenue to be given in small Precepts or Pensions of £4 up to £8 p. an^m to poor old men or women in rather indigent and needful circumstances, not under sixty years of age (except in peculiar or distressing circumstances), and of excellent character, sober and industrious habits, and members of or attached to any of our Presbyterian or Episcopal churches; applicants to be natives of Scotland or England, but must have been resi-

dent in Glasgow, or within a radius of ten miles, for at least seven years." No. 117. Then followed detailed directions as to the manner in which this legacy was to be applied; and, towards the end of the deed, a power was given to the trustees in the event of their not having "ample funds at their disposal at the time of my decease" to "pay the bequest to the Magistrates of £10,000 in three yearly instalments if necessary."

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When this codicil was opened after the testator's death, it was found that pencil lines had been drawn perpendicularly or in a slanting direction through the whole of the provisions relating to that bequest, the text of which had further been altered in some small particulars (in figures and otherwise) in ink. Further, along the margin of the whole of these provisions (with the exception of the last mentioned power to the trustees), there was drawn in ink a bracket or circumflex.

There were in other parts of the codicil various alterations in ink or in pencil, and some words were deleted both in ink and in pencil.

One of the holograph documents written in pencil and unsigned and undated, was headed "Notes as to settlement and alterations." It contained this clause:—"As regards my oldest son, his share is to be retained in trust, and only the interest paid him. In the event of his decease, his share to be divided amongst his children when the youngest comes of age, should he have any. If there is none, then the his share will go to my other sons, with the exception of £10,000 which I had arranged to leave to the Magistrates of Glasgow for benevolent purposes, as stated in the manuscript which I handed you, but have now meantime cancelled, owing to losses on investments. . . . Burden this also with the keeping my repair painting monument in the Southern Necropolis in repair, oiling, & painting it, and the inscriptions.

"The \$1000 or £500 to Merchant's House to be burdened with keeping my monumt in the Necropolis in good condition, & painting the inscriptions, when required, to have them distinct & readable."

The fourth writing was a list of charities to which legacies were left, and the amount left to them. They, in the main, coincided with those left in the holograph codicil; the legacy to the Magistrates of Glasgow was nowhere mentioned in this writing.

The following question was submitted to the Court:—"Are the parties of the second part entitled to demand, and are the parties of the first part bound to make payment of the said legacy of £10,000 as a valid and subsisting legacy?"

Argued for the first parties;—The legacy in question had been validly cancelled by the truster. The question was, did the truster intend to cancel the legacy? The words of the holograph writing were quite clear. They referred to a deed which had been done, and the only act the truster had done was to draw pencil lines through the part of the codicil which bequeathed the £10,000. They conceded that where a document in ink was scored with pencil marks the presumption was that the pencil markings were merely deliberative,¹ but that presumption could be rebutted by evidence, parole or otherwise, of the intention of the testator that the pencil marks should be considered as final. The mere fact that they were in pencil was of no materiality.² Here the truster not only told his agents he intended to alter his testamentary writings but got them into his own possession on purpose to alter them, and put this holograph writing along with them in his repositories. It was not of great importance to their argument whether the unsigned deed was a valid testament, because it was, at least, evidence of the testator's intention when he made

¹ Williams on Executors, 8th edn. p. 112.

² Colvin v. Hutchison, May 20, 1885, 12 R. 947.

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these pencillings, and was quite competent evidence on that point.¹ If, however, it was a valid testament, that would settle the case in their favour, and they submitted that it was so. It was exactly such a document as the truster contemplated in his second direction to his trustees in the original deed.² The words "under my hand or signed by me" evidently referred to holograph deeds unsigned or signed, and deeds not in his own hand, but signed. The heading "notes on settlement and intended alterations" was not enough to take away the character of the writing as a valid testament.¹ In the holograph document the word "meantime" meant that the truster who had admittedly lost much money deleted the legacy, reserving a power to himself to reinsert it if his investments became in the future more valuable. The evidence of the state of the codicil itself was important. The pencil lines were made through every reference in the whole deed to this legacy, and the ink bracket down the margin must have been made to emphasize the deletion.

Argued for the second parties;—Whatever was the intention of the truster, he had failed validly to cancel this legacy. It was admitted that there was no incompetency in cancelling a document in ink by pencil markings, but there was a strong presumption in favour of such cancellation being deliberative and not final. The question was, had that presumption been overcome. The evidence of the pencil marks themselves were against that view. Some of the sums, &c., were altered both in ink and pencil, which shewed that it was only when the truster had finally made up his mind on any cancellation that he used ink. As for the ink bracket, if it was put on after the pencil markings, it shewed that he was deliberating still, because it would have been equally easy to score the writing through with the ink as to make this mark on the margin; if it was put on before the pencil marks the result was the same, because then he could as easily have put an ink line through the writing, and when it was put where it was it only emphasized his deliberative intention. On the unsigned document they maintained that in form it was evidently a memorandum of instructions to his agents.³ No word was inconsistent with that view, and in one case at least "burden this also," &c., the imperative mood was used. The word "meantime" meant "I have cancelled this legacy as a deliberative act," and argued strongly against finality.

LORD PRESIDENT.—It appears that the testator here had made considerable sums of money in business or otherwise, and he settled his affairs by the trust-deed of October 1874. It would appear from what follows that after that date his property increased in value, for in 1878 he made a separate holograph codicil by which he increased, to a considerable extent, the number and value of the legacies which he had left by the trust-deed. These two writings remained in the hands of his agents till 1884, but we have it stated that in April of that year he called on his agents and stated to them, that having lost considerable sums, about £30,000, through bad investments, he had resolved to make some alterations on his codicil, which he wished to get possession of for that purpose. He accordingly was given the codicil of 1878-79. In July following he again

¹ Hamilton v. White, July 13, 1881, 8 R. 940, aff. June 15, 1882, 9 R. (H. L.) 53.

² Baird v. Jaap and Others (Lady Baird Preston's Trustees), July 15, 1856, 18 D. 1246, 28 Scot. Jur. 626; Young's Trustees v. Ross, Nov. 3, 1864, 3 Macph. 10, 37 Scot. Jur. 5; Crosbie v. Wilson, June 2, 1865, 3 Macph. 870, 37 Scot. Jur. 443; Wilson's Trustees v. Stirling, Dec. 13, 1861, 24 D. 163, 34 Scot. Jur. 88.

³ Lowson v. Ford, March 20, 1866, 4 Macph. 631, 38 Scot. Jur. 325.

called, and referring again to his losses, he asked to have his trust-deed too. No. 117. After taking possession of these deeds, it appears that he went to Harrogate for his health, and from that time all we hear about him is that he died there on 9th October 1884. It is undoubted that between the time he received back these deeds and his death he had made great alterations on them by cancelling and altering various legacies and sums left by them. What is the effect to be given to these alterations is the question now before us, in so far, however, only as regards one legacy of £10,000 to the Magistrates of Glasgow.

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The alterations made upon the words of this bequest are made in pencil, and I agree that there is a fair presumption when a testator takes his holograph deed written in ink and makes pencil alterations on it, that that was done with a view to future consideration whether the alteration should subsequently be made final or not; in other words, that the alterations are merely deliberative in character. Unless there is something to take off from that presumption I think it would be pretty conclusive of the question, but we are here not left with these deeds alone, for we have two other holograph writings, both of which are in pencil, and undated and unsigned. The first is headed "Notes as to settlement and alterations." The second contains a list of the various legacies to charitable institutions which he intended to bequeath. Both of these papers are, I think, of the greatest importance.

As regards the first, there may be a question whether it is not in itself a valid testamentary writing. The trust-deed directs the trustees to give effect to any directions contained in any codicil or "separate writing under my hand, or signed by me, from which my trustees may be satisfied as to my wishes and intentions, notwithstanding the same may be defective in the solemnities required by law." That is a clause which, so far as I know, has not occurred before in any case before the Court, and it has been well contended that though this pencil document is unsigned it is a valid testament by reason of the clause I have just read, for it is in one sense, being holograph, "a writing under my hand." On the other hand, it has been maintained that it is a mere paper of instructions, drawn up with a view to the preparation of a new settlement, or a memorandum for the testator's own use in giving instructions to his agents, and that the meaning of the clause in the trust-deed is that the trustees are to give effect to any document, whether holograph or not, which was signed by the testator. It is not, I think, necessary to decide that question, and, therefore, I give no opinion upon it. Much may be said on both sides, but it is enough for the present purpose to hold that this document is a proper expression of the testator's understanding with regard to something he had already done, and looking at it in that view, it enables us to consider whether the alterations in question were intended to be permanent and final.

The expression in the holograph paper is,—“As regards my oldest son, his share is to be retained in trust, and only the interest paid him. In the event of his decease, his share is to be divided amongst his children when the youngest comes of age, should he have any. If there is none, then his share will go to my other sons, with the exception of £10,000 which I had arranged to leave to the Magistrates of Glasgow for benevolent purposes, as stated in the manuscript which I handed you, but have now meantime cancelled, owing to losses on investments.” What would be the ultimate effect of that clause if the paper were considered a valid testament is of no consequence. The clause with reference to the decease of the son gives rise to a different question, but

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what we have to consider is, what is the effect of the statement as to the cancellation. The testator distinctly affirms that he has meantime cancelled the legacy of £10,000, but he has taken only one way of doing so, viz., by the pencil lines drawn through that part of the codicil, and therefore I construe this clause as meaning that the testator intended to cancel and had cancelled that legacy.

The other holograph writing is also important. It seems to have been made about the same time as the writing I have been considering, and is a list of legacies proceeding in conformity with the alteration he had made in his codicil, particularly it omits all mention of the legacy of £10,000.

Taking all these things together, I have come to the conclusion, without much difficulty, that the testator by drawing the pencil lines through the part of his codicil did intend to cancel that legacy, and has recorded in his own handwriting his intention to do so. I think, therefore, we should answer the question in the negative.

LORD MURE.—I am of the same opinion. If cancellation by means of pencil marks depended on the fact alone that such lines had been drawn I should have had great difficulty in coming to the conclusion that the cancellation had been effected, but we are by the terms of the trust-deed entitled to look at any other documents "under my hand or signed by me from which my trustees may be satisfied as to wishes and intentions." Now, under that clause I think we are entitled to look at the document which refers to the cancellation of the legacy of £10,000, and that without deciding whether it is a valid testament or not. When we look at it we find that the testator distinctly states that he has in the meantime cancelled that legacy. Now, looking at the pencil lines on the codicil in the light of that document, I think there is enough to make it necessary for us to hold that the legacy in question has been cancelled and is not now due.

LORD SHAND.—The parties are agreed in argument that the codicil of 1878-79 is a testamentary writing, and the sole question for us to consider is whether that admittedly testamentary writing is to have effect as it was originally written, or whether the deletion of the £10,000 legacy to the Magistrates of Glasgow is effectual and final, and so is no longer a part of the codicil. In considering that question we are entitled to take all the evidence we can get to enable us to say whether the deletions were deliberative or final. The Court may hereafter have a question before them rising out of the words "under my hand or signed by me" in the trust-deed, as to whether the unsigned holograph deed is a valid testament, but that question has no direct bearing here. We have wider means of getting at the truth, because we may consider parole evidence or anything written by the testator which helps us to a conclusion. Looking at the question so, we have the history of these documents given us by the parties. If with that history we had nothing but the codicil with the pencil alterations on it I should have had great difficulty in holding that the deletions had had the effect of destroying the legacy, but we have in writing a statement in the handwriting of the testator which shews that his intention was that these alterations should be not deliberative but final. Whether that writing is valid as a testament or not I do not consider, and desire to reserve my opinion on the point. There is a great deal to be said for the view that it is, but I take it for the purposes of this case as nothing higher than a mere record of a purpose to alter his settlement. Taking it so, it is the best evidence

possible as to the truster's purpose. The important words are "have now
 meantime cancelled." These words must refer to some prior act of cancellation. No. 117.
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 Glasgow.
 If the truster had only regarded this as a note of instructions to his agents the
 expression would naturally be, "which I intend or propose to cancel," in short,
 some expression of intention to do something in the future, but the words in
 the deed, being in the past tense, mark that the alterations are final. I am
 therefore clearly of opinion that there is evidence that these alterations were
 intended to be and are final.

The only point which occasions any difficulty is the words "burden this also
 with" the keeping of his monument in repair. This looks like a direction or
 mandate to his agents to do something, but that is followed by the words,—
 "The £1000 or £500 to Merchants' House to be burdened with keeping my
 monument" in repair, which words are quite consistent with the testator him-
 self doing the act set forth, and I do not think the mere circumstance of that
 one direction occurring can take away the clear effect of the words stating that
 the testator had "now meantime cancelled" the legacy of £10,000. On these
 grounds I concur.

LORD ADAM.—The question here is whether the pencil marks through the
 bequest of £10,000 to the Magistrates of Glasgow are effectual to cancel it.
 Had the lines been in ink it is undoubted that they would have been sufficient
 to do so, but being in pencil this question has arisen. If there were nothing
 before us but the deed with the pencil markings on it I should have been of
 opinion that the markings were not effectual, for I concur in the law as read to
 us from Williams on Executors, that where ink is scored out with pencil, and
 there is nothing to explain the markings, the result is that the markings are
 looked on as merely deliberative. But it is admitted that we are entitled to
 look at any evidence we can find, parole or otherwise, to ascertain what the
 intention of the testator in making the scorings really was. Here the evidence
 which is most material is the document headed "Notes on settlement and altera-
 tions," and I agree with Lord Shand in looking at that document as evidence
 merely and without regard to the question whether it derives any testamentary
 effect from the terms of the original trust-deed. Now, that document contains
 expressions referring back to the codicil of 1878-79, explaining the pencil
 marks on it, and the writer's intention in making them. He says that he had
 intended to leave £10,000 to the Magistrates of Glasgow, "as stated in the
 manuscript which I handed you, but have now meantime cancelled, owing to
 losses on investments." These words, I think, will bear no other meaning than
 a statement of a fact that before the document was written he had cancelled the
 bequest for the "meantime." That word means that in the future, if his invest-
 ments turned out better than he expected, he might restore it to his settlement.
 Looking at that document, I can come to no other conclusion than that the
 testator by these pencil markings meant to cancel the bequest. If the pencil
 markings were not on the codicil, and the case simply rested on the words
 "have meantime cancelled," a different question would have been raised, but on
 the only question before us I have no difficulty in concurring.

THE COURT answered the question in the negative.

FRASER, STODART, & BALLINGALL, W.S.—FODD, SIMPSON, & MARWICK, W.S.—Agents.

No. 118.

THE GLASGOW FEUING AND BUILDING COMPANY, LIMITED, Pursuers
(Respondents).—*Asher—R. Johnstone—Alison.*Mar. 11, 1887.
Glasgow
Feuing and
Building Co.
Limited v.
Watson's
Trustees.ARTHUR WATSON AND ANOTHER (William Watson's Trustees), Defenders
(Reclaimers).—*M'Kechnie—Shaw.**Et e contra.**Error—Contract—Records—Plan—Partial reduction of a feu-contract.*

By a feu-contract the granter became bound to form certain roads on the ground disposed, in so far as delineated and tinged brown on a plan appended to the contract. On the plan appended a number of other roads were by mistake also tinged brown. The feu-contract, with the erroneously coloured plan, was duly recorded. None of the parties to the contract observed the blunder at the time of signing, and it was not discovered until some years afterwards, when the ground had been sold by the original vassals to a building company. The company then raised an action against the superior for payment of the cost of forming the roads erroneously tinged brown on the plan, and the superior brought an action against the company for reduction of the feu-contract, in so far as it imported an obligation on him to form these roads. *Held (rev. judgment of Lord Fraser)* that as the original feu-contract was not intended to impose an obligation to make the roads in question on the superior, and as the company in contracting with the vassals did not stipulate for and did not understand that they were getting such an obligation, the mere fact that such an obligation erroneously appeared in the feu-contract and in the record did not entitle the company, though *bona fide* purchasers for value, to object to the Court rectifying the feu-contract and the records.

Observed (per Lord Young) that one purchasing on the faith of the records is not entitled to rely on the validity or subsistence of such incidental obligations as an obligation to make roads although appearing on the records undischarged.

2D DIVISION.
Lord Fraser.
I.

THESE were two actions, which were conjoined. The first, which was raised on 24th February 1885, was brought by the Glasgow Feuing and Building Company, Limited, against the trustees of the late William Watson, of Overlee, near Glasgow, and concluded for payment of £334, 10s. 7d., as the expense the company had been put to in making certain roads on part of the estate of Overlee feued by Watson to their authors, which roads Watson had, the company alleged, come under an obligation in the feu-contract to make.

The second action, which was raised on 12th June 1885, was raised by Watson's trustees against the Feuing Company, and also against certain feuars from them, Messrs Whyte, Binnie, Neilson, and Livingstone, after mentioned, being also called for their interest. It concluded for reduction of the feu-contract, in so far as it imported an obligation on Watson to form the roads in question, for declarator that the feu-contract was and had from the beginning been null and void, in so far as it imported such an obligation on Watson, and that he never had been and the pursuers were not bound under the feu-contract to form, or pay the expense of forming, the said roads; and for warrant to the pursuers to record the decrees to be pronounced thereon in the Register of Sasines for publication, or for publication and preservation.

The following narrative from the Lord Ordinary's opinion explains the circumstances out of which the actions arose:—"William Watson, now deceased, who is represented by his trustees, was proprietor of the lands of Overlee, near Glasgow, which he agreed to feu to Whyte & Binnie, merchants in Glasgow. Missive letters of feu were entered into between the parties, dated 24th January 1877. The first letter was written by Watson, who thereby offered the lands in feu to Whyte & Binnie in two lots, the first being a piece of ground extending to 3 acres 2 roods and 25

poles, as delineated on the feuing plan of the lands, at the annual feu-duty of £16 sterling per acre. In reference to this feu of 3 acres, Watson came under the following obligation:—‘I bind myself to make the roads free of charge to you, except the sewers, drains, curbstones, and gutters, which you shall pay me for. I bind myself to make the roads firmly bottomed, and well set and covered with ashes.’ No dispute has arisen in reference to this obligation, which Watson duly implemented.

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“But Watson also by the same letter offered to feu the remainder of the ground of Overlee, extending to 14 acres 1 rood and 30 poles, at a feu-duty of £20 sterling per acre. In reference to this second lot the following was the stipulation:—‘You (that is, Whyte & Binnie) shall be bound to put in roads at your own expense, of the same description as I bind myself to do to you, as above mentioned.’ A dispute has arisen with reference to the implementing of the stipulation as to the roads,—there being, however, no dispute whatever as to this, that Whyte & Binnie were to make the roads upon this 14 acre lot.

“The offer of Watson was duly accepted on the same date by Whyte & Binnie. The bargain so completed was put into formal shape by the execution of a feu-contract entered into between Watson on the one hand, and Whyte & Binnie, and two other persons of the name of William Neilson and Hugh Livingstone, on the other hand, both of whom were taken into the feuing speculation by Whyte & Binnie. This feu-contract conveyed over to these four persons, first, the 3 acres 2 roods and 28 poles which are said to be ‘delineated and tinged red on a plan thereof indorsed hereon, and subscribed as relative hereto,’ and secondly, the remainder of Overlee, containing 14 acres 1 rood and 30 $\frac{1}{2}$ poles, which also is described as ‘delineated and tinged blue on the foressaid plan, indorsed hereon and subscribed as relative hereto.’ All this is distinct enough, and a reference to the plan No. 11 of process shews the two lots of ground very plainly. This plan, No. 11 of process, was prepared by William Kirkwood, surveyor at Pollockshaws, and shews roads only at one point, viz., upon the 3 acre lot, in the shape of the letter T. If the reference in the feu-contract had been to the plan No. 11, there never would have been any dispute between the parties as to what were the roads which Watson, the superior, was to make, and what were the roads which the feuars from him were to take upon their own shoulders. But the reference in the feu-contract is not to No. 11, but to the plan appended to that contract, which was intended to be simply a copy of No. 11. The feu-contract contains this special stipulation in regard to the formation of the roads, ‘declaring that the first party (Watson) shall, in so far as not already done, form the roads (including the laying of the sewer-pipes, drain-pipes, cesspools, gutters, and kerbstones, but which pipes, gutters, and kerbstones are to be furnished by the second parties) intersecting the pieces of ground above disposed, in so far as delineated and tinged brown on said plan.’ Now, on referring to the plan appended to the contract, of which No. 182 is a copy, it will be seen that the roads there laid down are carried, not merely through the 3 acre lot, but also through the 14 acre lot, and they are all tinged brown. Thus, while the original missives only bound Watson to make the roads delineated on the plan No. 11 in the 3 acre lot alone, he is by the contract, with reference to the plan appended, under obligation to make the roads throughout the whole 17 acres.

“This was a clear error; and Watson’s trustees now seek to set aside the feu-contract, ‘in so far as the same declares that the said William Watson shall form, or imports an obligation on him or his heirs or suc-

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cessors to form, any roads (including the laying of the pipes, sewer-pipes, drain-pipes, cesspools, gutters, and kerbstones) on the said portion of ground containing 14 acres 1 rood 30 poles and $\frac{1}{6}$ parts of a pole or thereby imperial measure, disposed in the second place by the said feu-contract.' And there is further a conclusion for declarator, that no such obligation was incumbent upon Watson or his representatives.

"By an agreement between Watson and Whyte & Binnie, instead of making the roads upon the 3 acre lot in the form of the letter T,—that is to say, a road running from the East Kilbride road direct up through the 3 acre lot to a certain distance and then having two cross-roads on each side, it was agreed that Watson should not make cross-roads, but should carry the road direct through the whole of the 3 acres and 20 yards beyond them, into the 14 acre ground. Nothing turns upon this alteration of the original lie of the roads; the new road was nearly of the same length as the T-shaped roads laid down on the plan No. 11. The new road was substituted for the one originally intended.

"The mode in which the error was fallen into is very clearly traced. Whyte & Binnie, and their two associates Neilson and Livingstone, had entered into the feuing speculation in the year 1877, when there was a good deal of building speculation going on in Glasgow; and the first thing of course that they set about doing was to obtain a feuing plan exhibiting the laying out of the ground for feuing. This was prepared for them by Messrs Kyle, Dennison, & Frew, surveyors, Glasgow; and No. 185 is a lithographed copy of it. These gentlemen were not the persons who made the survey on behalf of Watson; but their services were taken by Watson in regard to the description of the subjects to be inserted in the feu-contract, and in regard to making a copy of the plan to be appended to that deed. Messrs J. & J. Boyd, the agents for Watson, wrote to these surveyors on 22d October 1877,—'We send the draft feu-contract herewith, and will thank you to check the descriptions and contents of ground. We shall afterwards instruct you to indorse the plan on the extended deed. Of course you will charge our client with such a proportion of the expense of the survey as you think fair.' It appears from the diaries kept by Kyle, Dennison, & Frew that they had got verbal instructions—and, as explained by Mr Dennison, these instructions came from Mr Boyd—to indorse the plan upon the feu-contract. On the 17th of October 1879 there is an entry to the effect, 'Indorse plan on feu-contract between Wm. Watson and David Whyte and others, J. & J. Boyd. See former plan and lithograph plan left, also letter by Mr Watson, 26th September 1879, describing line bounding the ground for small houses.' On November 19th, there is another entry in these terms,—'Delineate on reduced plan, endorsed on deed, all the roads as shewn on lithograph plan of Overlee for J. & J. Boyd.' Now this lithographed plan (No. 185 of process), shews the whole roads intended to be made by the feuars through the whole seventeen acres; and on the same 19th of November, Kyle, Dennison, & Frew's time-books have an entry to this effect,—'Delineating and colouring on plan, which was endorsed on deed on 20th October last, all the proposed roads shewn upon the feuing-plan of Overlee Ground.' The surveyors knew nothing of the terms of the missives which had been entered into between Watson and Whyte & Binnie, which limited the former's obligation to make the roads to the three acre lot; and having got instructions to delineate and colour all the roads and ground, they, or their clerks who did the manual work, naturally conceived that it was their duty to colour the whole road contemplated to be made by Whyte and his associates.

"The feu-contract and the plan appended—[the roads being then un-

coloured]—were signed on the 15th and 17th of November 1879; but in consequence of an agreement come to among themselves by the feuars, it was necessary to rewrite the last two pages, so as to give effect to the agreement, which had reference to the excluding any person from becoming assignee to the share of any one of the speculators without the consent of the others. A new stamped sheet was accordingly got, the two last pages were rewritten, and the contract as ultimately executed and delivered was dated 31st December 1879, and 5th and 7th January 1880—[and was recorded 30th January]. None of the persons who were present at the execution of the feu-contract took the trouble of looking at the plan—[which had by that time been returned from Messrs Kyle, Dennison, & Frew, with the roads coloured]—when they ultimately signed the deed. It was at the end of the deed; but between it and the two pages which were signed there was an inventory of writs; and so the error which had been committed in tinging brown the whole roads upon the property was not then discovered.

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"It was not discovered till March 1883. This was done by Mr Crawford, the agent for the defenders, the Glasgow Feuing and Building Company, Limited, who had come into the place of Whyte, Binnie, Neilson, and Livingstone; and he having communicated this to the directors of the Glasgow Feuing and Building Company, he was instructed to call upon Watson to make all the roads through the whole seventeen acres. This he did by letter to Watson's agents, dated 8th March 1883.

"It is necessary now to state how the Glasgow Feuing and Building Company came into the affair. The original feuars, Whyte and his other three associates, soon became desirous apparently to get rid of the speculation in which they had embarked, and for this purpose a limited liability feuing company—[registered on 26th December 1879]—was started. Accordingly a minute of agreement was entered into between Whyte and his three partners, on the one hand, and the Glasgow Feuing and Building Company on the other hand, dated 17th, 18th, and 19th March 1880, whereby the Feuing Company agreed to purchase from Whyte and the others the whole lands contained in the feu-contract.* The disposition following upon this minute of agreement was not executed till 24th November and 2d December 1880. By this disposition Whyte and the others convey over to the Glasgow Feuing Company the two lots of ground, 'with our whole right, title, and interest, present and future, therein, and with the whole pertinents thereof, but always with the liberties and privileges, and under the real liens, burdens, conditions, restrictions, limitations, provisions, obligations, and others specified or referred to in the said feu-contract.' The consideration for this disposi-

* This minute of agreement, which proceeded on the narrative, *inter alia*, that "the first parties [Whyte, &c.] have incurred, or are in course of incurring, expense in forming roads or streets and sewers in said lands and otherwise, with the object of laying out the same, and have also entered into, or are about to enter into, contracts of ground-annual with some of the persons to whom they have so sold parts of the said lands," provided, 4th, that "the second party [the Company] shall fulfil, implement, and perform all agreements, contracts, and obligations entered into and undertaken by the first parties in relation to and connected with the said several subjects in any manner of way; and particularly, without prejudice to said generality, they shall implement and fulfil all obligations undertaken by and incumbent on the first parties under the following minutes of agreement." Then followed the specification of a number of agreements by Whyte, &c., to feu parts of the fourteen acre lot, which agreements, *inter alia*, took the feuars bound to make roads, for the making of which the Company in the present action contended that Watson's trustees were liable.

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tion was the payment of the sum of £2378, 6s.; and there was excepted from the conveyance such parts of the lands as had been sold to other persons, by contracts of ground-annual, before the purchase made by the Feuing Company. The term of entry was at Whitsunday 1879." Whyte signed the memorandum of association of the Company, and was one of its directors from its formation until 1882.

In the action of reduction the pursuers, after giving a history of the feu-contract and the previous negotiations, averred—(Cond. 8) "The mistake which had been made as aforesaid in endorsing the wrong plan upon the engrossed feu-contract was not discovered prior to the execution and delivery of the said deed. It was the understanding and intention of both parties to the contract, at and prior to the execution of the deed, that Mr Watson should only be bound to form the roads within the dotted lines on the said plan prepared by Mr Kirkwood, and in particular, that he should not be bound to form any roads, &c., on the said piece of ground containing 14 acres 1 rood and 30 poles, and five-tenth parts of a pole, and that no roads on the said piece of ground should be delineated and tinged brown on the plan. The said feu-contract and plan endorsed thereon were signed by Mr Watson and the other parties thereto under essential error as to their import and effect in relation to the roads, &c., which the superior was bound to form. Both of the parties to the contract believed that the only roads delineated and tinged brown on the said plan were the roads marked on Mr Kirkwood's plan, and situated upon the said piece of ground containing 3 acres 2 roods and 28 poles or thereby, and that no roads upon the said piece of ground containing 14 acres 1 rood and 30 poles and five-tenth parts of a pole were delineated and tinged brown on the said plan, while in fact all the roads on the said plan over the whole ground feued were delineated and tinged brown. Mr Watson being, by the terms of the said feu-contract, taken bound to form, in so far as not already done, the roads, &c., intersecting the pieces of ground disposed, in so far as delineated and tinged brown on the plan endorsed, it was thus made to appear, erroneously and contrary to the understanding and intention of both parties to the contract, that Mr Watson was bound to form all the roads on the whole ground feued. Mr Watson would not have signed the feu-contract and plan if he had known their true import and effect in reference to the roads, &c., to be formed by him." (Cond. 9) "The defenders, the Glasgow Feuing and Building Company, Limited, were incorporated by registration under the Companies Acts on 26th December 1879. Prior to that date the said David Whyte, who for some time had been endeavouring to get a limited company formed to purchase the whole of the said ground from himself and his co-feuars, and to sell it off in building lots, had adjusted on all essential points with the promoters of the Company the terms on which the Company should acquire the ground, these terms being based on the express footing that the superior was not bound to form any additional roads to those shewn on Mr Kirkwood's plan, and situated on the smaller of the said two pieces of ground. . . . The said Feuing Company, at and before the date of their acquiring the said ground from Mr Whyte and his co-feuars, had been informed by Mr Whyte and his co-feuars and others, and well knew that Mr Watson was not bound to form any greater extent of roads than were delineated on Mr Kirkwood's plan, and in particular that he was under no obligation to form roads on any part of the ground feued other than the 3 acres 2 roods and 28 poles or thereby first disposed in the feu-contract, and they acquired the said subjects on that footing, and not in reliance on the existence of any pretended obligation on Mr Watson to

form roads on the said piece of ground containing 14 acres 1 rood and 30 No. 118.
and five-tenth poles. It was known to the said Company, at and before
the date of their acquiring the ground, that the roads delineated on the Mar. 11, 1887.
plan endorsed on the said feu-contract had, so far as situated on the 14 Glasgow
acres 1 rood and 30 and five-tenth poles, been tinged brown in error, Feuing and
contrary to the intention of both parties to the contract. In particular, Building Co.
at and before said date, it was known to the said David Whyte," and Limited v.
others named, "who subscribed the memorandum and articles of associa- Watson's
tion of the said Company on 4th and 15th December 1879, and who were Trustees.
then the directors and the only shareholders of the said Company, that
Mr Watson was only bound to form roads on the said 3 acres 2 roods and
28 poles, and that the said essential error in tinging the roads on the 14
acres 1 rood and 30 and five-tenth poles brown on said plan had been
committed."

The pursuers pleaded;—(1) The feu-contract—including the plan endorsed thereon—having been signed by the parties thereto under essential error as to its import and effect, in so far as it purported to impose on the superior an obligation to form roads, &c., on the piece of ground containing 14 acres 1 rood and 30 and five-tenth poles, it was and is null and void *quoad* such pretended obligation. (2) The feu-contract having been entered into under the common essential error specified, it ought to be reduced or declared null to the effect concluded for. (3) The defenders respectively having acquired their subjects in the knowledge of the essential error referred to, they are not entitled to enforce or to maintain the validity of the pretended obligation in question. (4) Decree ought to be granted as concluded for, in respect that it would be a fraud on the part of the defenders to enforce the said pretended obligation according to its terms.

The defenders pleaded;—(2) The pursuers' averments are not relevant or sufficient to support the conclusions of the action. (3) The pursuers' averments, so far as material, being unfounded in fact, the defenders are entitled to absolvitor with expenses. (5) The action, so far as it concludes for partial reduction, being incompetent, the defenders ought to be assoilzied.

A proof was allowed. The import of the evidence sufficiently appears from the foregoing extract from the Lord Ordinary's opinion, and from the rest of the opinion *infra*.

On 16th June 1886 the Lord Ordinary (Fraser) pronounced this interlocutor:—"1st, In the action of reduction, assoilzies the defenders from the conclusions of the summons, and decerns; and 2d, In the petitory action, appoints the case to be put to the roll for further procedure, and reserves all questions of expenses." *

* "OPINION.—[After the narrative above quoted]—The question now comes to be, whether redress can be obtained by Watson's representatives against the consequences of the error into which parties fell. The property is now in the hands of an onerous third party, and whatever might have been the pursuers' remedy, had the question been raised as between them and Whyte & Binnie, it is contended that the Feuing Company were entitled to rely upon the records, as indicating the extent of the property they were buying, and the obligations which the superior undertook. It was averred by the pursuers that the directors of the Feuing Company were aware of the error that had been committed before they made their purchase, and if this had been the case, then, according to several decisions, they could not be allowed to retain the property under such circumstances (*Lang v. Dixon*, 29th June 1813, F.C.; *Marshall v. Hynd*, 18th January 1828, 6 S. 384; *Magistrates of Airdrie v. Smith, &c.*, 13th July 1850, 12 D. 1222;

No. 118. On 7th July following the Lord Ordinary pronounced the following final interlocutor:—"Having resumed consideration of the conjoined actions, and having further heard counsel in the petitory action, Finds that the whole sum expended by the pursuers, the Glasgow Feuing and Building Company, Limited, in making roads (exclusive of the expense of kerbstones, sewer pipes, drain pipes, gutters, &c.), is £112, 19s.: Decerns against the defenders Watson's trustees therefor, reserving to the pursuers the Glasgow Feuing and Building Company, Limited, all claim for any further advances which they may make, or be called upon to make, in the formation of roads: Finds neither party entitled to expenses in the separate actions and in the conjoined actions, and decerns."*

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Morrison v. Somerville and Others, 21st December 1860, 23 D. 232; *Petrie v. Forsyth*, 16th December 1874, 2 Ret. 214; *Stodart v. Dalzell*, 16th December 1876, 4 Ret. 236). Amongst other matters, a proof was allowed of these averments, with the result that the averments were completely disproved. The persons who were said to have had this knowledge were examined as witnesses, and denied it, with the exception of Whyte, who had become a partner of, and had been a director up to 1882 of the Feuing Company. Whyte further states that Gibson, the secretary of the Feuing Company, and the agent of the Company were aware of the error. Now Gibson was examined, and flatly denied this. Mr Crawford, the present agent of the Feuing Company, also deposed that he had no knowledge of the fact till March 1883; and the Lord Ordinary is constrained to believe these two witnesses rather than Whyte upon this point. The whole correspondence and actings of the parties shew that it was a new discovery in March 1883.

"There thus being no knowledge on the part of the Feuing Company, they are entitled to maintain the position that, as onerous third parties, they had a right to rely upon everything which the record disclosed. If there was an error, they are not to be made the sufferers. The consequences of that error must fall upon the person who committed it (*Mansfield (Stuart's Trs.) v. Walker's Trustees*, 28th June 1833, 11 S. 813; *affd.* 10th April 1835, 1 S. & M.L. 203). It is said, however, that the Feuing Company, in point of fact, knew nothing about the obligation as to roads contained in the feu-contract before they made their purchase, seeing that neither the directors nor their agent saw the feu-contract until after the minute of agreement between Whyte & Binnie, Neilson & Livingstone, and the Feuing Company, had been entered into, and the Lord Ordinary holds this to be proved in point of fact. But he is constrained also to hold it to be irrelevant. It is no answer to an onerous third party buying heritable property to say that he had not gone to the records and there read the title of the intending seller to him. If he makes a purchase, the law says that he shall obtain right to all that the record discloses, if conveyed over to him. The case of *Stewart's Trustees v. Hart* (2d December 1875, 3 Ret. 192) shews how this case would have been dealt with by the Court if the question had arisen between the original contracting parties. When an onerous third party, however, appears upon the scene, different principles must be applied, and a different conclusion arrived at.

"The Lord Ordinary has dealt simply with the action of reduction. In the petitory action he has not pronounced any judgment, because he cannot find in the proof which has been led sufficient satisfactory materials for disposing of the claim made by the Glasgow Feuing and Building Company. Perhaps these parties may be able to shew the Lord Ordinary that there are such materials, about which, however, little or nothing was said at the debate. The attention of parties was very naturally directed to the main question raised by the action of reduction, and the pecuniary demand of the pursuers in the petitory action received but scant notice."

* "OPINION.—The Lord Ordinary does not see his way to decern for payment of any sums of money in favour of the pursuers, other than what they have themselves actually expended in making roads, and the sum decerned for is the sum proved by their secretary.

Watson's trustees reclaimed, and argued;—This was not a case of buying on the faith of the records; the Company bought on the faith of the missives alone, the plan appended to which (No. 11 of process) correctly shewed the true obligation of the parties to the original contract. The Company therefore were not entitled to appeal to the records as the measure of what they got under their contract. Even if they were, an obligation to make roads was merely a personal obligation, the validity of which was not strengthened by its being part of a recorded deed.¹ But to entitle them to appeal to the records the Company must be onerous *bona fide* third parties, which in fact they were not. They were identical with Whyte and the other original feuars; they were therefore liable to implement all the obligations undertaken by Watson. The evidence shewed that they became owners of the property on the footing of adopting the actings of the original feuars prior to the date of the feu-contract in which the mistake occurred. Further, they had sufficient knowledge of the true contract between Watson and the original feuars, even if they did not know of the way in which the plan had been coloured until 1883. Whyte, whether he knew that latter fact earlier or not, certainly knew the true contract, and he was to be taken as agent for the Company as well as for himself and his co-feuars, and so he infected the Company with his knowledge. Further, the Company must be held to know the contents of the contract to feu which Whyte and his co-feuars had entered into, and these took the vassals bound to make the roads which the Company here said Watson undertook to make. Lastly, if the deed was to be held as delivered on 19th November 1879, at which date there was no wrong colouring on the plan, then the subsequent mistake, with which Watson had nothing to do, could not affect him; if, on the other hand, it was to be taken as delivered on 7th January, then his signature had been appended under essential error of a character which entitled him to have the remedy here sought.² His signature to the plan was not to the plan as coloured.

Argued for the Company;—This was an action for the partial reduction of a deed, but in all cases of mutual error, or of error in which the defender was innocent, he was entitled to have the alternative of having the contract rescinded *in toto*.³ Even if the Company were to be taken as parties to the original contract, they had had nothing to do with the blunder, which was entirely that of Watson's agent. The Company neither actually nor constructively knew either of the blunder in the plan, or of the true contract between the parties. Whyte, whatever he knew, was not their agent, and the formal disposition by Whyte, &c., to the Company was what was to be looked at, not the minute of agreement which preceded it.⁴ The pursuers averred on record that the Company had purchased knowing of the blunder in the plan. That they did not now appear to press, for they maintained the inconsistent view of the facts that the Company in purchasing knew nothing about the record, and so had

¹ As to expenses, the Lord Ordinary has found neither party entitled to them. The case as against Watson's trustees is one of the very hardest possible, and they were justified in obtaining at least one judgment upon the matter."

² Magistrates of Edinburgh v. Begg, Dec. 20, 1883, 11 R. 352.

³ Wardlaw v. Mackenzie, June 10, 1859, 21 D. 940, 31 Scot. Jur. 515, *per* Lord President McNeill at p. 947; Waddell v. Waddell, March 17, 1863, 1 Macph. 635, 35 Scot. Jur. 337.

⁴ Harris v. Pepperell, Nov. 13, 1867, L. R., 5 Eq. 1; Bloomer v. Spittle, Feb. 26, 1872, L. R., 13 Eq. 427; Paget v. Marshall, July 7, 1884, L. R., 23 Chanc. Div. 255; Steuart's Trustees v. Hart, Dec. 2, 1875, 3 R. 192.

⁵ Blair v. Blair, Nov. 16, 1849, 12 D. 97, 21 Scot. Jur. 612; Gordon v. Hughes, 1819, 1 Bligh, 287.

No. 118. not purchased on the faith of what it contained. But the true view was the Lord Ordinary's—that a purchaser was in law entitled to what the record disclosed. This was not a case of essential error on the part of Watson. He, no doubt, did not, as matter of fact, know of the blunder in the plan, but that was not enough; to entitle him to a remedy, he must not have the means of knowledge.¹ Here he had.

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At advising,—

LORD YOUNG.—The facts of the case are so fully and accurately stated by the Lord Ordinary that I shall abstain from any recapitulation. I agree with his Lordship in the conclusions in fact which he reaches upon the evidence, parole and documentary. These are in substance, 1st, that there is “a clear error” in the feu-contract called for in the reduction, in so far as it imports an obligation on Mr Watson to construct roads on the fourteen acre lot of ground, he having in fact contracted to form roads only on the three acre lot; and 2d, that the Glasgow Feuing and Building Company acquired the property in ignorance of the fact that the feu-contract expressed or imputed any obligation on Watson as to roads, which they only became aware of a considerable time after their acquisition of the property and the completion of their title.

By the defence to the petitory action at the instance of the Feuing Company, and by the relative reduction at the instance of Watson's trustees, we are asked to rectify this “clear error” in the feu-contract.

It is proved, and indeed admitted, that Watson's obligation to form the roads on the three acre lot was duly implemented. I refer to the Lord Ordinary's exhaustive and accurate narrative for all details, only noticing that the mistake sought to be rectified consists in a blunder on the part of the colourist of the contract plan, he having “tinged brown” not only the roads on the three acre lot but also those on the fourteen acre lot, and thereby made the words of the contract (which refer to the roads “tinged brown” on the plan) express Watson's obligation about fourfold in excess of the true contract of the parties.

The mistake is thus of the nature of a clerical error, and indeed a plan colourist's error in “tinging” a road is perhaps of even a more mechanical character. It is not the case of both or either of two parties contracting under the influence of error, for here the parties were under none. It is the case of the instrument which was intended to express their contract, as to which they were quite agreed, failing through the blunder which I have mentioned to express it accurately. I agree with the Lord Ordinary that on satisfactory evidence of such a mistake this Court would not hesitate, as between the original parties, to rectify it. Neither of them would be permitted to take advantage of such a mistake either by cancelling the contract altogether should he have repented of it, or by taking an unconscionable benefit to the prejudice of the other.

In all that I have said I agree with the judgment of the Lord Ordinary.

But the question is not between the original parties, for the property (the subject of the feu-contract) was purchased in 1880 by the Glasgow Feuing Company, who, accordingly, are the parties now resisting a rectification of the mistake. I think they must be regarded as *bona fide* purchasers for value, and I attach no importance to the argument that the original feuars (Whyte and his

¹ Wilson and M'Lellan v. Sinclair, Dec. 7, 1830, 4 W. & S. 398, *per* Lord Lyndhurst, p. 409; Stodart v. Dalzell, Dec. 16, 1876, 4 R. 236; Howkins v. Jackson, Jan. 30, 1850, 19 L. J. Chanc. 451; Bell's Lect. on Conv. i. 168.

three associates) were truly pioneers of the Company, their intention from the first being to promote and form such a company, as they in fact eventually did, so that (for so ran the argument) they ought to be regarded as agents in advance for the Company before its creation. But, rejecting this argument, and admitting that a *bona fide* purchaser for value may have, and as a rule has, as strong an equity to resist the correction of a mistake as the party against whom it operates has to demand the correction, and that when the equities of opposing parties are equal the Court will decline to interfere, I am nevertheless of opinion that on the facts of this case there are grounds, worthy at least of careful consideration, for the pursuers' demand, even in a question with a *bona fide* purchaser for value, to correct the mistake immediately in question.

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And here I would ask leave to explain some expressions which I have used, and may continue to use. With us "equity" is part of the common law, accompanying and qualifying the administration of it by appeals to just and equitable considerations in every department of it. So also the equitable jurisdiction of this Court is simply part and portion of its common law jurisdiction, and not distinguished by a special name. The terms "equity" and "equitable" are nevertheless convenient and useful in our practice, as common words of the language without technical meaning. The equitable rules and considerations, or, in one word, the "equity" which is part of our common law, is none the less real and valuable, perhaps the more real and valuable, than with us "equity" has never degenerated into a technical system. When, therefore, I speak of "equity" on the one side or the other, or of "equal equities," I desire not to be understood as expressing any technicalities, but merely as referring more briefly and pointedly to considerations of equity and justice (in the ordinary meaning of the words) which the common law requires us to recognise and take account of in given circumstances.

Now, assuming that Watson's trustees have a clear equity to have this mistake to their prejudice rectified, what is the countervailing equity of the Glasgow Feuing Company to resist the rectification and claim the benefit of the mistake? I have already observed that if equal injustice, or injustice of the same character, will be done to them by correcting the mistake, as Watson's trustees will suffer if it is left in operation, we cannot interfere.

The Lord Ordinary, in expressing his own opinion, puts the case for the Feuing Company as clearly and forcibly as it can be put. His Lordship says that "as onerous third parties they had a right to rely on everything which the record disclosed," meaning, of course, that the error is in the feu-contract which is recorded in the Register of Sasines. I rather think that this consideration of the faith due to the "records" (meaning, of course, simply the Register of Sasines) is the ground of his judgment. For his Lordship says that he "holds it to be proved in point of fact" that "the Feuing Company knew nothing about the obligation as to roads contained in the feu-contract before they made their purchase, seeing that neither the directors nor their agent saw the feu-contract until after the minute of agreement between Whyte & Binnie, Neilson & Livingstone, and the Feuing Company had been entered into." It is clearly proved that neither the agent nor the directors of the Company saw the feu-contract, or, prior to the summer of 1882, had any idea that Watson was under any obligation as to roads. It is equally clearly proved that Messrs Whyte & Binnie, Neilson & Livingstone, from whom they purchased, did not intend to sell to them or transfer to them as an accessory of their purchase any obligation

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as to roads. It is, in short, proved that the sellers to the Feuing Company did not intend to sell, and that the Feuing Company did not intend to buy any such obligation. So that if in the result such obligation shall be held to have been bought and sold it will be contrary to the meaning and intention of both the parties to the contract of sale just as certainly as the original constitution of it by the blundered tinging of the roads on the contract plan was contrary to the meaning and intention of the parties to the original feu-contract. The fact is indisputable that the blunder was not discovered for upwards of two years after the purchase by the Feuing Company, when it came as a surprise to all interested in the matter.

But the Lord Ordinary, while holding this "to be proved in point of fact," feels "constrained also to hold it to be irrelevant," because when an onerous third party buys "heritable property," "the law says that he shall obtain right to all that the record discloses if conveyed over to him." His Lordship's judgment is thus, as I have already observed, put upon the sanctity of the records as, in his opinion, sufficient, at least under such circumstances as occur here, to entitle a party interested to uphold a mistake in a recorded instrument to resist any equity in the sufferer therefrom to have it rectified.

I am unable to concur in this opinion, although admitting that the fact of an instrument being recorded may be a very material circumstance in the question whether the party resisting the rectification of a proved mistake in it has not a strong equity on his side, or, in more popular language, whether a real and substantial injustice would not be done to him by the rectification. I should desire, so far as possible, to confine my observations and the expression of my opinion within the exigencies of the case before us, and with that view I have to point out that the mistake immediately in question occurs in the expression of an immediately prestable obligation to form certain roads, delineated and tinged brown on a plan. The expression of the obligation occurs in a deed of conveyance, but it does not regard the title to the property thereby conveyed, and would have been as valid if expressed in a separate writing even of a character so informal as a memorandum or a letter. Nor is the legal character of the obligation affected by the circumstance of its occurring in a deed of conveyance which enters the record. A seller's disposition of a house might contain an obligation on the seller to put it in good repair, and to paint and paper it before the buyer's entry, which would of course be recorded with the rest of the deed. I should have thought the circumstance immaterial for any purpose. The Register of Sasines is designed to preserve a continuous record of the titles to feudal estate and the burdens on it, and not of such mere incidental obligations as I am now referring to. If the debtor in such an obligation made the road, repaired or painted or papered the house, or paid the expense of the disposition to the buyer, I do not imagine that he would think it necessary to take steps for clearing the record of it, by recording a discharge or otherwise. But the obligation itself would continue to stand on the record, and without anything on the record to shew that it had been discharged on implement or otherwise. Every such obligation, even the most considerable of the class,—an obligation to form a road or to supply the labour, the other party furnishing the materials,—really results in an obligation for money, and would cease at once on payment of a sum satisfactory to the creditor. But would the receipt for the money have to enter the records? Take as an illustration the petitory action now before us, in which the Lord Ordinary has given decree for £112.

Must this decree and a discharge of it be recorded in the Register of Sasines? or, No. 118.
if not, will an onerous purchaser from the feuing company be entitled to say Mar. 11, 1887.
that the record discloses the obligation and discloses no discharge, and that the Glasgow
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Now, I venture to think that these observations, if sound in themselves, do bear on the question before us, for they go to this, that a purchaser does not look to the record alone with reference to obligations of the nature and character of that in which the mistake now sought to be rectified occurs. It is foreign to the purpose of the Register of Sasines to record the course and outcome of such obligations. I am not therefore moved by any consideration of the sanctity of the Register of Sasines in dealing with this case, and I rather think from another passage of the Lord Ordinary's note that his Lordship does not think that this sanctity could have prevailed if it had been proved that the Feuing Company had notice of the mistake before the purchase. But this is very important, for it implies that in the Lord Ordinary's opinion the records will not prevail over the considerations of justice and equity on facts proved by extraneous evidence.

And this leads me to what I shall venture to present as my most comprehensive and final view of the case, which is that the question of rectifying a satisfactorily proved mistake in a written instrument is a question of real and substantial justice and equity, and so depends on the very truth of the matter in the actual case before the Court. If through the blunder of a copying clerk or of a plan colourist (I give them only as instances) an instrument fails to express what the parties to it intended—the mistake will be rectified unless there be good reason to the contrary. The only reason to the contrary with which we have here to deal is that in the meanwhile a *bona fide* purchaser for value on the faith of the mistake would suffer injustice if the rectification were made. I think this would be conclusive reason to the contrary if it were true in fact. But then I am clearly of opinion that it is not true in fact. I think it is false in fact, being of opinion that it is proved that the Feuing Company (*i.e.* their agents and directors) had no intention or thought of acquiring what the mistake, if left unrectified, will give them, and that the discovery of the expressions in which the mistake consists, and of the advantage they might take by them (if allowed to stand) came upon them as a surprise.

LORD CRAIGHILL, LORD RUTHERFURD CLARK, and the LORD JUSTICE-CLERK concurred.

THE COURT recalled the Lord Ordinary's interlocutors of 16th June and 7th July 1886; in the action of reduction, reduced, decerned, and declared in terms of the conclusions of the summons; and in the petitory action assoilzied the defenders from the conclusions thereof.

R. AINSLIE BROWN, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

JAMES HASTON, Pursuer (Appellant).—*McLennan*.
THE EDINBURGH STREET TRAMWAYS COMPANY, LIMITED, Defenders
(Respondents).—*A. S. Paterson*.

Reparation—Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), secs. 1 and 2.—By the Employers Liability Act, 1880, an employer is made liable to any workman employed by him for injury arising from defects of the plant used in his business, when the defect has arisen from, or has not been discovered and remedied owing to the negligence of the employer,

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geon, who is called strangely enough by the pursuer. He examined the horse in July—the accident having taken place in the previous April—and he gives it a good character. But notwithstanding his testimony I am of opinion that the horse was in such a condition that it ought not to have been used on the tramway; and further, that those in charge of it on the part of the Company must be held to have known of its condition.

The question of law then arises, Are the Tramways Company liable in damages to the pursuer for the accident, which was the natural result of the horse's condition. I think they are. The horses used by a tramway company are part of its plant, and they are bound to employ persons to see that their plant is in a safe condition, with reference not merely to the safety of the public who make use of their conveyances, but also of persons in their employment. And I think that in permitting this horse to be continued in use fault is to be imputed to those whose duty it was to look after the horses of the Company and through them to the Company.

I therefore should propose, if your Lordships agree with me, that the following interlocutor should be pronounced:—(His Lordship then read the interlocutor afterwards pronounced).

LORD CRAIGHILL, LORD RUTHERFURD CLARK, and the LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"Find in fact that the pursuer, James Haston, sustained serious personal injury by the horse on which he was riding, in the performance of his duty as the defenders' servant, falling and rolling over upon him; that the horse was the property of the defenders and used by them in their business; that it was in a defective and dangerous condition, and unfit to be used by the defenders as it was at the time of the accident to the pursuer and for a considerable time before, and that it was so used while in a defective and dangerous condition owing to the negligence of the defenders or of some person in their service, and entrusted by them with the duty of seeing that the horses used by them in their business were in proper condition to be used with reasonable safety; and that the personal injury sustained by the pursuer was caused by reason of the said defective and dangerous condition of the said horse: Find further in fact, that there was no negligence or fault on the part of the pursuer: Find in law that the defenders are liable in damages to the pursuer, and assess the same at the sum of £50 sterling: Therefore sustain the appeal, recall the interlocutor appealed against: Ordain," &c.

J. D. MACAULAY, S.S.C.—PATERSON, CAMERON, & Co., S.S.C.—Agents.

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FERGUSON BEQUEST FUND, First Parties.—*D. F. Mackintosh—Murray—D. Dundas.*

COMMITTEE OF MINISTERS OF QUOAD SACRA CHURCHES BELONGING TO THE CHURCH OF SCOTLAND, AND OTHERS, Second Parties.—*J. C. Thomson—Guthrie—M^r Watt.*

COMMISSIONERS UNDER THE EDUCATIONAL ENDOWMENTS ACT, 1882, Third Parties.—*Darling—G. R. Gillespie.*

Trust—School—Educational Endowments Act, 1882 (45 and 46 Vict. c. 59)—Scope of that Act, and discretion of the Commissioners.—A truster left the residue of his estate to be applied "towards the maintenance and promotion of

religious ordinances and education and missionary operations" in a certain district, "and that by means of payments for the erection and support of churches and schools belonging to and in connection with" certain religious bodies. The trustees were to consist of members of these bodies in full communion with them. It was declared in the trust-deed that "the application and appropriation of the trust-funds shall be entirely at the option and discretion of the quorum of my said trustees as to the proportions thereof to be applied to the said several objects."

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The Commissioners under the Educational Endowments Act, 1882, having framed a scheme, whereby the administration of a part of the trust-funds (being the average amount annually devoted by the trustees to educational purposes) was transferred to a governing body, and the funds were devoted to the advancement of higher education in the district, the trustees submitted a case to the Court under the Act 1882, pleading, first, that the fund was not an educational endowment in the sense of the Act, and second, that the scheme was not in conformity with its provisions, as having diverted to educational purposes funds in use to be applied to other charitable purposes, and as not having had "regard to the spirit of the founder's intentions."

Held (1) that the fund was in part an educational endowment in the sense of the statute, the discretion given to the trustees not entitling them to withhold all payments from any of the three trust purposes; and (2) that the Court could not review the Commissioners in the exercise of the discretion committed to them by the statute in determining the proportion of the endowment to be applied to educational purposes in the case of a mixed endowment, or as to the proper amount of regard to be shewn to the spirit of the founder's intention.

MR JOHN FERGUSON of Cairnbrock, who died in January 1856, left a trust-disposition and settlement, with codicils, dated in 1853 and 1855, by which, *inter alia*, he directed his trustees to hold the residue of his estate "as a permanent fund, to be called The Ferguson Bequest Fund, and to pay, apply, and appropriate the interest and other annual income, profits, and produce thereof in and towards the maintenance and promotion of religious ordinances and education and missionary operations in the first instance, in the county of Ayr, stewartry of Kirkcudbright, and counties of Wigton, Lanark, Renfrew, and Dumbarton; and thereafter, if my said trustees in Great Britain shall think fit, in any other counties in Scotland; and that by means of payments for the erection or support of churches and schools (other than and excepting parish churches and parish schools) belonging to or in connection with *quoad sacra* churches belonging to the Established Church of Scotland, and belonging to or in connection with the Free Church, the United Presbyterian Church, the Reformed Presbyterian Church, and the Congregational or Independent Church, all in Scotland, or any or either of them; or in supplement of funds collected for these purposes, or in supplement of the stipends or salaries of the ministers of the said *quoad sacra* and other four churches; and by payments of salaries or in supplement of the salaries of religious missionaries, and of teachers of schools of or in connection with the said *quoad sacra* churches and the said Free Church, United Presbyterian Church, Reformed Presbyterian Church, and Congregational or Independent Church; and by payments for forming and maintaining, or in aid of funds raised for forming and maintaining, libraries for the use of the general public; such missionaries, schools, and libraries being under the superintendence or management of members in full communion with one or other of the said five churches: Declaring that the application and appropriation of the trust-funds shall be entirely at the option and discretion of the quorum of my said trustees as to the proportions thereof to be applied to the said several objects."

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There were also provisions for the permanent trustees being brought up to the number of thirteen, and consisting of members of the five churches in the proportions of three members of the Church of Scotland, four of the Free Church, four of the United Presbyterian, one of the Reformed Presbyterian, and one of the Congregational or Independent Church. The trustees were incorporated by Act of Parliament in 1869.

The total revenue of the trust for twenty-six years from 1858 was £399,164. Of this sum £307,244 was apportioned for religious ordinances, £37,144 for missionary operations, and £54,776 for education, £8300 of this last sum being spent in school buildings and repairs, and £42,203, or about £1623 per annum, in teachers' salaries.

The relative proportions applied in the case of the different churches to education and the other purposes varied very much. About 15·4 per cent of the grant that went to congregations of the Church of Scotland was spent in education, while only 2 per cent of the grant to the Congregational Church was so applied. After the passing of the Education Act in 1872 the amount spent in educational purposes was much reduced, from 1876 to 1880 nothing being so expended, and from 1880 onwards only £300 per annum. The schools towards the support of which the sums spent in education were applied were connected with and under the direct management of congregations belonging to the different churches specified by Mr Ferguson. The education given in them was in most cases substantially the ordinary education and religious instruction given in parish schools. In others, such as mission schools, the education was largely of a religious character. Most of these schools were, after the passing of the Education Act, transferred to the school boards of the districts in which they were situated. Many of the schools were situated either in remote country districts, or in the poorer and thickly populated quarters of large towns, but all of them were connected with the congregations and churches in the locality.

The Commissioners on Educational Endowments framed a scheme, under which it was provided that the Ferguson Trustees should pay £1600 per annum to a new governing body, to be by them applied in grants to assist schools in the counties named by Mr Ferguson, in providing higher education. In determining the amount of the grants the governors were to take into consideration, *inter alia*, "efficient instruction in the Christian Reformed Protestant religion." The governing body was to consist of fifteen persons, seven of whom were to be elected by the trustees, one by each University Senatus, and the remainder by the chairmen of the school boards in the district named.

The Trustees presented a special case under the 30th section of the Educational Endowments Act. The committee of ministers of the *quoad sacra* churches belonging to the Church of Scotland, and the representatives of the four other religious bodies concerned, were the parties of the second part, the Commissioners being the third parties.

The first parties contended that the scheme was not in conformity with the statute, upon the following grounds, viz:—(1) That the Ferguson Bequest Fund is not an 'educational endowment' on a sound construction of section 1 of the said Act; (2) that on a sound construction of section 8 of the said Act the said residue is not within the scope of the Act; (3) that the scheme of the third parties is not in terms of the said Act, and particularly section 10 thereof, in respect that it diverts from other charitable purposes money in use to be applied to the same; and (4) that it is contrary to the terms of the said Act, and particularly section 15 thereof, in so far as it does not have regard to the spirit of the founder's intentions, in respect that (first) it renders impossible the exercise by the

trustees of that absolute discretion which it was a cardinal point of the founder's scheme should be reserved to them, and supersedes them by a body whose members are not required to have the qualifications of membership of the respective churches which the testator thought essential; (second) it disintegrates the Ferguson Bequest Fund, which it was the wish of the testator to preserve 'as a permanent fund'; (third) it diverts to secular education what the founder enjoined should be devoted to denominational purposes controlled by the various churches alone."

The Commissioners contended that the scheme was in conformity with the Act. They stated;—"In particular, they are of opinion, and contend, that the said sum of £1600 does not exceed the proportions of the whole revenue which has been annually applied to educational purposes, according to the average of years, since 1858."

The question put to the Court (as altered during the debate) was,—“Whether the said scheme in the particulars above mentioned, or any of them, is not within the scope of or made in conformity with the Educational Endowments Act, 1882, or is contrary to law?”

The arguments of the first and second parties proceeded on an analysis of Mr Ferguson's deed to shew that his endowment was truly of a religious rather than an educational character. If this character did not exclude the endowment from the operation of the Act altogether, at all events a scheme that did not maintain it,—and the scheme in question did not,—had not had regard to the spirit of the founder's intention.¹ They also argued from the clauses of the Act that the scheme was not in conformity with it.²

The Commissioners argued upon the statute that the endowment was included in its operation, the education intended by Mr Ferguson and given by the trustees being the ordinary education of Scotland, which included religious teaching. As regarded the other points, they were within the discretion of the Commissioners, with which the Court could not interfere.³ They were directed to secure the end contemplated by Mr Ferguson in disregard of the means prescribed by him, a discretionary power which had even been exercised by the Court at common law.⁴

At advising,—

LORD PRESIDENT.—In the argument for the first and second parties here, who are in the same interest, we were reminded that we have a jurisdiction relating to the administration of charity, which has been defined in various cases, and particularly in the case of *Clephane v. The Magistrates of Edinburgh* (7 Macph., H. L., 7). That jurisdiction, I think, is very well defined in that case. It amounts just to this, that while the Court cannot change the object of a charity, it has jurisdiction to vary the means of attaining that object when circumstances render it necessary or expedient to do so. I mention this at the outset for the purpose of saying that that is not the jurisdiction which we are to exercise in the present case. We have nothing to do here with the equitable

¹ Reference was made to the case of “The Ferguson Bequest Fund,” Jan. 16, 1879, 6 R. 486.

² These clauses are quoted *infra*, in the Lord President's opinion. Cf. also *Forrest's Trustees, &c. v. Commissioners on Educational Endowments*, March 18, 1884, 11 R. 719.

³ *Donaldson's Hospital, &c. v. Commissioners on Educational Endowments*, Oct. 31, 1885, 13 R. 101.

⁴ *Clephane, &c. v. Magistrates of Edinburgh*, Feb. 26, 1869, 7 Macph. (H. L.) 7, 41 Scot. Jur. 306, *præs.* Lord Westbury.

No. 120. powers of this Court, nor can we bring them to bear in any degree, or in any shape, upon the question now before us. We are here to exercise, not an equitable jurisdiction, but, as a Court of law, to construe a statute. This is made very clear by the section of the Educational Endowments Act, which provides for a case being presented to this Court. It is conceived in these terms:—Sec. 30.—“If the governing body of any endowment to which a scheme relates, or any person or body corporate directly affected by such scheme, feel aggrieved by the scheme on the ground of the scheme being one which is not within the scope of, or made in conformity with this Act, such governing body, person, or body corporate may, within one month after the first publication of the scheme or amended scheme, submit a case to the Court of Session, to which the Commissioners shall, and any others directly interested may, be the parties, for the opinion of the said Court on the question or questions therein stated, and if the Court is of opinion that the scheme is contrary to law on any of the grounds in this section mentioned, the Scotch Education Department shall not approve thereof, but they may, if they think fit, remit the same to the Commissioners.” The question before us, therefore, is, whether this scheme is contrary to law as being either not within the scope of the Act, or not made in conformity with the Act. This has been already settled, I think, in two cases—the case of *Forrest's Trustees* in this Division (11 R. 719), and the case of *Donaldson's Hospital* in the Second Division of the Court (13 R. 101), and we are therefore to proceed now, just as the Court did in both these cases, to answer that question, and that question only, whether the scheme is contrary to law, as not being within the scope of the Act, or not in conformity with the Act.

Now, the objections which have been stated in this case for the complaining parties are enumerated in the 12th head of the case. The first is that “the Ferguson Bequest Fund is not an educational endowment on a sound construction of section 1 of the said Act.” Now, the first section of the Act provides that “‘educational endowment’ shall mean any property, heritable or moveable, dedicated to charitable uses, and which has been applied or is applicable in whole or in part, whether by the declared intention of the founder or the consent of the governing body, or by custom or otherwise, to educational purposes.” The section, therefore, contemplates that an educational endowment may be a fund which has been applied to educational purposes, or which is applicable to educational purposes; and it may be applicable to educational purposes although it has not been in fact applied, if it is so made applicable by the declared intention of the founder, or by the consent of the governing body, or by custom. Now, in this case it appears to me that this endowment is in part, although not in whole, applicable to educational purposes, according to the declared intention of the founder, and that, of course, requires to be shewn from the testamentary deed of the founder himself. The disposal of the residue of this estate is made in these terms:—“To hold, retain, set apart, and invest the whole residue,” &c. “as a permanent fund to be called the Ferguson Bequest Fund, and to pay, apply, and appropriate the interest and other annual income, profits, and produce thereof, in and towards the maintenance and promotion of religious ordinances, and education and missionary operations” within certain counties, which are specified, in the first place, and grants are to be made for this purpose to the different Presbyterian churches and the Independent Church in Scotland. Now, if that had stood

alone, of course there could be little difficulty in answering the question whether this is in part an educational endowment, because one of the objects of the endowment is expressly said to be education. I do not dispute that what is meant is religious education,—that is to say, education combined with religious instruction; it is not contended, as I understand, that the mere teaching of religion is the object, but education conducted upon religious principles, and embracing religious instruction. I say if this matter had stopped there, I cannot think it at all doubtful that the endowment is partly an educational endowment; but then there is a clause which follows the main clause disposing of the residue in these terms:—"Declaring that the application and appropriation of the trust-funds shall be entirely at the option and discretion of the quorum of my said trustees, as to the proportions thereof to be applied to the said several objects." Now, that has been read, or at least it has been argued that it may be read, as giving the trustees a discretion to apply the whole fund to one or two of the three objects the testator has prescribed, to the exclusion of the third, and that the trustees are entitled accordingly, if they think fit—and they have to a certain extent acted upon that idea—to give the whole funds for the purpose of religious ordinances and missionary enterprises, to the exclusion of education altogether. It appears to me that that is not a sound construction of this clause. The clause merely gives the trustees the power of apportionment, but not power to exclude any one of the three objects from the benefit of the fund; and therefore, I think, we must come to the conclusion that a part of this endowment is applicable to the purpose of promoting education. The discretion which the trustees have as to the proportion to be given is probably superseded entirely by the provisions of this scheme, and whether that is in itself contrary to the scope of the Act, or not within the scope of the Act, or illegal upon any other ground, is a different question; but the first objection, I think, is completely answered by a reference to the deed founded on.

Now, referring to the twelfth head of the case, the next objection advanced is "that on a sound construction of section 8 of the said Act, the said residue is not within the scope of the Act." It is needless to read that section at length, because the meaning of it is plainly this, that the Commissioners are not to interfere with any endowment which is appropriated exclusively to the teaching of theology; and it certainly cannot be maintained, upon even plausible grounds, that the Ferguson Bequest was intended by its founder to be applied to the teaching of theology, and therefore that objection clearly fails.

But then it is said further "that the scheme of the third parties is not in terms of the said Act, and particularly section 10 thereof, in respect that it diverts from other charitable purposes money in use to be applied to the same." Now, that requires a consideration of the 10th section, which provides that "where any part of an endowment is an educational endowment within the meaning of this Act, and part of it is applicable or applied to other charitable purposes, the scheme shall be in conformity with the following provisions (except so far as the governing body of such endowment assent to the scheme departing therefrom),—that is to say"; and then follows a subsection which is not applicable to the present case. But the 2d subsection is thus expressed:—"The proportion of the endowment or annual income for the time being so applicable to such other charitable uses shall be deemed to be the proportion which, in the opinion of the Commissioners, is the proportion which has, according to the average of such number of years as the Commissioners shall deter-

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mine, been appropriated as regards capital or applied as regards income to such uses, or if that proportion differs from the proportion which ought to have been so appropriated or applied according to the express directions of the instrument of foundation, or the decree of any competent Court, or the statutes or regulations governing such endowment, the proportion applicable to such other charitable uses shall be the proportion which ought, according to the express directions of such instrument, or such decree or such statutes or regulations, to have been appropriated or applied to such other charitable uses." Now, it is quite clear that the second part of that subsection does not apply to the present case, because the proportion has not been determined either by the deed of foundation or by any statute or by anything else. The proportion was left to the discretion of the trustees under the deed, and therefore the proportion now to be settled must be determined by the first part of this subsection, which leaves it to the Commissioners, and to them alone, to determine what is the proportion which has, according to the average of such number of years as they may determine, been appropriated in the past. Now, that is the course which the Commissioners in this case have followed. Whether they have acted prudently or well in the matter, or whether they have fixed a just or expedient proportion, I am not at liberty to inquire. The matter is left entirely in their hands; it is to be regulated by what is their opinion of the matter; and therefore, the discretion being entirely in the hands of the Commissioners, they cannot be said to have committed any illegality as regards either the scope of the statute or the way in which this scheme is framed, by exercising this discretion according to the best of their ability. This is just one of those cases in which there is an attempt to appeal to the discretion of this Court to over-rule the discretion of the Commissioners, but this Court is vested with no such discretion under the statute.

Now, the fourth objection is "that it is contrary to the terms of the said Act, and particularly section 15 thereof, in so far as it does not have regard to the spirit of the founder's intentions in respect that—(first), it renders impossible the exercise by the trustees of that absolute discretion which it was a cardinal point of the founder's scheme should be reserved to them, and supersedes them by a body whose members are not required to have the qualifications of membership of the respective Churches which the testator thought essential; (second), it disintegrates the Ferguson Bequest Fund, which it was the wish of the testator to preserve as a 'permanent fund'; (third), it diverts to secular education what the founder enjoined should be devoted to denominational purposes controlled by the various Churches alone." Now, with regard to section 15, it appears to me to contain instructions or directions to the Commissioners as to what they shall do, but leaves them full discretion as to the manner in which they shall do those things; and therefore, to say as a matter of objection that what they have done in the exercise of that discretion is contrary to their legal rights, is in my opinion not an objection to this scheme, or to what the Commissioners have done, but an objection to the provisions of the statute itself. In short, the whole of this fourth objection is just a complaint that the Commissioners have been vested with the powers which the statute has given them; and therefore the whole of that objection, I think, is just a repetition of the same kind of objection as is maintained as applicable under section 10, and is an interference, or an attempt to get this Court to interfere, with the powers of discretion specially vested in the Commissioners by the Act of Parliament.

I think, therefore, that all the objections are unfounded.

LORD MURK.—By the decisions which your Lordship referred to in the case of *No. 120. Forrest's Trustees*, and in that of *Donaldson's Hospital*, the extent to which this Court can go in dealing with questions of this description was pretty distinctly laid down; and the decision of both Divisions of the Court was that, under the statute the power which this Court received to deal with the schemes of the Commissioners, or with objections taken to the schemes of the Commissioners was this, that we could only inquire whether the schemes were within the scope of the statute or in conformity with the rules of the statute, or rather in conformity with the powers given to the Commissioners by the statute, and that if we found they were within the scope and within the powers given under the statute, we had no right to sustain any objection that might be taken to them. Beyond that, the Court have no jurisdiction at all; and, as I understand the statute, it is left to parties who object to the scheme of the Commissioners, to state their objections to the Education Department of the Privy Council in London, which deals with those matters; but Courts of law have no right to entertain them. Now, I have gone over all the clauses in the statute which have been founded upon in this case to shew that the four points that are raised in the 12th head of the case were points in which the Court could interfere, and in which the Commissioners had gone beyond the statute, and I have come to the same conclusion as your Lordship, to the effect that in all those matters the Commissioners are in point of fact acting within the powers given to them by the statute, and that therefore this Court has no jurisdiction to entertain the objections taken to this scheme. There is an absolute discretion vested by the statute as regards section 10 whereby the proportion to be fixed is left to the opinion of the Commissioners, and they have expressed their opinion, and we have no jurisdiction to inquire in regard to it one way or another. I think the same remark applies to the other objections that have been raised, and I therefore concur with your Lordship as to the manner in which the question should be answered.

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sioners on
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Endowments.

LORD ADAM.—The only objections that we can entertain to a scheme are either that it is not within the scope of the Act, or that it is not made in conformity with the provisions of the Act; and these two things are different, because if the fund is not within the scope of the Act then the scheme cannot be altered or amended, while if the objection merely comes to this, that the scheme is not in conformity with the Act, then the scheme might be amended. Of the objections here, I think the first two are objections which come to this, that the fund is not within the scope of the Act; I think the others are objections that the scheme is not in conformity with the Act, and if we think it is not, an amended scheme might yet be prepared. I think there is that distinction between the kind of objections which have been stated.

Now, I agree with your Lordship that the fund we have to deal with is one which falls within the scope of the 1st section of the Act, and is an educational endowment in the sense there stated. I think it is clearly so for two reasons. In the first place, as your Lordship has pointed out, the testator himself has declared his intention to be that this particular fund with which we are dealing shall be applied to religious "ordinances and education and missionary operations"; and I quite think the proper reading of that is "shall be applied to religious ordinances, religious education, and missionary operations"; but even putting that interpretation upon it in the sense in which religious educa-

No. 120. **Mar. 15, 1887.**
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tion is used there, I see no reason to suppose that, on that account, it ceases to be an educational endowment. I have no doubt upon that point at all. With regard to religious matters, the only exception I see of an endowment for such a purpose is that contained in the 8th section of the Act, which is referred to in the next objection—namely, that it is a fund solely applicable or applied for purposes of theological instruction. That appears to me to be the only exception in the Act with regard to religious education which can be taken. This fund clearly does not fall within that section, and therefore I am satisfied that the Act applies. I am equally clear, with your Lordship, that the trustees have no option in this matter as to applying part of the fund to educational purposes, because the direction which is given to them is—"declaring that the application and appropriation of the trust funds shall be entirely at the option and discretion of the quorum of my said trustees, as to the proportions thereof to be applied to the several objects"; that is, they have entire discretion as to the proportion, but none as to this—that some portion at least must be applied to each of the three purposes. I think that is quite clear. On that ground I think this is a fund, part of which by the declared intention of the founder is applied to educational purposes; and, therefore, on that ground it falls within the Act. But I think, further, if there was a doubt about that, it would fall within it too upon this second ground, that it has been a fund which has been applied by the consent of the trustees for many years past to educational purposes; and that also would bring it within the 1st section if the intention of the founder had been less clear than it is. That that is so is quite clear from the statements in the ninth article of the case, which give us ever since the foundation of the fund the particular amounts which have been applied to educational purposes. Upon these two grounds I have no doubt whatever that this is a fund part of which is an educational endowment in the sense of section 1 of this Act. This being so, that is an answer to the first two of the objections,—that the fund does not fall within the scope of the Act.

The third objection is that the scheme "diverts from other charitable purposes money in use to be applied to the same,"—that it diverts from the other charitable purposes to which this fund is dedicated an undue proportion of the money, viz., that it diverts from the religious ordinances and missionary operations a larger sum than the Commissioners are entitled to do. Now, that matter depends upon this, whether the proportion of this joint fund which the Commissioners have directed to be devoted is a larger proportion than they were entitled under the second subsection of section 10 to order. That is the question, and it is clear that that depends on the number of years which the Commissioners have taken, or are entitled to take, in order to strike an average. It is pretty obvious, if the Commissioners had limited themselves to some of the later years of the application of this money, the sum brought out would have been very small comparatively; but they have not done that; they have taken the expenditure on educational purposes for the whole period of the existence of the fund, and having done that, taking all those years into the average, it is not said or suggested that they have exceeded the proportion which they were entitled to fix. But if that be so, then the answer to that is, that the number of years which they shall include in taking the average is entirely within the power of the Commissioners, and within their discretion. They might, if they had chosen, have taken the last seven years, if they had thought it a fair way, or the last ten years, or they might have done as they

have done in this case, gone away back to the beginning of the trust. It was entirely in their discretion whether they should take that course or follow another course in taking the average number of years. It was a matter which, as your Lordship has pointed out, was in their own discretion, and we cannot interfere with them.

The only other objection is that stated in objection 4, and upon that matter I entirely agree with your Lordship that the powers given to the Commissioners in this Act are of the very widest description. If you once get the fund within the scope of the Act, I should think it very difficult to touch any scheme framed by the Commissioners, because it seems to me upon looking over the whole of this Act that the purpose was to leave the widest possible discretion to the Commissioners, subject to the review of the Education Department and the Houses of Parliament. I think that is the scope of the Act, and that it would be very difficult, if the fund is within the Act, to challenge a scheme. However that may be, I do not think it has been successfully challenged in this case; and I concur with your Lordship that the whole of these objections must be repelled.

LORD SHAND being one of the Commissioners did not hear the case.

THE following interlocutor was pronounced on 17th May†:—"Find and declare that the scheme complained of is not, in respect of any of the objections maintained by the governing body, beyond the scope of or disconform to the provisions of the Educational Endowment Act, 1882, and is not contrary to law."

CARMENT, WEDDERBURN, & WATSON, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—
COWAN & DALMAHOY, W.S.—MACK & GRANT, S.S.C.—DONALD BEITH, W.S.—Agents.

JAMES HALDEN AND OTHERS, Petitioners.—*Jameson*—G. J. F. Grant.
LIQUIDATOR OF THE SCOTTISH HERITABLE SECURITY COMPANY, LIMITED,
Respondent.

No. 121.

Expenses—Company—Winding-up—Meetings of creditors with view to reconstruction of company—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 156.
—In a petition presented by certain creditors of a company in liquidation for an order under sec. 156 of the Companies Act, 1862,* for access to the company's books, the petitioners obtained an order, and subsequently held various meetings to consider reports by the liquidator with a view to bringing the winding-up to an end, and reconstructing the company. The scheme of reconstruction having proved abortive, held that the creditors were not entitled to the expenses of the petition and procedure following thereon out of the funds in the liquidation.

On 7th January 1886 James Halden and others, creditors of the Scottish Heritable Security Company, Limited, in liquidation, presented a petition under sec. 156 of the Companies Act, 1862, praying the Court to ordain the liquidator of the company to furnish to the petitioners a list of the creditors of the company in order that they might convene a meeting of the creditors, and, further, to ordain him to give the petitioners access to the books of the company, and to find the expenses of the petition, procedure following thereon, expense of said meetings, &c. to be expenses in the liquidation, and to authorise the liquidator to pay those expenses out of the funds in his hand as liquidator.

The liquidator lodged answers to the petition, in which he, *inter alia*,

* Quoted in the opinion of the Lord President, *infra*.

† See *infra*, under date 17th May.

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No. 121. pointed out that there was no authority in the statute for the expenses of the petition, &c. coming out of the funds in the liquidation.

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On 20th January 1886 the Court granted the prayer of the petition, reserving the question of expenses.

Subsequently several meetings of the creditors of the company were held, at which reports by the liquidator, made up with a view to putting an end to the liquidation and reconstructing the company, were considered. This scheme ultimately proved abortive.

On 4th March 1887 Mr Halden and others, creditors of the company, presented a note to the Court, in which they prayed the Court to find all the expenses following on the original petition to be expenses in the liquidation, and to authorise the liquidator to pay them out of the funds of the liquidation. The liquidator did not appear in this note.

LORD PRESIDENT.—The original petition here was presented under sec. 156 of the Companies Act, 1862, which gives the Court power to make an order “for the inspection by the creditors and contributories of the company of its books and papers as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories in conformity with the order of the Court, but not further or otherwise.” Now, that is of course intended to give creditors the means of ascertaining anything they want to know for their own interests from the books of the company, but it was certainly not intended to be used for the purpose of enabling creditors to consider whether they should put an end to the liquidation and take means to reconstruct the company. That is what was done here. The scheme, however, proved abortive, and was abandoned. The proposal now is, that out of the funds in the liquidation shall be paid the expenses of that abortive attempt. I think that is altogether incompetent and out of the question, and I am therefore for refusing the petition.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT refused the prayer of the note.

RONALD & RITCHIE, S.S.C.—MACKENZIE, INNER, & LOGAN, W.S.—Agents.

No. 122.

MRS MARY THOMSON AND HER CURATOR AD LITEM, Pursuers
(Respondents).—*M'Kechnie—Ure.*

Mar. 16, 1887.
Thomson v.
Thomson.

JAMES THOMSON, Defender (Reclaimer).—*Murray—Grierson.*

Husband and Wife—Separation—Insanity.—Held (rev. judgment of Lord M'Laren) that an action of separation at the instance of an insane wife is incompetent.

2D DIVISION.
Lord M'Laren. I. THIS was an action of separation and aliment, on the ground of adultery and cruelty, at the instance of “Mrs Mary Livingstone M'Callum or Thomson, presently residing at the Royal Lunatic Asylum, Gartnavel, near Glasgow, wife of James Thomson, clothier and outfitter in Glasgow, with consent and concurrence of Duncan M'Callum, wright and builder in Glasgow, her father, and the said Duncan M'Callum, for any interest he has in the premises,” against the said James Thomson.

The defender denied the alleged adultery and cruelty, and also pleaded, *inter alia*,—(1) No title to sue; (2) The pursuer Mrs Thomson being insane, and therefore incapable of giving authority to raise this action, and the pursuer Duncan M'Callum having no interest or title to pursue it, the action is incompetent, and should be dismissed.

A curator *ad litem* was appointed to Mrs Thomson before the record No. 122. was made up, and was afterwards sisted as a pursuer.

On 25th January 1887 the Lord Ordinary (M'Laren) repelled the de- Mar. 16, 1887.
fender's first and second pleas, and allowed a proof.* Thomson v.
Thomson.

The defender reclaimed, and argued;—*Reid v. Duff*¹ settled that an action in the name of a fatuous person who was not cognosced was incompetent. That case was still law. Here Mrs Thomson had not been cognosced, as she competently might have been, though a married woman, and anyone might purchase a brieve and sue it out.² The tutor-dative thus appointed might bring an action of separation on behalf of his ward. Neither a *curator bonis* nor a *curator ad litem* had anything to do with the person of the *incapax*, merely with her property and with the *lis* respectively;³ certainly neither could represent the *incapax* in an action of so personal a character as one of separation or of divorce,—even if the wife were the defender in a divorce. Cognition was analogous to the appointment of a committee in England, which was a proceeding of a very thorough character by way of petition to the Lord Chancellor, with an examination before a master in lunacy.⁴ The absence of cognition here, therefore, took

* "OPINION.—This case was argued on the question of title to sue. It is an action of separation and aliment, instituted in the name of a lady whose state of mind has rendered necessary her confinement in an asylum, and it is instituted with the concurrence of her father, as next of kin or nearest agnate. A *curator ad litem* was appointed in the course of making up a record, and he also insists in the action. There does not appear to be any precedent in the reported decisions of this Court for an action of separation instituted under such circumstances; and my first impressions were adverse to the claim of a father or guardian to sue for a separation in name of the daughter or ward.

"The arguments against the title are obvious. The action is in its nature strictly personal; and it is easy to see the objections to the prosecution of a claim in the name of an insane wife, which she herself, had she been capable of giving instructions to a lawyer, might have declined to raise, and which, in the event of her recovery, she might disapprove.

"But there are also reasons of expediency in favour of the action. An insane wife might be condemned by fate to suffer every kind of cruelty and indignity at the hands of her husband if the right were denied to her of suing for separation in the only way in which she can prosecute legal measures, that is, through the intervention of her nearest relative or guardian.

"Having regard to the current of English authority, and particularly to the case of *Woodgate*, 30 L. J. Prob. and Mat. 197, I have come to be of opinion that the action is maintainable.

"The case of *Woodgate* underwent very careful consideration. The committee of the lunatic wife applied, in the first instance, to the Lords Justices in Chancery for authority to promote the suit, and after a reference to the Master, the desired authority was given. After a trial, the Judge, Sir Cresswell Cresswell, granted decree of judicial separation.

"The practice of the English Courts in this matter rests on their common law jurisdiction, and is not derived directly from the statutes under which the present Court for probate and matrimonial causes is constituted.

"There being no settled principle of the law of Scotland which would debar a lunatic wife from the exercise of such rights against her husband as may be claimed by married women under the circumstances set forth in this record, I am of opinion that the authority which is justly due to the decisions of a co-ordinate Court may be allowed to determine the question in favour of the competency of the action."

¹ *Reid v. Duff*, Jan. 19, 1839, 1 D. 400.

² *Fraser, Parent and Child*, 2d edit. p. 534.

³ *Fraser, Parent and Child*, 2d edit. p. 570.

⁴ *Pope's Law and Practice on Lunacy*, p. 51.

No. 122. this case out of the principle of *Woodgate*¹ and the other English cases, in all of which there had been a committee appointed to the lunatic. Further, *Mordaunt v. Mordaunt*,² and the cases following on it, proceeded solely on the terms of the English Divorce Act, which were held to give the Court no discretion to inquire into the sanity of the wife.

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Argued for the pursuers;—The question here came to be merely one of procedure, for it was admitted that the wife could get decree of separation if she had the proper guardian. It was said she must be cognosced, and have a tutor-dative appointed to her. Now, as regarded ordinary actions that was unsound; a pupil might raise an action in his own name and have a tutor *ad litem* appointed to him afterwards,³ and the same principle applied to an insane wife.⁴ This action, however, was said to be different because it was for separation; but, on the other hand, it was not an action of divorce, and its real purpose was, that the wife might get suitable aliment. The Court would therefore be slow to require such a cumbrous proceeding as the bringing of a cognition of insanity before allowing the wife to get an award of aliment. The law of England was clear. The committee of an insane wife might bring a separation on her behalf,⁵ or a divorce,⁶ or defend an action of divorce for her,⁷ or bring a suit for nullity of her marriage.⁸ It had also been held in England that an *ex facie* valid appointment of guardian would not be questioned in such actions.⁹

After the hearing the Court gave the parties an opportunity of considering whether they would arrange for the aliment of the wife, but it was intimated that they had failed to come to terms.

At advising,—

LORD JUSTICE-CLERK.—I think that this action, both in form and on its merits, is incompetent, and that it should be dismissed.

LORD YOUNG.—That is my opinion too. I think that there are very strong and obvious reasons against allowing an action of separation to proceed in the name of a lunatic wife, who owing to her lunacy is confined in a lunatic asylum. I think that such an action would be highly inexpedient. I know of no instance of it in this Court, and I am not prepared to make one now, nor am I influenced by the English authorities, which have been referred to. I think, then, that an action of separation, and still more an action of divorce at the instance of a lunatic wife, is incompetent. She must of course be alimented, and an action for aliment may be brought in her name with the aid of any guardian whom the Court may assign to her, but this is not such an action. If the parties had agreed to convert it into such an action we might perhaps have entertained it, although I do not know that that is quite clear, because it seems to me doubtful whether we can pronounce a decree although even for aliment only in this action, which concludes for separation, and for aliment merely as an incident of that separation. If there is a dispute between this lady's father and

¹ *Woodgate v. Woodgate*, June 7, 1861, 30 L. Jour. Prob. and Matr. 197.

² *Mordaunt v. Mordaunt*, June 22, 1874, L. R., 2 Scot. and Div. App. 375.

³ Fraser, Parent and Child, 2d edit. p. 152.

⁴ Swan or Briggs, Jan. 29, 1853, 2 Stuart, 184.

⁵ *Woodgate v. Woodgate*, *supra*.

⁶ *Parnell v. Parnell*, Jan. 2, 1814, 2 Hagg. Cons. 169; *Mordaunt v. Mordaunt*, *supra*.

⁷ *Baker v. Baker*, April 6, 1880, 5 Prob. Div. 142.

⁸ *Hancock v. Peaty*, March 19, 1867, 1 Prob. and Div. 335.

⁹ *Barham v. Barham*, Jan. 13, 1819, 1 Hagg. Cons. 5.

her husband as to the suitable amount of aliment for her in the circumstances, and the question is to be determined of consent, the reference ought to be made to some third party rather than to this Court. But, I think with your Lordships that we of our own proper authority and jurisdiction can regard this action only as an action in the name of a lunatic wife for separation, and for aliment as an incident of the separation, and so regarding it, I think that it is incompetent, and ought to be dismissed.

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LORD CRAIGHILL.—I confess I was surprised when I saw that this was an action for separation at the instance of an insane wife, and still more so when I found that the competency of such an action had been sustained by the Lord Ordinary. It is an action in which the lady's father has taken the initiative because she herself was not able from mental incapacity to form any judgment as to her rights and interests. In such circumstances, the instance in so far as she is concerned might just as well have been a blank. It seems to me that to allow an action of this character to proceed without the knowledge of the wife would be a very serious matter indeed, and one for which we should require very clear and distinct authority. It is admitted there is no precedent for such an action in Scotland, and although I have the highest respect for the Courts of England, yet their decisions are not binding on us here, and in the present instance I am unable to adopt the principle of the case from that law on which the Lord Ordinary has founded his judgment, for I regard such an action as the present as one contrary to public policy. I therefore agree with your Lordships that it is incompetent, and ought to be dismissed.

LORD RUTHERFURD CLARK.—I am of the same opinion with reference to the competency of the action. I think that we cannot sustain an action of separation at the instance of an admittedly insane wife. There is, I think, no proper action before us. I should, nevertheless, for myself have been glad to prevent further expense being incurred by allowing a remit to ascertain the amount of the husband's estate if the parties had consented to it, but as this is apparently not desired, I think we have no alternative but to dismiss the action.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the first and second pleas in law for the defender, and dismissed the action.

RONALD & RITCHIE, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

WILLIAM STRANG, Pursuer (Respondent).—*Low—Salvesen.*
JAMES STIRLING STIRLING STUART, Defender (Appellant).—*Murray—*
C. K. Mackenzie.

No. 123.

Mar. 16, 1887.
Strang v.
Stuart.

Lease—Agricultural Holdings Act, 1883 (46 and 47 Vict. cap. 62), secs. 1, 36, and 42—Compensation for unexhausted improvements.—Held that a renun-*

* Sec. 1.—“Subject as in this Act mentioned, a tenant who has made on his holding any improvement specified in the schedule hereto, shall, from and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant. . . .”

Sec. 36.—“Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing

No. 123. ciation of a lease by a tenant, accepted by the landlord, did not bar the tenant from recovering compensation for unexhausted improvements under the Agricultural Holdings Act, 1883.

Mar. 16, 1887.
Strang v.
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Lease—Agricultural Holdings Act, 1883 (46 and 47 Vict. cap. 62), sec. 7—Compensation for unexhausted improvements—Notice.*—The Agricultural Holdings Act, 1883, requires a tenant who claims compensation from his landlord for unexhausted improvements to give notice of his claim four months before the termination of his tenancy. *Held* that, in the case of leases which terminate at Martinmas for the arable land, and six months later for the houses and grass, notice given four months before the latter term is sufficient notice.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

By a lease dated 21st and 26th August 1871 for nineteen years Captain Stuart let the farm of Parklee to Mrs Janet Strang. Her son William acquired right to this lease by assignment dated 28th December 1883.

The clause as to entry was in these terms:—The lease was to endure “for the space of nineteen years from and after the term of Martinmas 1871, as to the arable lands, and Whitsunday thereafter as to the houses and grass, all at the yearly rent of £125 sterling, payable half-yearly by equal portions, at Martinmas and Whitsunday, commencing the half-yearly payment at Martinmas 1872, and the next at Whitsunday thereafter.”

By renunciation dated 7th and 9th November 1885, Strang gave up his lease “from and after the term of Martinmas 1885 as to the arable lands, and Whitsunday 1886 as to the houses and grass.” The renunciation made provision for payment of rent and arrears of rent, but contained no reference to any claim for compensation. Captain Stuart accepted the renunciation, “but under the express condition that the offer to lease the farm by William Lawson, blacksmith, Provanmill, by Millerston, will be confirmed by missive.”

In January 1886 William Strang sent to Captain Stuart notice of an intended claim under the Agricultural Holdings Act, 1883, for unexhausted improvements. Captain Stuart having failed to take any steps to appoint a referee in terms of the 9th section, Strang in July 1886 raised an action in the Sheriff Court of Lanarkshire craving the Court, —“To appoint a competent and impartial person to be a referee, along with William Fleming, farmer, Fulwood, by Linwood, Renfrewshire, the referee appointed by the pursuer, to settle the difference between pursuer and defender arising out of a notice of intended claim by the pursuer and the said James Strang to the defender, specified in the condescendence hereto annexed.”

His claim was thus specified:—

“(1) Value of grass and clover seeds sown in 1885, .	£6 9 0
(2) Repayment of account for fencing, . . .	1 3 11
(3) (a) Sums expended in application to the land	

Carry forward, £7 12 11

such compensation as is by this Act permitted to be substituted for compensation under this Act), shall, so far as it deprives him of such right, be void.”

Sec. 42.—“ . . . Determination of tenancy means the termination of a lease by reason of effluxion of time, or from any other cause.”

* Sec. 7.—“Notwithstanding anything in this Act a tenant shall not be entitled to compensation under this Act unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act.

“When a tenant gives such a notice the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter notice in writing to the tenant of his intention to make a claim for compensation under this Act.”

" Brought forward,	£7 12 11	No. 123.
of purchased artificial or other purchased manure; and (b) sums expended in bean-meal and other feeding stuffs not produced on the farm, and consumed by cattle and pigs, as detailed in said claim,	48 9 5	Mar. 16, 1887. Strang v. Stuart.
	<u>£56 2 4"</u>	

The defender pleaded (1) that the claim had been abandoned, and (2) that the pursuer had failed to give notice of his claim in conformity with the Act.

On 24th July the Sheriff-substitute (Guthrie) pronounced this interlocutor:—(After findings in fact)—“Finds that the said claim is not excluded by the foreshaid renunciation; therefore repels the defender's pleas; and in respect that the defender has failed, for seven days after notice from the pursuer, to appoint a referee for settling the amount and mode and time of payment of compensation under the said Act, appoints Allan Kirkwood, Esq., land-agent, Glasgow, to be referee, to act along with the referee appointed by the pursuer in the premises, and decerns.”*

On 9th November the Sheriff (Berry) adhered.†

* “NOTE.— . . . The notice is said to have been too late, the ish of the lease being at Martinmas 1885, not at Whitsunday 1886. It seems to me that this is the ordinary case of a Whitsunday entry and Whitsunday removal, with the usual provision to enable the incoming tenant to labour the arable land at the preceding Martinmas. See 1 Hunter, L. & T. 384; *E. of Hopetoun v. Wight*, 1863, 1 Macph. 1097, app. 1864, 2 Macph. H. L. 35. The point is clear, and needs no commentary.

“I do not think I can hold the tenant to be excluded from his statutory right to claim compensation by his having renounced the lease without reserving this claim. The statute which confers the right to compensation on a tenant gives it to him ‘on quitting his holding at the determination of a tenancy’ (sec. 1), and ‘the determination of a tenancy’ is said (sec. 42) to ‘mean the termination of a lease by reason of effluxion of time, or from any other cause.’ There is no more usual or natural cause, apart from expiry by effluxion of time, than renunciation or agreement; and it seems altogether inconsistent with the purpose and intention of the Act, to hold that every renunciation shall exclude its operation, unless the right of the tenant to claim compensation is expressly reserved. In renouncing a lease a tenant is presumably aware of the rights which the law confers at ‘the determination of a lease,’ and there is no reasonable ground for assuming that he waives or abandons them, unless he expressly says so. The recent case of *Lyons v. Anderson*, June 25, 1886, is different from the present case. However that may be, the principle laid down in that and previous cases (*Waterson v. Stewart*, 1881, 9 R. 155) that a renunciation of a lease imports a renunciation of all claims under it, cannot, in my opinion, be extended so as to make such a renunciation extinguish the statutory claim for compensation, which comes into existence only by reason of the renunciation itself.”

† “NOTE.— . . . I do not think that the renunciation, by expressly providing for payment of the rent to the landlord, necessarily excludes the tenant's claim under the statute; and were there any doubt on this point, the provision in section 36 of the Act, that any agreement by the tenant depriving himself of his right to claim compensation shall be void, would prevent the tenant from being prejudiced in that way. The other objection is one of more general importance. Under section 7 of the statute, it is required that, to entitle a tenant to compensation, he shall, ‘four months, at least, before the determination of the tenancy,’ give the statutory notice, and the question is, when did this tenancy determine? I am of opinion that it did not ‘determine’

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The defender appealed, and argued;—In the first place, this was not a Whitsunday but a Martinmas entry; that followed from the principle on which the case of the *Earl of Hopetoun v. Wight* was decided,¹ viz., that you must look to the term when occupation actually began as the term of the lease. In the Sheriff Court Act of 1853, it was provided² that when a lease had twoishes notices of removal must be given before the first of them. The period described as “the determination of the tenancy” must be the term of removal. The landlord was entitled to give a counter notice within fourteen days after the determination of the tenancy; that could not mean six months after another tenant had been in possession of the arable land for six months. Further, if the tenant were entitled to give his notice in January, when the whole course of cultivation had been altered by a new tenant, the object of requiring notice, viz., that evidence might be preserved, could not be attained. Besides the renunciation here was not “any other cause” in the sense of section 42 of the statute; that referred to the irritancy commonly following on a failure to pay rent.³ At a renunciation there was a presumption that all claims *hinc inde* were settled.⁴ The mere fact of the lease coming to a premature termination gave the tenant at common law no right to compensation for improvements; he spent his money under that risk among others.⁵

Argued for the pursuer;—The term before which notice was to be given was Whitsunday; that was the term when the tenant was to quit the houses and the grass, which might be a very considerable part of the farm. This was not a Martinmas entry; in a Martinmas entry a tenant entered to the whole farm at that term.⁶ The analogy of such cases as the *Hopetoun* case was misleading; there the real nature of the lease was that entry was to the whole farm at Whitsunday with a privilege to the old tenant to come on the lands to carry off the crop which he had sown. Here the

till Whitsunday 1886. The renunciation which determined it bears to be ‘from and after the term of Martinmas 1885 as to the arable lands, and Whitsunday 1886 as to the houses and grass.’ Now, although the tenant gave up possession of the arable lands at Martinmas 1885, he remained in possession of the houses and grass till Whitsunday 1886. He did not quit the subjects, therefore, till the latter date, and I do not think his tenancy determined till then. It is true that, as was suggested, inconvenience may arise from the statutory notice being delayed till after a new tenant has interfered with the land. But, on the other hand, inconvenience might arise from requiring that notice be given at a very early date, and in construing the statute we can hardly take a balance of convenience or inconvenience on the one side or the other as a safe guide. In these circumstances, I am of opinion that the notice which was given four months before Whitsunday 1886 was given four months before the determination of the tenancy, and was, therefore, sufficient within the statute. The case differs materially from that of *Hannan v. Ramsay*, March 10, 1885, 1 Sheriff Court Reps. 236, decided in the Sheriff Court of Argyllshire, and referred to at the debate. The tenant there had quitted the houses, buildings, and pasture lands at Whitsunday 1884, and had merely a right to use the barns till the 15th March 1885. He was no longer, after the former date, in the position of tenant, and his tenancy had, as the Sheriff held, determined. Here the pursuer remained in possession as tenant of the house and pasture land till Whitsunday 1886, and, as I have said, his tenancy did not, in my opinion, determine till then.”

¹ July 10, 1863, 1 Macph. 1074, 35 Scot. Jur. 612.

² 16 and 17 Vict. cap. 80, sec. 30.

³ Bell's Pr. sec. 124.

⁴ *Lyons v. Anderson*, June 25, 1886, 13 R. 1020; *Jenkin v. Younger*, March 10, 1825, 3 S. 639.

⁵ *Scott's Executors v. Hepburn*, June 14, 1876, 3 R. 816.

⁶ *Hunter*, i. 384.

important condition was that the old tenant retained the houses, *e.g.* for feeding purposes, and for the residence of his family, while the new tenant had the privilege of coming on to the farm to labour it. It would be impossible to give notice before Martinmas, for a tenant might go on earning a right to compensation up to Whitsunday, *e.g.* by feeding with oilcake or eating off turnips. Again renunciation was included in the term "any other cause." Even if it were not, by the 36th section any contract by which the tenant was deprived of his right to compensation was void. [LORD YOUNG.—But you cannot apply that to a case where a tenant discharges his claim.] The renunciation here was pleaded as a bar rather than as a discharge. This was an entirely different case from a case of a discharge of claims under a lease; a renunciation might well cover them, for it was a renunciation of the lease itself. Again, cases such as that of *Lyons*, where claims *hinc inde* had been discussed, were different.

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At advising.—

LORD JUSTICE-CLERK.—The Sheriff has found that the notice was sufficient, and I agree with him. The statute says that it must be given four months at least before the determination of the tenancy, and it seems to me that the statute would be entirely inextricable unless there were a specific point. It can only mean one point, and I think that the just and reasonable interpretation to put upon the words "determination of the tenancy" is the period after which no possession can be had by the tenant in terms of the lease. In this case, although his renunciation of part of the farm at Martinmas terminated his right to occupy the arable land from that term, the lease was not at an end, and the tenant had right to occupy part of the lands under it till Whitsunday. That seems to me, therefore, to be the determination of the tenancy.

With regard to the second point, *viz.*, whether the tenant has given up his claim by the renunciation, it would have been better if parties had provided for this in the renunciation, for there may be two views of the matter. The landlord might say that the renunciation covered all such claims, the tenant might say that it was hard to take away from him a right which was not expressly mentioned. On the whole I am of opinion that the latter view is the better.

The result is that I agree with the Sheriff on both points.

LORD YOUNG.—I agree with your Lordship. The lease here terminated, not by coming to an end according to its own terms, but by an agreement of parties to bring it to a conclusion before its natural termination. In these circumstances two questions are raised, and I think it is well to separate them as your Lordship has done. The first is whether, when a renunciation is made and accepted, there is an end to claims under the Agricultural Holdings Act,—whether that arrangement between the parties extinguishes any such claim. I agree that that is not so. I think the tenant had a right at the time of the renunciation,—the right which the statute gave him. If the unexhausted improvements had been made by him he had a right to compensation for them at the time of the renunciation. If parties meant to discharge that right, which I think it was quite lawful for them to do notwithstanding the provisions of the 36th section, I think they must have expressly excluded the claim. As that was not done, I am of opinion that the claim was not renounced.

No. 123. The other question is quite a general question, and is exactly the same question as would have arisen if the lease had run on to its natural term. In all, or almost all leases of arable farms there are two periods of entry and two periods of removing. The more common case is that the term of entry is Whitsunday with respect to the grass and houses, and the following Martinmas with respect to the arable land, i.e., the land which is under the plough for that year. When the statute prescribes as a condition of the right to compensation for unexhausted improvements that notice shall be given four months at least before the termination of the tenancy, to which of the two periods does it refer? The statute says (sec. 42) "determination of tenancy" means the termination of a lease by "reason of effluxion of time, or from any other cause." That does not make the matter any clearer, for the lease terminates at one period as to one part of the farm and at another as to the rest. It is a pity that the statute did not settle the matter. I think with your Lordship that the argument is not all on one side; there is room for reasonable argument on both.

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I prefer the latter term, having in view what is, I think, a legitimate consideration that, whatever opinions may be entertained as to the policy of the Act, and, as we know, there is a difference of opinion on that matter, it was in the view of the Legislature a remedial statute, intended to remedy what in their view was a grievance of the tenant. The rule and principle is that a remedial statute is to have a liberal, as distinguished from a strict, construction. I think, therefore, that the proper construction of the statute is that the termination of the lease is when a total termination takes place,—when an end is put to it. This cannot be reasonably predicated when a tenant, who is still in possession of the houses and a considerable part of the lands, gives the incoming tenant access to the land to sow his crop.

We are determining here a general rule of construction. The term at which the tenant ceases under the lease to be tenant of the lands specified in it is the term referred to.

LORD CRAIGHILL.—I have come to the same conclusion as the Sheriffs, and think that the appeal against their judgment ought to be dismissed.

With reference to the first of the defences, it appears to me that there is no implication of any abandonment of the pursuer's right to compensation involved in the renunciation of his lease. The renunciation is a bipartite contract. It is given by the one party and accepted by the other, and the terms on which the pursuer gave up the farm are those which are specified in the deed of renunciation. There may be cases in which the renunciation of a lease without the reservation of a claim may bar the tenant from bringing it forward, but, assuming this, the present claim is not of such a nature as to involve this result. The claim was a statutory claim. The amelioration of the farm by manures put into the ground, the benefit to be derived from these in the future so far as unexhausted, are the origin of the right. The claim, therefore, is not for damages, but merely for compensation for benefits conferred. There is in the ground, *ex hypothesi*, value for all that can be claimed, or will be awarded. Presumptively, therefore, there can be no implication that such a claim was abandoned, because the lease was renounced. Probably there might have been a bargain, had the parties chosen to make it the subject of a special agreement. But neither made any stipulation on the subject, and accordingly, as I think,

the matter is left as it would have been left if the lease in place of being **No. 123.**
renounced had run for the full period of nineteen years.

As to the second of the defences, I have little to add to that which has been presented by the Sheriffs in explanation of their grounds of judgment. The Act provides (sec. 1), "The tenant shall be entitled on quitting his holding at the determination of his tenancy to obtain from the landlord as compensation under this Act such sum as fairly represents the value of the improvements to an incoming tenant," but subject to this proviso (sec. 7)—"A tenant shall not be entitled to compensation unless four months at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this Act." The question is whether four months at least before the determination of his tenancy the pursuer gave the requisite notice. If his tenancy terminated at Martinmas 1885 he was too late, for it was only in January following that notice was given. If, on the other hand, the determination of his tenancy was not until Whitsunday 1886, the notice was within the statutory period. Part of the subject let was no doubt surrendered, or, in other words, the pursuer's tenancy of that part of the farm came to an end at Martinmas 1885, but with reference to the houses and grass the tenancy did not then come to an end. It was continued, and the lease was the title of possession till Whitsunday 1886. Were it enough to shew that the right of tenancy over the farm as a whole had ended at Martinmas 1885, the defender's contention would probably be made good. But there is nothing in the words of the Act which leads to this conclusion. On the contrary, the issue is the determination of the tenancy, and that is defined by the interpretation clause, sec. 42, to be "the termination of a lease by reason of effluxion of time, or from any other cause." The lease was an operative contract after Martinmas 1885. Neither by effluxion of time nor otherwise had the contract been brought to an end. On the contrary, there was possession under the lease; there were rights and obligations resulting therefrom, and, consequently, Whitsunday 1886 was the term four months before which it was necessary, if a claim for unexhausted ameliorations was to be made, that notice should be given to the defender.

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LORD RUTHERFURD CLARK concurred.

THE COURT dismissed the appeal, and affirmed the interlocutor appealed against.

J. YOUNG GUTHRIE, S.S.C.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

JOHN MANTACH (James Davidson's Trustee), Pursuer and Real Raiser.

No. 124.

THOMAS NEILSON (Davidson Sharp's Factor), Claimant.—*Lyell.*

JAMES JAMESON, Claimant.—*J. C. Lorimer—Macphail.*

Mar. 18, 1887.
Jameson v.
Sharp.

Prescription—Arrestments—Furthcoming—Act 1669, cap. 9—Personal Diligence Act, 1838 (1 and 2 Vict. c. 114), sec. 22.—A creditor arrested upon a decree a fund vested in his debtor, but not payable till the death of an annuitant. Within three years of the date of the arrestments* the debtor applied for and obtained

* The Act 1669, c. 9, enacts,—“That all arrestments to be used hereafter upon decreets, registrate bonds, dispositions or contracts, not pursued or insisted on within five years after the laying on thereof, shall after that time prescrive; and that all arrestments already used upon the ground aforesaid shall prescrive

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decree of *cessio*. The arrester appeared to oppose the application, but did not found on his arrestments. *Held* that on the lapse of the three years, the arrestments prescribed, as they had not been "pursued or insisted on" in the sense of the Act 1669, cap. 9.

Observed, that though the arrested fund was not payable till the death of the annuitant, it would have been competent for the arrester to interrupt the course of prescription by raising an action of furthcoming, concluding for payment upon that event.

Trust—Assignment—Intimation.—Intimation of an assignment of a beneficial right under a trust was made to A, one of the two trustees. The other trustee was in bad health, but was able for business, and had not resigned. The funds were in A's hands, and he managed the whole affairs of the trust. *Held* that the intimation was sufficient.

1st Division.
Lord Kinnear.
B.

JAMES DAVIDSON, merchant, Rothes, died in 1868 leaving a trust-disposition and settlement under which his trustees, John Mantach, the Rev. Alexander M'Watt, and another, were directed, *inter alia*, to pay to his widow, Mrs Helen Davidson, a certain annuity, and on her death to divide the residue of his estate among his grandchildren then surviving, of whom James Davidson Sharp was one, but under the declaration that the interest of the residuary legatees should vest at his, the truster's, death, and be payable on their reaching twenty-one years of age.

James Davidson Sharp died in 1872, and one-half of his share of his grandfather's estate then vested in his father, James Sharp.

On 26th September 1879, James Sharp by a bond and assignment in security assigned his interest to his son, Davidson Sharp, and this assignment was intimated to Mr Mantach, as James Davidson's trustee, on 1st December 1879. There was another trustee then alive, Mr M'Watt, but he was in bad health, and Mr Mantach was the managing trustee, and had the funds in his hands. On 1st October 1879, James Jameson, solicitor, Elgin, raised an action for payment against James Sharp, and on the dependence used arrestments on 22d October following in the hands of Mr Mantach, as James Davidson's trustee.

On 18th November 1879, Jameson obtained decree.

On 4th June 1880, arrestments in execution, proceeding on that decree, were executed in the hands of both the surviving trustees (Mr Mantach and Mr M'Watt) of James Davidson.

On 21st June 1880, James Sharp was charged on the decree in the action.

On 29th July 1880, James Sharp presented a petition for *cessio* in the Sheriff Court of Lanarkshire, and James Jameson, the pursuer of the action against Sharp, appeared in that process and opposed the *cessio*, but finally acquiesced in the decree, which was granted, and thereafter extracted in November 1880. A trustee was nominated, in whose favour James Sharp was appointed to execute a disposition, but no such disposition was executed, and no further proceedings were taken in the process. The arrestments of 22d October 1879 were not founded on, or indeed mentioned in that process.

In May 1883, Mrs Davidson, the widow of the truster James Davidson, died, and his estate became divisible.

Mr Jameson again used arrestments in execution in May 1883, and

within five years of the date hereof, and that all arrestments used or to be used upon dependence of actions shall likewise prescribe within five years after sentence is obtained in the said actions, if the said arrestments be not pursued or insisted on within that time." By Act 1 and 2 Vict. c. 114, sec. 22, the period of prescription is limited to three years.

September and October 1884, in the hands of Mr Mantach (Mr M'Watt No. 124. having died on 27th November 1880).

On 1st December 1884, Mr Mantach, sole surviving trustee on the estate, raised an action of multipointing, in which the fund *in medio* was James Davidson Sharp's share in his grandfather's succession, which had passed to his father, James Sharp. He called as defenders, Mr James Jameson, the arresting creditor, and Mr Davidson Sharp (who was represented by his factor, Mr Neilson), the assignee under his father's assignation above mentioned, who both claimed. Mar. 18, 1887.
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The above facts were admitted, and it was further admitted that Mr M'Watt, one of James Davidson's trustees, who died in 1880, was in delicate bodily health for several years before his death, but was able to transact business, and did so till he died. He never resigned the trust, but the whole trust funds were in the hands of Mr Mantach, who managed the trust.

Mr Jameson claimed to be ranked preferably on the fund to the extent of the debt for which he had obtained decree, with all subsequent expenses.

He pleaded;—(1) In virtue of the decree and arrestments libelled, particularly the arrestment used on 4th June 1880 and subsequent dates, the claimant James Jameson is entitled to be ranked and preferred as claimed. (2) The bond and assignation founded on by the claimant Thomas Neilson was not duly intimated, and is inept.

Mr Neilson claimed the whole fund *in medio*. In answer to the competing claim, he stated,—“The claimant does not admit the validity of said arrestments, of which those executed on 22d October 1879 and 4th June 1880 have become void by prescription. The latter has also become inoperative in respect of said decree of *cessio*, while the other arrestments are subsequent in date to the intimation to the pursuer of the assignation before mentioned, and to the decree of *cessio* already referred to.”

He pleaded,—(1) The said Davidson Sharp having acquired, as condescended on, right to the said share of the trust-estate of the said James Davidson, to the exclusion of all other claims, the present claim to the whole fund *in medio* should be sustained. (2) The arrestments founded on by the claimant Mr Jameson being invalid and inept, and the arrestments specially founded on being posterior in date to the intimation of the bond condescended on, and being also prescribed, his claim is unfounded, and should be repelled.

On 22d June 1886, the Lord Ordinary (Kinnear) repelled James Jameson's 1st and 2d pleas in law, and allowed proof on a third plea which need not be here specified.*

* “NOTE.—The subject of competition in this case is the interest of James Sharp in the residuary estate of the late James Davidson, merchant in Rothes; and the competing claimants are a creditor who claims a preference in respect of certain arrestments, and the factor and commissioner for Davidson Sharp, a son of James Sharp, who founds upon an intimated assignation.

“James Sharp in 1880 obtained a decree of *cessio bonorum*, and a trustee was nominated in whose favour he was appointed to execute a disposition. But no such disposition was in fact executed, and no further proceedings were taken in the process. The present process has been intimated to the trustee, but he has not thought fit to enter appearance. The only persons who were stated by the petitioner in the application for *cessio* to be creditors are the real raiser, Mr Mantach, and the claimant, Mr Jameson; and all parties are agreed that their rights may be determined in this process, and that it is unnecessary to resort to the process of *cessio* for that purpose.

“The questions argued were, whether the arresting creditor has obtained an

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On 2d November 1886 the Lord Ordinary sustained the claim of Mr Neilson, and ranked and preferred him to the whole fund *in medio*.

Mr Jameson reclaimed, and argued;—(1) The arrestments of 22d October 1879 and 4th June 1880 were not prescribed. The Act of 1669, cap. 9, enacted that if not “pursued or insisted on” within five years arrestments prescribed, and by the Act 1 and 2 Vict. c. 114, the time was shortened to three years. The question then came to be, had the three years been interrupted by any act of pursuit or insistence? He maintained that they had. No definite rule as to what constituted pursuit could be laid down; it was always a question of circumstances. Undoubtedly some judicial steps required to be taken.¹ Appearance in a multiplepoinding was sufficient. Appearance in a *cessio* ought to be looked upon as equivalent to appearance in a multiplepoinding.² *Thomas's* case was a decision on what was pursuit of a debt, but the Act on which that question depended (1579, c. 83) was practically in the same words as regarded this point as the statute regarding the prescription of arrestments. The appearance in the *cessio* was all the arrester here could do, as the money could not be made forthcoming till

effectual preference, assuming the assignation to be valid; and if not, whether the assignation has been duly intimated, so as to divest the cedent.

“The arrestments used on 22d October 1879, and on the 4th of June 1880, are in my opinion prescribed (1 and 2 Vict. c. 114, sec. 22); and the assignation, assuming that it is valid and well intimated, is preferable to the later arrestments. It is maintained that prescription was interrupted by the decree of *cessio* in October 1880. But there is nothing in the proceedings upon which the claimant Jameson can found as being tantamount to his ‘pursuing and insisting on’ his arrestment within the statutory period of three years. The Sheriff found the petitioner entitled to the benefit of *cessio* on the 7th October, and pronounced decree of *cessio* on the 22d October 1880; and since then nothing appears to have been done in that process. Mr Jameson made no claim in the *cessio*, and took no step to make his arrestment effectual, or to found upon it for any purpose, until he claimed in the present action. He appears to have objected to decree of *cessio* being granted, on the ground that the fund now *in medio* was not included in the debtor’s statement of his assets. But the Sheriff repelled the objection, first, because the petitioner was not, at that date, possessed of funds to meet his liabilities; and secondly, because in so far as he had a prospective interest in James Davidson’s estate, he had either been denuded of the same by the assignation to his son, or if that assignation were, as Mr Jameson maintained, challengeable as collusive, he would be denuded by the disposition *omnium bonorum* which he would be required to grant. It appears to me that there is nothing in these proceedings to keep alive the arrestment. It is said that under the *Cessio* Act then in force (6 and 7 Will. IV. c. 56), the decree operated as an assignation of the debtor’s moveables in favour of the trustee for behoof of creditors. But that would not affect preferences already obtained, either by a previously intimated assignation, or by duly executed diligence; nor could it have any effect in perfecting uncompleted diligence.

“The next question is whether the intimation has been duly intimated so as to be preferable to the later arrestment. The objection is that there were two trustees, and that the assignation was intimated only to one of them. But it is admitted that the whole trust funds were in the hands of Mr Mantach, the trustee to whom intimation was made; and that his co-trustee, Mr M’Watt, died in November 1880, before any of the arrestments were used, which were still in force when this action was raised.”

¹ Thomson & Ainslie v. Simpson, 1774, M. 11,049; Macmath & Campbell, 1802, M. 11,051; Crawford v. Simpson, 1732, M. 11,049.

² Thomas v. Stiven, May 20, 1868, 6 Macph. 777, 40 Scot. Jur. 399,—See Lord Ordinary Mure’s note.

the death of the truster's widow. The *cessio* was applied for in consequence of the charge which followed on the arrestments. (2) The intimation founded on by the other claimant was not good, being made to only one of two trustees.¹

Argued for Mr Neilson ;—(1) The reclamer had failed to shew that he had done anything to insist in his diligence during the statutory three years. He certainly appeared in the *cessio*, but he did not found on his arrestments, and merely appeared as a creditor. His proper course would have been to raise a furthcoming, and limit the conclusions of his summons to payment at the death of the liferenter. (2) The intimation to Mr Mantach was sufficient.² He was the managing trustee, and all the funds of the trust were in his hands.

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LORD PRESIDENT.—The first question in this case is whether the arrestments used by the reclamer on 22d October 1879 and 4th June 1880 are prescribed, and, if that question is to be determined in his favour, of course the arrestments being effectual he will be preferred in this action. The Lord Ordinary has, however, found that they are prescribed, and I agree with him in that conclusion. The Statute of 1669, though it is old, is still *in viridi observatione*, for not only has effect been given to it in quite modern times, but its policy has been recognised in comparatively recent legislation by the Act 1 and 2 Vict. c. 114. In that statute, so far from there being any intention manifested of going back on the policy of the older statute, the time of prescription of arrestments is reduced from five to three years. Accordingly, if after the lapse of three years from the laying on of the arrestments nothing has been done to break the period of prescription, the arrestments are prescribed and of no avail. It is said here, however, that the arrestments have been acted on during the prescriptive period, and the question is, has anything been done here sufficient to satisfy the words of the statute?

The Act 1669, chap. 9, provides that any arrestment “already used upon the ground aforesaid shall prescribe within five years of the date hereof, and that all arrestments used or to be used upon dependence of actions shall likewise prescribe within five years after sentence is obtained in the said actions if the said arrestments be not pursued or insisted on within that time.” The statute carefully repeats the words we have to construe, “pursued or insisted on” as regards all kinds of arrestments, (1) arrestments to be used hereafter; (2) arrestments that have been used; and (3) arrestments on the dependence.

Now, what has happened here to answer the words of the statute? It is said that the common debtor applied for *cessio*, and that decree of *cessio* was pronounced. That by itself is not a proceeding on the part of the arresting creditor in the way of pursuing or insisting on the arrestments. But it is said, further, that the arresting creditor appeared in the process, and indeed that the foundation of the application for *cessio* was a charge by him on the debt secured by the arrestments. That may be very true, and he did doubtless appear in the process, but all he did was as a creditor on a debt, and nothing was done in

¹ Bell's Comms. ii. p. 17, 7th ed. note; Black v. Scott, Jan. 22, 1830, 8 S. 367; Hill v. Lindsay, Feb. 7, 1846, 8 D. 472, 18 Scot. Jur. 218.

² Ersk. Inst. iii. 5, 5; Miller v. Learmonth (H. L.), May 17, 1870, 42 Scot. Jur. 418; Watt's Trustees v. Pinkney, Dec. 21, 1853, 16 D. 279, 26 Scot. Jur. 131.

No. 124. the process of *cessio* which would not have been done equally had no arrestments ever been used at all. How that can be said to answer the words of the statute, I cannot see. The facts simply come to this, that nothing has been done by the arrester, for in the *cessio* his arrestments were never even mentioned.

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The arrester next says that he was placed in a very awkward position, because he could not make his arrestments available, as though the fund in question was vested in the debtor it was not payable till the death of a liferenter. No doubt that is a peculiarity in the case, but it is just one of those peculiarities which require great attention on the part of the creditor, in order to avoid prescription of his arrestments. No doubt had there been any double distress, or any competition for the arrested fund, an action of multiplepounding would have been competent though the fund was not immediately payable, but supposing there was no double distress, I do not doubt that it would have been perfectly competent to raise an action of furthcoming, the pursuer guarding the conclusions of his summons in point of time so as not to conclude for immediate payment against the arrestee, but for payment at the death of the liferenter. If nothing else could have been done but to raise a furthcoming, then without doubt such an action would have been competent. Nothing, however, of that kind was done, and I think, therefore, we must give effect to the statute.

The next question relates to the sufficiency of the intimation of the assignation founded on by the other claimant. The fund assigned was in the hands of two trustees, Mr Mantach and Mr M'Watt. The intimation was made to Mr Mantach alone. There being at that time no other surviving and acting trustees than these two, the question is whether the intimation to Mr Mantach was sufficient. It is admitted that Mr Mantach had the whole trust funds in his hands, and was really the acting trustee. Mr M'Watt, though still a trustee,—for he had not resigned,—was in very indifferent health (though fit to attend to business), and obviously left the administration of the trust in the hands of his co-trustee. In these circumstances, I have no hesitation in saying that the intimation was good. The doctrine of Mr Erskine (iii. 5, 5) goes even further than is necessary for the present case, and none of the cases cited to us throw any doubt on the soundness of his law, and no case known to me would justify us in saying that when such intimation is made in the hands of a trustee who holds the trust funds, and practically administers the trust, it is not sufficient intimation in point of law. On these grounds, I am for adhering to the judgment of the Lord Ordinary.

LORD MURK.—I am clear that on the words of the statute “pursued and insisted on,” we can come to no other conclusion than that these arrestments have prescribed. It may be at first sight difficult to see what the arrester could have done to avert prescription, but the words are clear; and I agree that, in the circumstances, nothing would have prevented his raising an action of furthcoming. That being so, the arrestments necessarily fall.

The only question remaining is as to the validity of the intimation of the assignation; on that point I am quite clear that the doctrine of Mr Erskine to which we have been referred is quite sufficient to cover the case. There might be special circumstances in which the intimation might not be sufficient, but there is nothing of that kind alleged here, and, therefore, I think we must hold the intimation to Mr Mantach to be good. On these grounds I concur.

LORD SHAND.—Under the older statute as amended by 1 and 2 Vict. chap. No. 124. 114, it is a condition of arrestments remaining in force, that during three years after they have been used they shall be “pursued and insisted on.” In the ordinary case there is no difficulty in applying those words, but here it is said that the fund arrested being liferented by a lady, it could not be made forthcoming till her death. It may have required some ingenuity to devise some course to prevent the arrestments becoming prescribed, but I think a forthcoming might have been raised, and decree obtained thereunder, subject to the liferent. Nothing, however, was done, and I am satisfied that the mere appearance in a *cessio* in which no notice was taken of the arrestments is not sufficient.

As to the other question, I do not think we can on the authorities lay down any precise rule for all cases, but as here intimation was made to the only trustee who managed the trust funds, I have no doubt that that intimation was quite sufficient.

LORD ADAM.—I concur in all that your Lordship has said, and I also concur in the Lord Ordinary’s note, with one exception, viz., where he suggests that though the intimation of the assignation might have been bad at first, it became good by the death of the other trustee. That seems to me to be very doubtful law, but I agree in thinking that, in the circumstances, the whole management of the trust being in Mr Mantach’s hands, the intimation given was sufficient.

THE COURT adhered.

PHILIP, LAING, & TRAIL, S.S.C.—W. B. GLEN, S.S.C.—J. K. & W. P. LINDSAY, W.S.—Agents.

JAMES BOWIE, Pursuer (Respondent).—*D.-F. Mackintosh—Salvesen—Gardner.* No. 125.

THE MARQUIS OF AILSA, Defender (Reclaimer).—*Muirhead—Blair—Darling.* Mar. 18, 1887.
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JAMES BOWIE, Pursuer (Appellant).—*D.-F. Mackintosh—Salvesen—Gardner.*

THE MARQUIS OF AILSA AND ANOTHER, Defenders (Respondents).—*Muirhead—Blair—Darling.*

Fishings—White fishings—Tidal and navigable river—Acts Anne, 1705, cap. 2, and 29 Geo. II. cap. 23.—A member of the public brought an action against the riparian proprietor concluding for declarator that he had a right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish which were not of the salmon kind, in that part of the river Doon where the tide ebbed and flowed, and as far as the highest point reached by the ordinary spring tides; and averred that the portion of the Doon so described extended from the sea to a distance of about 500 yards inland. The action was founded both on common law and the Acts of Anne, 1705, cap. 2, and 29 Geo. II. cap. 23, which gave the public right to take “herrings, cod, ling, or any other sort of white fish in all and every part of the seas, channels, bays, firths, lochs, rivers, and other waters where such fish are to be found on the coasts” of Scotland.

The riparian proprietor in defence produced a crown charter of barony, dated 1793, which contained a clause “cum piscationibus yairis et cruives et salmonum et alborum piscium tam in aquis salsis quam dulcibus,” and averred exclusive possession of both the white and the salmon fishings on that title. He further denied that the river was either tidal or navigable beyond a point in line with

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the line of high-water on the neighbouring coasts, and averred that between the points in dispute floating white fish were not to be found, or at least not in such numbers as to be of any value to the public.

It was proved that no part of the *solum* of the river for the 500 yards in question was left dry at low-water, although the level of the water rose and fell with the flow and ebb of the tide, and was sometimes found to be brackish up to the extreme point claimed by the pursuer. The defender had let the fishings in question for more than forty years previous to the date of the action, and had granted licences to anglers entitling them to fish there, of which the pursuer at one time held one. Eels, small flounders, and also, to some extent, seath and lythe were caught in the water in question; but the only fish which the defender's tacksmen thought it worth while to keep were fish of the salmon kind and yellow trout, of which last comparatively few were to be caught. Pleasure parties in rowing boats occasionally went up the river at high tide, but there was a bar at the mouth which was an obstacle to more extended navigation, although it was proved that in former years small smacks, and on one occasion a small steamer, had gone a short way up.

Held (rev. judgment of Lord Trayner) (1) that the Doon between the points in question was neither a tidal nor a navigable river, and that the pursuer was not entitled to declarator either at common law or under the statute; and (2) that the defender under his titles had right to the whole fishings therein, and had had from time immemorial exclusive possession thereof. Defender therefore *assolvièd*.

River—Foreshore—Line of high-water—Held (per Lord Trayner, Ordinary) that the right of the Crown in the sea-shore extends to the line of high-water of ordinary spring tides, and is not limited (as is the rule in England) to the line reached by the average of the medium high tides between the spring and the neap.

Sheriff—Jurisdiction—Declarator—Sheriff Court Act, 1877 (40 and 41 Vict. cap. 50), sec. 8—*Value of subjects.*—*Question*, whether in an action of declarator in the Sheriff Court under the Sheriff Courts Act, 1877, the value of the subjects is to be determined by reference to the pursuer's or to the defender's interest.

2D DIVISION.
Lord Trayner.
Sheriff of Ayr-
shire.

M.

In October 1884, James Bowie, who was an upholsterer in Glasgow, but who, in the course of the proceedings to be narrated, came to reside at Ayr, and who, while temporarily living there, had been apprehended on the night of 11th August 1884 by Robert Armour, water-bailiff to the Marquis of Ailsa on a charge of poaching in the river Doon, brought an action in the Sheriff Court at Ayr, against the Marquis, also calling Armour as a defender, in which he prayed the Court "to find and declare that the pursuer, as a member of the public, has an undoubted right and privilege of fishing with single rod and line for trout, flounders, eels, and all other fish which are not salmon, sea trout, and whiting, and the young of salmon, sea trout, and whiting, in the river Doon, at least in that part of it within the tidal influence of the sea"; then followed a prayer for interdict against interfering with him in the exercise of that right.

Except that the pursuer in the Sheriff Court did not found on the Acts of Anne and Geo. II. founded on by him in the Court of Session action, the pleadings of parties were substantially to the same effect as in an action in the Court of Session raised subsequently by Bowie against the Marquis, as after mentioned. The question in the actions related to a portion of the river Doon (which flows into the sea about two miles to the south of Ayr), extending for about 500 yards from the bar at its mouth to a mill-dam known as "the lower dam-dyke." The pursuer was found fishing on the night of 11th August above this dam-dyke—between it and a bridge known as the Doonfoot Bridge,—but he pleaded ultimately, at least, that he, as a member of the public, had no right to fish in the Doon above the dam-dyke, because he came to admit that "the tidal

influence" (as it was described in the Sheriff Court action) did not extend higher; but on the other hand he averred that the tidal influence reached the dam-dyke, and further that the river had been navigated, or at least was navigable, that distance from its mouth, and therefore he contended that the river to that extent, either as tidal or as navigable, or as both, was a public river, and that as such the white-fishings in it (including the right of fishing for yellow trout) were the inalienable property of the Crown in trust for the use of the public. He further denied that the Marquis had had exclusive possession on his titles.

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A question was also raised as to whether the public had a right of access to the river by means of certain footpaths, but as both the Sheriffs and all the Judges in the Court of Session were against the pursuer on that question its details need not be given here.

The defenders founded on the titles of the Marquis to the riparian properties, and particularly on a crown charter of barony, dated 5th July, and written to the seal and registered 2d September 1793, which contained the following clause:—"Una cum piscationibus yairis et cruives et salmonum et alborum piscium tam in aquis salsis quam dulcibus cum cymbis in mari et escis in arena ad capiendos pisces ex adverso dict. terrarum ac cum cymbis una vel pluribus pro piscatione salmonum in flumine de Doon vel in mari inter locum de Greenan et Ecclesiam Sancti Joannis in Ayr et integra piscatione dict. fluminis de Doon ex utraque ripa ejusdem ad altissimam partem dict. terrarum de Greenan." The defenders averred that the Marquis and his authors had had exclusive and uninterrupted possession of the fishings in question on that title. They further denied that the river was a public river, averring that it was between the points in dispute neither tidal nor navigable.

The parties had also the following averments bearing on the jurisdiction of the Sheriff to entertain the action, but the defenders did not plead that the Sheriff had no jurisdiction:—(Cond. 7) "The value of the said right and privilege to the pursuer does not exceed the sum of £50 by the year, or £1000 value."* (Ans. 7) "The privilege of fishing for trout and fish other than fish of the salmon species in the portion of the river Doon referred to is of no value whatever to the pursuer, but if the right of fishing is opened to the pursuer and the public, the defender's salmon-fishings in the Doon will be injured to a much greater extent than £50 by the year, or £1000 value, and that in respect large numbers of salmon and sea trout fry, and of whiting and sea trout, will necessarily be destroyed, and the exercise of the right of salmon-fishing by the defender will be seriously interfered with."

A proof was allowed. The evidence was to the following effect:—The Doon between Doonfoot Bridge and the sea was a favourite resort of salmon fry, which swarmed there at certain seasons, and passed out and in with the ebb and flow of the tide, gathering strength to proceed seaward; and fishing by single rod and line, if carried on to any considerable extent, even without any intention to hook such fry, would destroy large numbers, as they take readily almost any sort of lure, and after being hooked are exceedingly apt to die. Whiting and sea trout were also common between the same points in the river, but yellow trout, though

* The Sheriff Courts Act, 1877 (40 and 41 Vict. cap. 50), sec. 8, enacts:—"The jurisdictions, powers, and authorities of the Sheriffs and Sheriffs-substitute of Scotland shall be and the same are hereby extended to—(1) All actions (including actions of declarator, but excluding actions of adjudication, save in so far as now competent, and excluding actions of reduction), relating to a question of heritable right or title, where the value of the subject in dispute does not exceed the sum of £50 by the year, or £1000 value. . . ."

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caught there both by anglers and in the salmon nets, were comparatively rare, that species of fish having been almost exterminated in the river through an influx of tainted water from a coal-pit into the upper waters some years previously. Eels, flounders, seath, lythe, and mullet were also to be caught from the dam-dyke downwards. There was some difference of opinion on the point, but the fair result of the evidence was that none of these fish (except perhaps eels) were to be caught in the Doon in such numbers or of such a size as to make their capture of moment to anglers or to the public.*

There was no parole evidence in the Sheriff Court action on the question as to the highest point to which tidal influence reached in the Doon, the parties having agreed to remit to Mr James Morris, architect, Ayr,—“to ascertain and report what is the highest point reached by the ordinary spring tides in the river Doon in the present state of the lower dam-dyke, reserving parties’ pleas on the general question of law on the point.” Mr Morris reported that he had ascertained the lower dam-dyke to be the point in question. This view was assumed to be correct by both

* The following excerpts shew the nature of the evidence regarding the character of the white fishings:—

The pursuer himself deponed,—“I have seen shoals of mullet, and shoals of lythe, seath, and lots of flounders and eels between the mouth of the Doon and the dam-dyke. Plenty of them go up within 200 yards of the dam-dyke. I have often fished in the tidal part of the Doon for those flounders and eels, and caught those fish.” Cross-examined,—“I was in the habit of fishing for flounders with rod and line and worms. I did not know whether the flounders were fresh or salt-water flounders. They might be from six to nine inches long. I used them for food. I never fished either for mullet or seath. I have fished for eels with garden worms.”

William Purdie, tailor, Ayr, deponed, in cross-examination by the defender,—“When fishing between the dam-dyke and the sea I generally caught whiting, or yellow trout, flounders, or eels. I got flounders and eels oftener than I wanted them. I generally fished with the fly, and sometimes with bait. It was with bait I caught the flounders. It was whiting and yellow trout I was generally fishing for, and it was when I was fishing for yellow trout and whiting that I got the flounders and eels. I generally threw the eels away, and brought one of the flounders home for a favourite cat. . . . Most of them are too small for human food.”

John Gemmell, an old man who latterly had made his livelihood by fishing, deponed, in cross-examination by the defender,—“I would get from two pounds to half a stone a night. I fished for a living, and sold the fish I caught. Nobody ever stopped me, and I just worked away at the fishing. I generally went to fish a little before sunset. The last time I was out, about five weeks ago, I caught about five stones of flounders, and a cod a stone weight. Some of the flounders were half a pound weight, and some were less. I also got seath and lythe with the worm. I also got cod with the worm. I have got a good when of small yellow trout. I have seen me get fifty in a night.” But it appeared that this witness usually fished close to the mouth of the river.

Samuel Bell, fisherman, employed in 1869 by the tacksman of the fishings, a witness for the pursuer, deponed,—“We caught in the net salmon, grilse, white trout and yellow trout, eels, flounders, mullets and crabs, seath and lythe, and various other kinds of fish. The mesh of the net was, I think, from $2\frac{1}{2}$ to $3\frac{1}{2}$ inches. At times we got a good number of yellow trout from about one and one and a quarter pounds down to half a pound. There were a good many flounders. There were a good many eels, seath, and lythe frequented the river for shelter. At times we got a good number of them.” Cross-examined.—“Salmon, sea trout, whiting, and yellow trout were the only fish which the tacksman sold. The white fish the fishermen used for their own eating—at least any that were fit for eating.”

Sheriffs, and their interlocutors contained a finding of fact embodying it. No. 125.

The bar at the mouth of the river was used as a ford for horses and carts at low-water, and could at that state of the tide be crossed only by small boats, and hardly even by them; at high tide there was a considerable depth of water on the top of the bar, and above it up to the dam-dyke the river was at all states of the tide deep enough for rowing boats. Pleasure parties occasionally went up the river in boats from the sea as far as they could, but this took place more frequently in former years, and there was little evidence of the use of the river for the purposes of commercial navigation.*

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From 1835 down to 1881 the Marquis of Ailsa and his predecessors let the fishings at large rents, and the tacksmen were in use to watch the river and protect the fishings, and to stop those found fishing, whether by single rod and line or otherwise, unless they had leave either from the Marquis or the tacksmen. It did not appear that the inhabitants of the locality made any protest against the exercise of these alleged rights, but, on the other hand, there was a body of evidence by persons who had themselves fished, and by fishermen who had been in the employment of tacksmen, that single rod and line fishing without leave had been practised to a considerable extent.

On 23d July 1878 the Marquis caused a handbill to be issued, in the following terms, headed:—"Notice to Fishers.—All parties found fishing in the lower portion of the river Doon, without written permission from the Marquess of Ailsa, will be prosecuted," &c., &c. On 12th September 1879, the pursuer received under the hand of the Marquis a written permission in the following terms:—"James Bowie has leave to fish with the rod and fly in the river Doon between the Low Bridge and the sea, subject to whatever regulations have been or may be made by the Fishery Board of Heritors of the river Doon." The pursuer fished the Doon under the authority of that permission, and knew that others had "got

* The following was some of the evidence on the question of the navigation of the river:—

Purdie, tailor, already mentioned, deponed,—“When I lived at Gateside of Bellisle I kept a pleasure boat at the foot of Bellisle Burn, and I was often up the Doon with that pleasure boat as far as the battery—[some distance below the dam-dyke]. We were just rowing up and down the river, when the tide was in, for pleasure. I had a bigger boat, which I kept at the fishers' place at the mouth of the Doon, as it was too large for going up the river. I have seen pleasure boats from Ayr, with pleasure parties in them, rowing up and down the Doon as far as the battery. I have seen pleasure parties row up and down half a dozen times any way, but I cannot say how often. The last time I saw a pleasure party up the Doon was in Alexander Mitchell's time, about twenty years ago. I have since seen small boats belonging to the fishermen and to Mr Wright row up the river. I once saw a small steamer over twenty years ago up the Doon as far as the fishermen's house—[very near the sea]. The steamer belonged to Mr Smith of the Ayr shipyard. Mr Mitchell, tacksman, allowed him to bring the steamer up, and lay it up during the winter.” This was the only witness who spoke to having seen a steamer on the Doon.

Gemmell, also already mentioned, deponed,—“I have gone up the river in my own boat, and many more forbye me, in other boats. Twenty-five or thirty years ago it was a common thing to take a boat there on a Sunday.” Re-examined for the pursuer.—“I had often in my time to run up the Doon in gales of wind for shelter. That was when I was sea-fishing. I have not been much pleasuring for the last twenty years. It is fifty years since I ran for shelter to the water of Doon. I remember once running up there with a cargo of herrings. I ran up to where the fish-house is now.”

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leave for asking, and that Lord Ailsa's officers hindered people from fishing who had not leave." He further admitted in evidence that this leave only continued for the current season, and that it "was withdrawn by public advertisement in the following season." Since then the pursuer had not had any permission whatever to fish, but had on various occasions fished without permission, and, as he admitted, he occasionally got whitling when fishing for trout, and when he caught them he kept them. Late on the night of 11th August 1884 the pursuer went to fish the river between the dam-dyke and the Doonfoot Bridge, and therefore above the highest point to which the tide reached, according to Mr Morris' report, with single rod and line, equipped with flies which to his knowledge were well adapted to kill sea trout and whitling at night, although he had bought them for yellow trout night fishing in the Girvan, and between twelve and one on the morning of the 12th August he was found wading and fishing with rod and line in that part of the river by the defender Armour and his assistant, Cunningham. When challenged, the pursuer threw into the river a bag containing five fish, one of which was afterwards got hold of by Cunningham, and proved to be a whitling. The pursuer deponed that he believed all the fish he had caught that night were yellow trout, though there might have been a whitling among them. He did not particularly examine them as he caught them. He at first gave a false name and address, but afterwards, when being taken to the police-station, told his real name and address, and claimed a legal right to fish for yellow trout with single rod and line in the river Doon at the place where he was found.

On 30th June 1885, the Sheriff-substitute (Orr Paterson) pronounced an interlocutor, in which, after findings in fact, he found and declared that the pursuer as a member of the public had a right of fishing in the terms prayed for, "in that part of the river Doon within the tidal influence of the sea, viz., from the mouth up to the lower dam-dyke," assoilzied the defender from the conclusion for interdict, and found the pursuer entitled to expenses.

On appeal the Sheriff (Brand), on 13th January 1886, pronounced this interlocutor (after findings in fact):—"Finds in point of law that the pursuer is not entitled to the declarator and interdict sought for, but reserves to him any right he may have as one of the public to fish in the Doon from the sea-shore, but subject always to the provisions of the Salmon Fishery laws: Therefore assoilzies the defender from the conclusions of the action; finds the pursuer liable in expenses; allows," &c.*

* "NOTE.—There can be no doubt that the public have an inalienable right of fishing for white fish in the sea, but does this right extend as far up a river as the tide ebbs and flows, or may the Crown readily convey the exclusive right of fishing in a river at the part subject to the tidal influence? It does not appear to the Sheriff that the opinion expressed by Lord Cairns in *McDouall's* case, 2 R. (H. L.) 55, was intended to go the length the Sheriff-substitute would carry it. The Lord Chancellor in delivering his opinion was dealing exclusively with the case of a proprietor of lands on the sea-coast, and had not before him such a case as the present. Accordingly, he speaks only of 'the sea,' and of 'a title on the part of the subjects to use the shore.' The ebb and flow of the tide may extend a mile or more up a narrow stream, the land on each side of which belongs to private owners, and it would be a startling thing to say that the public had an inalienable right to catch by single rod and line the fish therein, other than salmon and fish of the salmon kind. There is a dearth of authority on the point, but the Sheriff is of opinion that a grantee may acquire an exclusive title from the Crown to the whole fishings in such a river. In *Nicol v. Blaikie*, 23d December 1859, 22 D. 335, the Lord Justice-Clerk says,

The pursuer appealed. The defender took the objection that the action No. 125. was not within the jurisdiction of the Sheriff, on the ground that the sub-

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p. 343,—‘It is important in the present case to observe that the public right of fishing, in aid of which the shore may be used by the public, is the right of white-fishing, which is essentially *juris publici*, and may be exercised by any one without title, licence, or authority of any kind.’ Inasmuch as there is special reference to the sea and the rights of the public in both these cases, they cannot be taken as in any way deciding the present question, but seem to leave it entirely open. In deciding the case of *Gilbertson*, 5 R. p. 610, Lord Ormisdale said, p. 615,—‘As a general proposition, I take it to be clear that to fish white fish is a right common to all. Whether it may not to some extent and in certain specified places be appropriated and secured by royal grant, accompanied with immemorial use, is a question which does not seem ever to have been precisely and authoritatively determined.’ The present is a case of royal grant, accompanied by immemorial use, and, as it seems to the Sheriff, the exclusive right of fishing is claimed by the defender in such circumstances as to entitle him to have effect given to his claim.

‘The pursuer says he was fishing for yellow trout; Lord Cairns makes no reference to yellow trout in the opinion above mentioned. He deals exclusively with such white fish as inhabit the sea. If the Sheriff is correct in his views as to the defender’s rights of fishing in the Doon, then the pursuer had no right to carry on such fishing without written permission, trout-fishing being a part and pertinent of the lands adjoining the Doon, through which it flows.—See *McKenzie v. Rose*, 26th May 1830, 8 S. 816, and opinion of Lord Cringletie, p. 818; *Carmichael v. Colquhoun*, 20th November 1787, M. 9645; and *Ferguson v. Sheriff*, 18th July 1844, 6 D. 1363.

‘It is deserving of notice that the terms of the grant to the defender partly coincide with the terms of a similar grant to the Duke of Argyll—See *Duke of Argyll v. Robertson*, 17th December 1859, 22 D. 261.

‘The grant there was of ‘salmon-fishings and other fishings, as well in salt as in fresh waters.’ This, it was held, did not comprehend mussel-scalps, unless followed by exclusive possession for the prescriptive period. But in the later case of the *Duchess of Sutherland v. Watson*, 10th January 1868, 6 M. 199, it was held that the Crown may grant to a subject the exclusive right to mussel-scalps situated between high and low-water marks, and that a crown title to a barony with fishings in the Sands of Nigg (Cromarty) was a sufficient title on which to establish by exclusive possession for the prescriptive period an exclusive right to mussel-scalps between high and low-water marks in the said lands. Lord Cowan there reserves his opinion, as the Sheriff-substitute points out, ‘relative to white-fishing or the fishing of floating fish in the sea or along the coast or shore of the sea.’ If the Crown may grant such a right as to mussel-scalps, why not to the white-fishings within the tidal portion of the river Doon, there being reserved to the public the right of fishing at the mouth of the Doon from the shore for fish other than those of the salmon kind, and the whole shore rights of fishing.

‘The Sheriff entirely agrees with the views of the Sheriff-substitute as to the alleged footpath. It is quite clear that the public have not acquired any right of footpath along either bank of the river between Doonfoot Bridge and the sea. That the banks of the river at this point have often been frequented by pedestrians and others may be taken as certain, but they were only there on sufferance.

‘The Sheriff further agrees with the Sheriff-substitute that there is no right of access for fishing the river Doon from the public road, and that between the road and the river there is a stripe of private ground of varying breadth, from which the defender has right absolutely to exclude the public. But the Sheriff-substitute thinks there can be no practical difficulty in getting access from the sea by boats at certain stages of the tide, or from the sea-shore by wading. Possibly, when the river is high and the tide in, small boats may get up to the dam-dyke, and when the river is low and the tide out, wading may be practi-

No. 125. Mar. 18, 1887. *Bowie v. Marquis of Ailsa.* ject in dispute exceeded the statutory value (see Sheriff Courts Act, 1877, sec. 8, quoted, *supra*, p. 651, note). The Court expressed doubts as to the competency of the action, and agreed to allow the action to stand over to give Bowie an opportunity of bringing an action in the Court of Session.

Bowie accordingly, on 26th May 1886, raised an action in the Court of Session against the Marquis, in which he concluded for declarator "that the pursuer, as a member of the public, has right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish which are not salmon, sea trout, or whiting, or the young of salmon, sea trout, or whiting, or fish of the salmon kind, in that part of the river Doon where the tide ebbs and flows, and as far as the highest point reached by ordinary spring tides, and that the defender, or anyone claiming under him, has no right to interfere with the right of the pursuer to fish as aforesaid." There was also a conclusion for interdict.

The averments of parties sufficiently appear from the foregoing narrative, but as means of access they are attended with obvious trouble and difficulty, and, in short, unless the public can get access to the water from the banks (which they cannot legally without permission), they have really no other such mode of access as would enable them to exercise their assumed right to any useful extent. Further, there is very little for the public to catch. The Sheriff is satisfied on the evidence that neither yellow trout, eels, flounders, seath, lythe, nor mullet are to be found in any considerable numbers. And, on the other hand, the presence of boats or persons wading would be highly injurious to the defender's net fishing. Boats seldom or never seem to have been used by the public for fishing purposes, and it may be taken as certain that those who fished with or without leave invariably approached the river from the banks.

"The pursuer's contention that the Doon is a navigable river is extravagant. In coming to a conclusion on this point, the Sheriff has had in view the opinions expressed in the Court of Session in the case of *Colquhoun's Trustees v. Orr Ewing & Company*, 26th January 1877, 4 R. 350, where the Lord President says,—'But I rather think that if a river is navigable at all, and has been enjoyed and used as a navigable river by the public, the right of the public must be judged very much according to the same rule whether the river be capable of being navigated by vessels of one kind or another, by vessels of large or small dimensions.' It has not been proved that the Doon has been enjoyed and used as a navigable river by the public, and in particular it is not and never was 'fit for the transportation of the country products.'—Bell's Prin. 648; see also Erskine, 2, 6, 17. In this respect the Doon contrasts strongly with the Leven, which, it was found in *Colquhoun's* case, had been for a long period of time navigated by scows or gabbarts, which descended the river by the force of the current, and were towed up by horse haulage, there being a towing-path on the right bank. No doubt the defender's titles provide for the use of boats (*cymbæ*) in *flumine de Doon*, and there is not only evidence that the defender or his tenants have been in the habit of using a boat or boats when netting the river below the dam-dyke, and there is some evidence in the pursuer's proof (particularly the evidence of the witnesses Purdie, Ball, and M'Guire) that other boats have occasionally been seen on the river. But when it is remembered not only that there is a bar at the mouth of the Doon, which must seriously impede the ascent of boats, unless in certain conditions of the tide, but that the bed of the river is liable to constant silting up and other changes from floods, that boats cannot get further up than the dam-dyke, which is but a short distance from the mouth, and that it is not proved that boats have ever sailed on the Doon for any practical purpose except netting the river, the Sheriff is of opinion that there are no sufficient materials for enabling him to hold that the Doon is a navigable river."

tive of the Sheriff Court action, except that the pursuer now founded for the first time on the Acts of Anne, 1705, cap. 2, and 29 Geo. II. cap. 23.* No. 125.

The pursuer pleaded;—1. The pursuer, as one of the public, having at common law right to fish for all floating fish not of the salmon kind in the tidal portion of the river Doon, is entitled to decree of declarator as craved, with expenses. 2. The pursuer, by virtue of the Acts of Queen Anne and 29 Geo. II. cap. 23, quoted in condescendence 2, is entitled to decree in terms of the declaratory conclusions of the action. 3. The right of white-fishing in the sea (including the tidal portions of rivers) being incapable of alienation by the Crown, the second plea in law for the defender should be repelled. 4. The defender having prevented, or asserted a right to prevent, the pursuer from exercising his legal right of fishing in the tidal portion of the river Doon, the pursuer is entitled to decree of interdict as concluded for, with expenses. Mar. 18, 1887.
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The defender pleaded;—1. The pursuer's averments are not relevant or sufficient to support the conclusions of the summons. 2. The defender having in virtue of his titles, and the immemorial possession following thereon, the exclusive right to the fishings in the lower portion of the river Doon, he ought to be assoilzied. 3. The pursuer not having, as a member of the public or otherwise, any right or title to fish in the fore-said portion of the river Doon, the property of the defender, the defender should be assoilzied. 4. The Acts of Parliament quoted by the pursuer do not apply to the defender's fishings in the river Doon, in respect that (1) the said portion of said river is not within the localities mentioned in said Acts, and (2) the fish frequenting said portion of said river are not of the kinds specified in the said Acts. 5. The pursuer's averments, so far as material, being unfounded in fact, and his pleas untenable in law, the defender ought to be assoilzied, with expenses.

A proof was allowed. The evidence was mainly directed to the question of the range and character of the tidal influence in the Doon, which in the Sheriff Court action was held to be settled by Mr Morris' report already referred to. The pursuer adduced several witnesses, who deposed generally † that with all ordinary high tides (unless when the river was

* The Act of Queen Anne, 1705, cap. 2, entitled "An Act for advancing and establishing the Fishing Trade in and about this Kingdom," enacts,—“Her Majesty, with advice and consent of the Estates of Parliament, authorises and empowers all her good subjects of this kingdom to take, buy, and cure herring and white fish, in all and sundry seas, channels, bays, firths, lochs, rivers, &c. of this Her Majesty's ancient kingdom and islands thereto belonging, wheresoever herring or white fish are or may be taken.”

The Act 29 Geo. II. cap. 23, entitled “An Act for encouraging the Fisheries in that part of Great Britain called Scotland,” on the preamble, *inter alia*, that “the extending and improving of the British fishery is of great importance to this kingdom, as it not only adds considerably to the national wealth, but is moreover a fruitful nursery of able seamen for the public service,” enacts (sec. 1).—“From and after the 25th day of June 1756, all persons whatsoever, inhabitants of Great Britain, shall, and they are hereby declared to have power and authority at all times and seasons when they shall think proper, freely to take, buy from fishermen, and cure any herrings, cod, ling, or any other sort of white fish, in all and every part of the seas, channels, bays, firths, lochs, rivers, or other waters, where such fish are to be found, on the coasts of that part of Great Britain called Scotland, and of Orkney, Shetland, and all other islands belonging to that part of Great Britain called Scotland, any law, statute, or custom to the contrary notwithstanding.”

† The following may be taken as samples of the pursuer's evidence on this point:—

William Shearer, cabinetmaker, Ayr, who had been acquainted with the

No. 125. in flood) the level of the water up to the dam-dyke was raised several feet, and also became more or less brackish up to the same point. The defender adduced Mr C. A. Stevenson, C.E., a partner of the firm of D. & T. Stevenson, C.E., Edinburgh, who had made experiments at the river on 22d, 23d, and 24th November 1886, the result of which, according to his evidence, was that he found the highest range of salt water, on an average high tide, to be a line C D, as marked by him on a plan, which line was about thirty feet above a line drawn across the river in continuation of the average line of ordinary spring tides along the coast, as laid down in the Ordnance Survey Map. On his plan he also marked a line A B as the line of the average of ordinary spring and neap tides. The substance of Mr Stevenson's evidence is given below, as also of David Powrie, a river bailiff, the only other important witness for the defender.*

Doon from boyhood, deponed,—“ I have had occasion to notice the tides when I have been fishing in the Doon. I always fished at low-water, and the water generally came up and put me away from the back of the dam-dyke. It got too deep for wading. There are some rocks near the dam-dyke. I was in the habit of standing on them at low-water and fishing. When the tide comes up these rocks are covered, and you have to leave them. I never saw a tide so low in the Doon that it did not get the length of the ford. All the tides I ever observed when I was fishing reached the dam-dyke. I never had difficulty in crossing the ford in a boat when the tide was full, either neap or spring. I have seen the river in summer when there was very little water in it. On these occasions the tide always, so far as I saw, came up to the dam-dyke. Cross.—When I say that the tide comes up to the dam-dyke, I mean that the salt water runs up there. It will be mixed with fresh water there, I daresay. I understand that the sea flows in up to the dam-dyke; it would flow further if it was not for the dyke. The flounders come up from the sea with the tide. (Q.) What does your understanding rest upon? (A.) The flow of the tide up the river. By the Court.—I have seen trouts coming up in front of the tide when I have been fishing, and spluttering amongst the spray, and the water come right up to the dam-dyke.”

John Burn, saw-sharper, who had lived at Ayr nearly all his life and knew the Doon well, deponed,—“ There are some rocks immediately below the dam-dyke. They are uncovered when the tide is out, unless when there is a heavy spate in the river. I have often seen these rocks covered in spring tides when I have been fishing; I have had to come off the rocks because of the tide coming up. At ordinary spring tides the water will rise about $3\frac{1}{2}$ feet up the dam-dyke or more. I never saw the water rise almost to the top of the dyke. I cannot exactly say within what distance of the top of the dyke I have seen the water; I think $3\frac{1}{2}$ feet is hardly half-way up. That is at one side of the dyke. The dyke slants downwards. I have repeatedly seen two currents in the river when the tide was flowing—the one flowing down on the top, and the other flowing up underneath. I have tasted the water below the dam-dyke; it tasted salt and brackish. I have seen it as salt there as lower down on the beach. I have noticed that about the month of August or July—in summer when the water of the Doon was low.”

* Mr Stevenson deponed that he made the investigations into the saltiness of the water on 23d and 24th November. “ The condition of the tide at the time was an average high water. . . . I discovered the point to which high water came by levelling at the sides of the river with a spirit-level, and ascertaining where the coast line was. The water of the sea comes up the channel of the river as far as the line C D—not any higher—that is, the salt water. In droughts it may of course come higher. I ascertained whether there was salt water in that part of the channel by means of a hydrometer, an instrument for determining the specific gravity of water, and a hydrophore, an instrument for obtaining water at different depths. It is necessary to get water from the bottom, as the salt water creeps up the bottom of the river. . . . The influx

Except the rocks mentioned by some of the pursuer's witnesses, no part of the *solum* covered by the river at high-water was left uncovered at low-water, i.e. there was always water from bank to bank down at least to the bar. No. 125.
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On the question of navigability there was evidence of the same general class as had been adduced in the Sheriff Court action, the statements there as to the depths of water at the bar and above at the various states of the

of the tide affects the fresh water in the stream to a very much higher point than that to which the salt water itself reaches ; in this case as far as the dam. In the Clyde the effect of the tidal wave is felt twenty-two miles from the sea—up as far as the weir which used to be at Glasgow Green—that is, reckoning from Port-Glasgow. In the Nith the effect of the tide goes as far as Dumfries ; in the Severn it goes sixty-eight miles ; and in the Tay thirty-five miles, measuring from Dundee. In the Tay it goes up to a little below Scone Palace, four or five miles above Perth Bridge. When I say that the tide goes up as far as that, I mean that the tidal wave is propagated as far as that in fresh water. The salt water does not go up anything like that distance. In drought salt water might be got beyond the point I have indicated, but I do not consider that should be taken ; the river was neither in flood nor in drought when I took it. In drought the salt water finds its way up an abnormal distance, because there is less fresh water flowing in, and consequently less resistance. The Doon is not a navigable river ; it would be extravagant to call it so, I think. Cross-examined.—The mark C D is . . . the point to which, on an average tide, I say the salt water penetrates, assuming the tide which I observed to be an average tide. I have not made any observations regarding the length to which the salt water penetrates at ordinary spring tide. (Q.) How can you say then it won't reach the foot of the dam-dyke ? (A.) Because of the fresh water running in ; if the river were perfectly dry it would do so. I have not measured the height to which the water will rise on the dam-dyke in ordinary spring tide, but I should say about a foot or eighteen inches. (Q.) If you were told that it actually rises from two to three feet on the dam-dyke, would you have any doubt that the salt water would penetrate very nearly up as far as that ? (A.) It would not penetrate that length. If the water rises to that extent on the dam-dyke, I would attribute it to the filling in of fresh water from above. The fresh water continues to flow seaward the whole time. (Q.) Then how does it dam back ? (A.) The moment you lessen the inclination in the least, you have a rise in the surface of the water. Assuming there was no river there, the average tide would reach the dam-dyke ; it has a flow which, unless prevented, would bring it up that length. I cannot say whether there was rain previous to my making my observations, but the river did not appear to be in flood. The water was quite clear. I had never seen the Doon before. The average tide is the mean between high-water spring tides and high-water neap tides. It occurs four times a month. By the Court.—The river might be abnormally high, and yet the water quite clear. I don't think there was the normal flow of water when I saw the river ; the river was pretty full. By defender's counsel.—The two highest tides of this month were on 13th and 27th. The lowest neaps occurred on the 5th and 22d.*

Powrie deponed,—“I made daily observations [from 2d to 25th November 1886] as to the freshness or saltiness of the water. I brought the water up from the bottom of the river with a bottle. Cross.—I tested the saltiness of the water by taste. I let the bottle down to the bottom, gave it time to fill, and then drew it up. . . . I commenced my tests about 200 yards above the bar, and continued them at intervals down to the bar. I would sometimes make three tests—one 200 yards above the bar, one about 100 yards above the bar, and one on the bar.” Witness embodied the results of his observations in a table produced by him, from which it appeared that only on seven occasions had he found salt water at or above the bar, and then at distances varying from 410 to 445 yards from the dam-dyke.

* The defender's counsel at the hearing maintained that “22d,” looking to the other dates given, was an obvious blunder for “20th.”

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tide being confirmed by specific details of soundings, &c. The only additional evidence of importance was that of James Dow, a witness for the pursuer, who deponed that between the years 1838 and 1848 smacks of from eight to ten tons, with corn from the island of Arran for the Alloway mill (which was about 600 yards up the river), of which his father was then lessee, had discharged at a point some way up the river, though much below the dam-dyke. This practice, witness stated, ceased after the building of a mill in Arran.

On 10th December 1886, the Lord Ordinary (Trayner) pronounced this interlocutor:—"Finds and declares, interdicts and prohibits, in terms of the conclusions of the summons, and decerns: Finds the defender liable in expenses," &c.*

* "OPINION.—The pursuer in this case seeks to have it declared that he, as a member of the public, has right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish, not being salmon or fish of the salmon kind, in that part of the river Doon where the tide ebbs and flows, and as far as the highest point reached by ordinary spring tides. The defender, on the other hand, claims the exclusive right to the fishings in the lower part of the Doon (that is, the part of the Doon in which the pursuer asserts his right to fish), and denies the right of the pursuer, as a member of the public, to fish there at all. He maintains, alternatively, that, in any view, the pursuer is not entitled to fish in the Doon so far up as the point to which the pursuer claims right to go.

"The river Doon flows into the sea about two miles to the south of Ayr, and is therefore one of the rivers on the coast of Scotland. Access can be had to the mouth of the Doon either by walking along the sea-shore or by boats, without trespassing upon the grounds of the defender. When the mouth of the river has been reached, it can be easily waded as far up as the dam-dyke. That the tide flows into the river is admitted, but how far up the river the flood tide goes is a matter of controversy.

"The exclusive right of fishing claimed by the defender has not, in my opinion, been made out. His title, which is a barony title, no doubt contains the words '*cum piscationibus yairis et cruives et salmonum et alborum piscium tam in aquis salsis quam dulcibus*,' but upon that title there has not been any exclusive possession of white-fishing. Indeed, there is no distinct proof of any white-fishing at all by the defender in respect of that title. In these circumstances it does not appear to me to be necessary to decide whether the Crown could grant a title to white-fishing on the shore—that is, where the tide ebbs and flows—which, without possession following thereon, would exclude the public.

"The pursuer bases his right to fish for floating white fish in the part of the Doon in question upon the provisions of the Acts of Queen Anne and King George II., mentioned in the condescendence. The latter of these Acts provides that 'all persons whatsoever, inhabitants of Great Britain, shall, and they are hereby declared to have power and authority at all times and seasons, when they shall think proper, freely to take, buy from fishermen, and cure any herrings, cod, ling, or any other sort of white fish, in all and every part of the seas, channels, bays, friths, lochs, rivers, or other waters, where such fish are to be found on the coasts' of Scotland. I think there is no room to doubt that the primary, if not the sole, purpose of that Act was to encourage the trade or industry of fishing, and had no reference to fishing for sport. But although this is so, the words of the Act do not confine the privileges thereby conferred to fishermen, or persons engaged in the trade of fishing, alone; it confers them on 'all persons whatsoever, inhabitants of Great Britain,' and that without regard to the motive or purpose which leads to the use or exercise of the privilege. It follows, therefore, that the pursuer is entitled to the privilege, whatever it may be, conferred on the inhabitants of Great Britain by the statute. I think it is equally clear that he is entitled under this statute to take white fish

The defender reclaimed, and argued ;—The Acts of Anne and Geo. II. No. 125. did not apply here. In the first place, they did not include yellow or

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in the Doon, as the Doon, at least the portion of it in question, appears to me to fall within the words of the statute as a river on the coast of Scotland where such fish are to be found. Of the fact that white fish are to be found there, there can be no doubt. I agree, however, with the defender's counsel that the privilege conferred by the statute will not cover fishing for river or yellow trout. The fish referred to in the statute are 'herrings, cod, ling, or any other sort of white fish,' and in my view that means 'any sort of white fish' *ejusdem generis*. In a word, I think the statute only confers the privilege of catching fish which are inhabitants of the sea. I shall deal with the right to fish for trout claimed by the pursuer afterwards.

"The next question is—How far up the river is the pursuer entitled to go in exercise of his right of white-fishing? If the right to fish at all is conceded or established, I think the parties are agreed that the right may be exercised on the shore. But how far the shore extends is a question on which they are at variance. The pursuer says that the shore extends as far inland as the high-water mark of ordinary spring tides; the defender confines it to the line which marks the average between ordinary spring and ordinary neap tides. In this controversy I think the pursuer is right; Erskine (B. 2, T. 6, sec. 17) remarking that, under the Roman law, the sea-shore reached as far as the highest spring tide—(the words of Justinian are, 'quatenus hybernus fluctus maximus excurrit')—says 'It goes no further, by the custom of Scotland, than the sand over which the sea flows in common tides.' I take that to mean exactly what the pursuer contends for. The ordinary spring tide is a common tide—as distinguished from an extraordinary or uncommon tide—and therefore as distinguished from the highest spring tide or highest winter flood. So also Bell (Pr. sec. 641) describes the shore as comprehending 'all that is covered by the sea in ordinary tides—the land which lies between high and low-water mark.' Here, again, I think the word 'ordinary' is used as opposed to 'extraordinary,' and means the ordinary spring tides, not the highest spring, or the highest point reached by some unusual tidal wave. In *Nicol v. Blaikie* (22 D. 542), the Lord Justice-Clerk Inglis speaks of the shore vested in the Crown for public uses as 'between high and low-water mark of ordinary spring tides.' The same view was in effect adopted in the case of *Smith v. Officers of State*, 8 D. 711. I refer especially to the opinions of the Lord Justice-Clerk (p. 719) and of Lord Moncreiff (p. 721).

"The defender, in support of his view, refers to the case of *Attorney-General v. Chambers* (23 L. J., Chan. 662), in which it was decided 'that the right of the Crown to the sea-shore is limited to the line reached by the average of the medium high tides between the spring and the neap.' No doubt that is now the law of England, but I cannot accept it as the law of Scotland in the face of the authorities which I have cited. The shore has always been regarded by the law of Scotland as limited to high-water mark, and that might mean either the mark of high-water at ordinary spring or ordinary neap tides. But there is no authority in Scotland which defines the shore as limited to a line which marks the average between these two. Nor can 'ordinary' or 'common' tides necessarily mean neap tides, for spring tides are as ordinary and common as neaps. I therefore hold that to be shore where the tide ebbs and flows up to the high-water mark of ordinary spring tides. As to the exact point reached in the Doon by ordinary spring tides I will pronounce no decision, because it is or may be a fluctuating point. A change in the conformation of the coast, or in the bed of the river, or the course of the river, might make a very material alteration on the line of high-water mark. But it may be for the convenience of parties, so long as the coast and river remain in their present condition, to have my opinion on this point, as regulating at present the rights of parties. The evidence, I think, establishes that ordinary spring tides reach the dam-dyke. Several of the pursuer's witnesses have tasted the water there, and found it brackish,—that is, saltish to some extent. Others have been driven away from

No. 125. river trout, but only sea white fish—on this point the Lord Ordinary was with the defender; and the pursuer was not entitled to use his right to fish for sea white fish, assuming that the statutes gave him such a right, as an excuse for taking yellow trout, on the ground that they were *res nullius*, and he legitimately fishing in the river;—his right was merely a statutory right, and he could not go beyond what the statute gave him. Secondly, the Acts did not include the stretch of river here in question. The Acts were intended to protect the fishing industry of Scotland, not to facilitate private sport, and in this stretch of 500 yards sea white fish were not to be caught in such quantities as to make them of the slightest commercial value. Salmon and fish of the salmon kind were the only fish of any value to be caught there, and even if the public did not intend to poach for these fish, it had been proved that they would do the young salmon much injury merely by fishing, though for other fish. The mention of “rivers” in the enumeration, “seas, channels,” &c., on the “coasts” of Scotland was merely intended to ensure that all the waters on the coasts of Scotland, whatever name might be given to them should be included. The “river” must be on the coast; that meant that where there was a river, so to speak, seaward of the coast line it was to be included,—that was to say, if at low-water it was uncovered, but at high-water it was covered by the tide. But (2) if the Acts did not apply,—and in any case as regarded yellow trout fishing,—the river must be a public river, if the

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the rocks just below the dam-dyke by the rising of the tide upon them. The witness Shearer is a good example of this kind of evidence, and he was a very clear and intelligent witness. I think this kind of evidence better than that given by Mr Stevenson and David Powrie. It is the result of a longer and more varied experience. Powrie's observations are not corroborated by anyone, and their value depends largely on the care with which he made his experiments, which were at the best of a very rough-and-ready character. The value of Mr Stevenson's experiments is detracted from by their having been confined to a single occasion, and at a time when (according to his own statement) the river was not in a normal or usual condition. I may notice, in addition to what I have already said, that on the Ordnance Survey map, prepared in 1859-60, the dam-dyke is marked as ‘the highest point to which ordinary spring tides flow,’ affording corroboration of a valuable kind to the evidence of the pursuer's witnesses.

“I come now to the question whether the pursuer is entitled to fish for trout in the part of the Doon in question. This he claims on the ground that the Doon, so far as he claims the right, is a public navigable river, and that therefore the public have a right to fish there.

“One of the defender's witnesses says—‘The Doon is not a navigable river; it would be extravagant to call it so, I think.’ I think so too, if by the Doon is meant the whole river, from its leaving Loch Doon until it reaches the sea. But the same thing might with equal propriety be said of the Clyde. The Doon, however, at the point in question is navigable, and has been navigated by boats for pleasure, and formerly was navigated by smacks taking grain to the mill, although they did not ascend higher than the fisher's house, which is a very considerable way below the dam-dyke. But in the view I take of the case, it is not necessary to determine how far the Doon is navigable, or whether it is navigable at all. According to my opinion, the ordinary spring tide, which is the limit of the shore, flows up to the dam-dyke. To that point, therefore, the river is public, and in the water which covers that part of the bed of the river I think the public have the right to fish for trout (Bell's Pr. sec. 747). That right, however, must not be exercised so as to injure the higher right of salmon-fishing, which is in the defender. I see no reason why trout-fishing should not be carried on without injury to the salmon-fishing, although there may be reason for saying that it has not always been so. If the pursuer does injury to the defender's rights, the defender has his remedy.”

pursuer was to prevail. In order that a river might be public, it must be both tidal and navigable.¹ Here it was neither. Tidal did not mean subject to tidal influence as shewn in the damming back of the fresh water.² That would include in the case of some rivers a stretch of many miles inland, and these it would be absurd to call tidal. The line at which a river ceased to be tidal was the line of the average tides of each lunar period, i.e. the average both of spring and neap tides—in the present case, Stevenson's line A B. That was the rule in England,³ and although the Lord Ordinary had held that it was the average of spring tides only in Scotland, the authorities, whose use of the expression "ordinary" tides the Lord Ordinary had misunderstood, tended the other way.⁴ At all events the highest point at which a river could be called tidal was the highest point to which the salt water extended—in the present case, the line C D of Stevenson's plan. Nor was the river navigable above the bar. "Navigable" did not mean capable of being used by small rowing boats for purposes of pleasure, it must be open to navigation for purposes of commerce; and of use of the latter class there was little evidence, and none at all for anything like the distance of the dam-dyke. The Crown Lands Act, 1866 (29 and 31 Vict. cap. 62), sec. 7, shewed that the view of the public authorities when the Crown's right of foreshore was transferred to the Board of Trade, was that the crown right extended only to rivers that were tidal and navigable. (3) Even if the river up to the dam-dyke were held to be public, the Crown could competently grant an exclusive right to the white-fishings in it to a private individual,⁵ and had done so here, taking the titles as interpreted by possession, for the defender had made every use of the fishings of which they were capable, or at least which was worth while, and had excluded the public from them. There was no public access to that part of the river.

Argued for the pursuer;—The public right of taking sea white fish was on a different footing from the public right of taking yellow trout. The former depended on the Acts of Anne and George II., and on these Acts there was really no answer to the pursuer's claim, if in point of fact sea fish were to be found as high as the dam-dyke, and the evidence shewed that they were. The question whether the public had the right of trout-fishing, on the other hand, depended, mainly at least, on whether the river was public or not, though the pursuer also maintained that as he was legitimately fishing as high as the mill-dam (in the exercise of his rights under the statutes) he might keep trout if he caught any, they being *res nullius*. By "public river" was meant a river of which the *alveus* was in the Crown in trust for the public. According to the civil law every river

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¹ Mayor of Lynn v. Turner, 1774, 1 Cowp. 86; Rex v. Montague, June 7, 1825, 4 B. & C. 598; Murphy v. Ryan, Jan. 20, 1868, Ir. Rep., 2 Com. Law, 143; Pearce v. Scotcher, March 31, 1882, L. R., 9 Q. B. Div. 162.

² The King v. Smith, 1780, 2 Doug. 441; Horne v. Mackenzie, Aug. 26, 1839, 1 MacL. & Robins, 977.

³ Attorney-General v. Chambers, July 1854, 23 L. J. Chanc. 662, 4 De Gex, MacN. & Gord. 206.

⁴ Bell's Princ. 641; Stair, ii. 1, 5; Ersk. ii. 6, 17; Dunbar v. Brodie, Feb. 1765, 6 Pat. App. 769; Berry v. Holden, Dec. 10, 1840, 3 D. 205, per Lord Medwyn, p. 212; Smith v. Officers of State, July 13, 1849, 6 Bell's App. 487, 21 Scot. Jur. 534; Agnew v. Lord Advocate, Jan. 21, 1873, 11 Macph. 309, 45 Scot. Jur. 214; Rankine on Landownership, 217, et seqq.

⁵ Duke of Portland v. Gray, Nov. 15, 1832, 11 S. 14, per Lord Corehouse, p. 16; Nicol v. Lord Advocate, July 1, 1868, 6 Macph. 972, 40 Scot. Jur. 557, per Lord Barcapple; Gilbertson v. Mackenzie, Feb. 2, 1878, 5 R. 610, per Lord Ormisdale, p. 615; Craig, i. 15, 17; Stair, ii. 3, 69; Ersk. ii. 6, 6.

No. 125. was public provided it was perennial, and was a *flumen* not a *rius*,¹ which excluded burns. The law of England drew a distinction between a navigable river, which as such was public only as regarded its use of navigation, and a tidal river, of which the *solum* was in the Crown in trust for the public. The test of the one was navigability, of the other tidal influence, so that if a river was navigable but not under tidal influence its bed was not public property, but if it was under tidal influence, though not navigable, the bed was public property. Even when "navigable" was used as convertible with "public," that really meant "tidal," and a tidal river was *prima facie* navigable, and actual navigation need not be proved, if the river was fit for navigation. The American law was the same.² The law of Scotland also now recognised the same distinction between rivers merely navigable and tidal rivers,³ but did not limit, as English law did, the crown right to the average of both spring and neap tides. The Lord Ordinary was right in holding that the test was the average of the ordinary spring tides. Now, here there could be no doubt that the Doon was up to the dam-dyke both navigable and tidal. It had been navigated not only by pleasure boats, but by a steamer and also by trading smacks, and it could not be disputed that the tide flowed up to the dam-dyke in this sense, that through the influence of the tide the level of the water there was periodically raised and lowered whether the salt water itself actually went so high or not. But even Stevenson admitted that but for the resistance of the fresh water the salt water would have gone up that length, and the pursuer's witnesses, who were people who had long known the locality, and had caught fish of salt water species in the disputed stretch of water, were clear that the salt water reached the dam-dyke. Stevenson, who with Powrie alone spoke to the contrary, based his evidence on the experience of a single day, when he admitted that there was a heavy volume of fresh water, which would keep the tide back, and according to the print of the evidence a neap tide. Besides, even Stevenson stated that his line of highest salt water was taken on the basis of an average tide, not on that of an ordinary spring tide—as it should have been if the Lord Ordinary's law on that point was sound. These being the facts, the river up to the dam-dyke was a public river.⁴ Then as regarded the defenders' claim on his titles to an exclusive property in the white-fishings, if the river was within the Acts that was a conclusive answer to the pursuer's claim, for the Acts unambiguously made such crown grants incompetent. If, however, the river was public merely, but not within the Acts, then even if the Crown could competently grant an exclusive right to white-fishings in a public river (which the pursuer disputed) the defender's title was not in terms exclusive, and had not been interpreted to be so by possession. Indeed, as far as the evidence went, he had had no possession of the white-fishings at all. By English law all grants by the Crown to private persons of public rivers were bad unless made prior to Magna Charta.⁵

At advising,—

LORD JUSTICE-CLERK.—There has been a good deal of procedure in this case, and some difference of opinion among the Judges who have had to consider it. It began with a petition in the Sheriff Court of Ayrshire, praying to have it found and declared "that the pursuer, as a member of the public, has an un-

¹ Dig. xliii. 12, 1.

² Angell on Water-courses, p. 550.

³ Orr Ewing v. Colquhoun, July 30, 1877, 4 R. (H. L.) 116.

⁴ Earl of Kintore v. Forbes, July 11, 1828, 3 W. and S. 261.

⁵ Hall on the Sea-shore, 47.

doubted right and privilege of fishing with single rod and line for trout, No. 125. flounders, eels, and all other fish which are not salmon, sea trout, and whiting, Mar. 18, 1887. or the young of salmon, sea trout, and whiting, in the river Doon, at least Bowle v. Mar- in that part of it within the tidal influence of the sea." After a proof quis of Ailsa. of considerable length, the Sheriff-substitute decided in favour of the petitioner. That judgment was recalled by the Sheriff, whose judgment came before your Lordships by appeal. After hearing parties on the appeal, and having some difficulty as to the competency of dealing with such questions as are here raised for decision in an application to the Sheriff, your Lordships thought that it would be desirable that a declarator should be brought in this Court, and accordingly it has been brought, and the conclusion of the summons in this case is substantially to the same effect as in the Sheriff Court action,—“That the pursuer, as a member of the public, has right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish which are not salmon, sea trout, or whiting, or the young of salmon, sea trout, or whiting, or fish of the salmon kind, in that part of the river Doon where the tide ebbs and flows, and as far as the highest point reached by ordinary spring tides.”

It was contended on the part of the pursuer that as long as he confines himself to fishing for white fish, he is entitled to fish anywhere in the river Doon where white fish can be found within the salt water of the sea, and he founds his contention upon two Acts of Parliament of Queen Anne and Geo. II. for the encouragement of white-fishing in Scotland, which certainly give a right to fish for white fish wherever they can be found on the “coasts” of Scotland. The pursuer says further that the Doon at that part of it to which this complaint relates is a public river, and not private property, that the tide ebbs and flows within those limits, and that the *solum* belongs not to the Marquis of Ailsa, but to the Crown, and therefore that the Marquis of Ailsa has no right to prohibit the pursuer in the exercise of his right to fish for white fish.

The Marquis of Ailsa, on the other hand, says that his titles give him not only right to the *solum* of both banks of the stream down to a point considerably below the place in question, but also the sole and exclusive right to the fishings of all kinds, both white-fishing and salmon-fishing, and if that contention is well founded the Marquis of Ailsa's right must necessarily exclude the right of the pursuer. The Marquis of Ailsa says besides that the river is neither tidal nor navigable at that part, and that the real object of the proceedings on the part of the pursuer is to obtain the authority of the Court to fish within these limits in order that he may fish for sea trout, whiting, and fish of that kind under pretence of fishing for white fish; that there are no white fish in that part of the river, and nothing that would tempt a man to go there except the opportunity of obtaining that other and illegal kind of fishing. The Marquis of Ailsa says further—and I think that this is a very material part of the case—that there are no means of access to the fishings in question without trespassing upon his private property. It is said on the part of the pursuer that the water may be reached by a public footpath which runs on the north side, or by a public road running upon the south side. Lord Ailsa contends that he is proprietor of the ground between the high road and the river, and that the other access is a private footpath.

These are the questions which your Lordships have to consider. Undoubtedly they touch upon some very important principles of law in regard to property in

No. 125. the sea and in a river. I shall state the opinion I have formed as shortly as I can.

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In the first place, I am quite clear that the Acts of Parliament referred to do not affect this case, and are not meant to affect any question about private property in a tidal stream. They are meant to apply to sea-fishings, and to provide protection for the public in carrying on an important article of commerce without interruption. The case of *M'Douall*, 2 R. (H. of L.) 55, referred to in the Sheriff's note, was a case of that sort, and Lord Cairns' observation was necessarily directed to sea-fishing only. It certainly never was intended to do more than to give a right to the public to fish on the "coasts," as the Act expresses it; and I do not apprehend that the banks of a river, although subject to tidal influence, come within that description.

In the second place arises the important question, whether the river is tidal at the point here in dispute. But before I say a few words upon that subject, I think it not immaterial to see how this question arose, because this may throw a good deal of light upon the real objects of the action, as well as upon the real rights of the parties, and the state of the possession which it is proposed to subvert. The Marquis of Ailsa's titles give him the bank of the river on each side, and also the fishings, and his possession has been, as far as I can see, exclusive, because although it is quite true that some of the public have been in the habit of fishing in part of the stream at the mouth, this was done uniformly by the permission of either Lord Ailsa or his tacksman. This very pursuer himself had such a written permission dated in 1879, which was a clear acknowledgment of Lord Ailsa's right. In this way the state of possession when this question arose was that Lord Ailsa had exclusive right to the whole fishing in the Doon, and that the public fished there only by permission or by trespass. The way in which the question arose was by the pursuer being found by the keepers of Lord Ailsa fishing with a rod and line above the place which he alleges is the ordinary high-water mark—that is to say, above the Doonfoot dam. He endeavoured to escape in the first place. He had some fish in his bag, and he threw these out, but one was taken, and it turned out to be a whiting, not a white fish. He was taken to the police-office, gave a false name, but at last gave his real name; and when he was examined I see that even then he fenced with the question whether it was not a whiting which had been taken by the police. So that the whole conduct of the pursuer shows that he was quite aware that he had been so far trespassing. His conduct, I think, indicates that his real object was not to fish for white fish, but to fish for fish of the salmon kind. That was the object which the pursuer had in view when he brought this action.

The main question in this case is, as I have already said, as to whether this is a tidal river at the point in dispute. The Lord Ordinary holds that it is, and it is quite true that the influence of the tide extends beyond the point contended for by Lord Ailsa in this case. That is to say, the rising of the tide affects the level of the fresh water flowing to the sea. But this must take place in every case where fresh water meets salt water, and the salt water is under the influence of the tide. Without going into the evidence I think it is sufficient to say that the salt water, in my opinion, ceases at a point considerably below the Doonfoot dam, which I take to be the terminus contended for by the pursuer. Of course the hydrostatic effect of raising the level of the salt water through the action of the tide is to raise also

the level of the fresh water, which is obstructed by the higher level to which the salt water has ascended; but I think that the result of the evidence is that no salt water, or at least no material saline quality in the water is to be found at Doonfoot dam-dyke, or considerably below it. Now, upon this matter a great deal of legal lore has been expended in other cases, but I do not think that the question has ever arisen as to whether the fact that fresh water has had its level raised through the influence of the tide constitutes it to the extent to which that rising has taken place a part of the sea. I think it does not. The *dicta* which have been cited from cases relating to the sea margin only have no real bearing upon the question which we have here. I therefore think that in this case the high-water mark of ordinary spring tides is to be found as marked upon the Ordnance Survey, and as it is reproduced in the plans by Mr Stevenson, C.E., put into process, and that the tide does not extend beyond; that in the portion of the river between that point and the Doonfoot dam-dyke there is no salt water, or substantially none; and that the raising of the fresh water by the operation of the obstructing tide is not of itself a sufficient test to shew where the public right in the river ends. No. 125.
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If I am right in that, there is no doubt that both upon principle and on the evidence which was led in the Court below, and also before the Lord Ordinary, there is substantially an end of this case, because it follows that the river above the point to which I have alluded is the private property of Lord Ailsa, and not public in any sense. In regard to the question of navigability, I do not think there is any pretext whatever for saying that this is a navigable river. According to the evidence of perhaps the strongest witness for the pursuer on that matter, while he says that there used to be smacks with corn going up the Doon/ he admits that there have been none such for the last forty years. Clearly, it is impossible that your Lordships should hold that this is a public navigable river used as such by the public. I think, further, that the banks of the river are the property of Lord Ailsa. The public have no right to the private foot-path on the north side, and there are no means of getting at the water from the public road on the south except by trespassing upon the bank. It is said, and said quite truly, that boats could reach the point in question, but I apprehend that what I have said, if sound, leads to the result that the channel of the river is private property. The impression made upon my mind is that the view taken by the Sheriff in the Court below in the appeal case is the right one; and although the Lord Ordinary has stated his views with ability and force, I do not think that they are sound. I think that the substantial fallacy which pervades the Lord Ordinary's views is simply this, that although perfectly sound as applied to any question of sea margin, they cannot be applied to the junction of river and sea. Upon the whole matter I am for recalling the interlocutor of the Lord Ordinary, and assoilzieing the defender.

LORD YOUNG.—I am of the same opinion. I concur exactly in all that your Lordship has said, and I agree generally with the Sheriff in the opinion expressed by him in the Sheriff Court action. It is quite clear, and I have no doubt about it, that the public have a right to fish for white fish in the sea; if it were necessary that I should do so, I should say that they have that right irrespective altogether of the Acts of Anne and Geo. II., which were passed to promote the fishing industry in Scotland; but I agree with your Lordship that the river Doon is no part of the sea. It runs into the sea, but it is not the sea. Nor do I

No. 125. think that it is a river of the kind or class to which the statutes refer. There are rivers in Scotland, as we know, which have estuaries opening out gradually until they really become sea, finishing their course through sand which on either side is uncovered at low water. The Doon is not a river of that kind at all. It is a river with a distinct narrow *alveus* or channel, very much like a creek, only that it contains fresh water which fills it from bank to bank, and leaves no part dry at any state of the tide. Three or four hundred yards from where the river enters the Firth of Clyde there is a dam, and to talk about the river being a navigable river is out of the question. There is private cultivated property on either bank belonging to Lord Ailsa up to the dam, and beyond the dam no navigation can possibly proceed. Nor does it affect the question, in my opinion, that there is tidal influence here. There is tidal influence in every mere creek. If there is a lower level, the tide, as it rises, will pass into it and fill it up, be it creek, burn, or anything else. A mere pipe conveying fresh water into the sea is as good an illustration as anything else. When the tide flows it will stop the current of the fresh water and dam it back, and possibly in some cases the salt water may contend successfully with the fresh, and give a salt flavour to it. But in many cases that is not so; the tide merely serves to dam back the fresh water; and that is tidal influence. This, then, is not a public river, but a private river as distinguished from a public navigable river, and the fishing industry of Scotland is not to be prosecuted there. "The fishing industry of Scotland" is, no doubt, a very general expression, but according to the statutes, taking the later of them, it applies to herrings, cod, ling, or any other white fish, to the fishing for these in the sea, and to taking measures upon the sea-coast for curing them. Now, a man detected poaching here in the river Doon—possibly a representative poacher with others at his back—appeals to these statutes, and to what I shall assume to be the common law, giving the public a right to fish for white fish in the sea, and brings this action, and I should like to call attention to the conclusions of his summons. The Lord Ordinary in his note says,—“The fish referred to in the statute are ‘herrings, cod, ling, or any other sort of white fish,’ and, in my view, that means ‘any sort of white fish’ *ejusdem generis*. In a word, I think the statute only confers the privilege of catching fish which are inhabitants of the sea.” Now, observe the conclusions of the summons, in terms of which the Lord Ordinary has pronounced decree. The pursuer asks the Court to declare that “the pursuer, as a member of the public, has right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish which are not salmon,” and so on. Why limit it to single rod and line? Is that the way in which herring, cod, and ling are fished for? If this is a place to which the statute applies, the pursuer is entitled to fish with the net, or in any other way that may be practised in order to take herring or cod or ling, or any other fish that are inhabitants of the sea. Single rod and line is all very well for such poaching as the pursuer was detected in, and which he intends to continue if he has this right declared in his favour, but it is an odd idea in herring-fishing. Therefore this judgment of declarator of a right on the pursuer's part to fish with single rod and line is rather singular when contrasted with the Act of Parliament upon which the Lord Ordinary founds. But I need say no more. We all know instances in which the tide has an influence—even a greater influence than here—upon streams not of great magnitude flowing through ornamental parks enclosed with walls. These are not public navigable rivers because the

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tide flows up them for a short distance, or because a boat can be floated upon them. I think that there has been some misapprehension of the law applicable to white-fishing in the sea, and about the character of the rivers to which these Acts apply. My opinion is that in the declarator the defences ought to be sustained, and the defender assoilzied, with expenses, and that in the Sheriff Court action, if it is before us, the appeal ought to be dismissed, and the judgment of the Sheriff affirmed, also with expenses.

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LORD CRAIGHILL.—I concur in all that your Lordship and Lord Young have said. I think that the Doon from its source till it meets the sea is a private river, and it appears to me that it meets the sea only at the point up to which the high-water of ordinary spring tides rises along the shore. No doubt there are many cases in which it may be said that the river still exists after it has met the sea. The present is not of that class at all. There is here but one channel, and that is covered as well at low-water as at high. If it had been the case that at low-water there was left on either side of the channel what would be called shore, then the river would have had its channel, and the rest would have been part of the sea. As it is, the channel is the channel of the river only, and is not a part and pertinent of the sea. I think the judgments proposed are in accordance both with the law and the facts of the case, and ought to be pronounced.

LORD RUTHERFURD CLARK.—I am of the same opinion. I am clear that the river Doon between Doonfoot Bridge and the high-water mark of ordinary spring tides is a private river in all essential respects, and is in no sense a public navigable river. I therefore think that the Acts of Parliament do not apply to it in so far as between these two points, because it is not there a river in the sense of these statutes upon the coasts of Scotland. That being so, I have no difficulty in concurring in the judgments which your Lordships propose to pronounce.

IN the Court of Session action, the Court recalled the interlocutor of the Lord Ordinary; sustained the defences; and assoilzied the defender from the conclusions of the action, with expenses.

IN the Sheriff Court action, the Court pronounced this interlocutor: —“Find in fact (1) that the Doon is not a public river, and is not tidal nor navigable; (2) that the defender, the Marquis of Ailsa, is proprietor of the *alveus* and banks at the point where it reaches the sea, and thence upwards to the Doonfoot Bridge; (3) that under his titles the said defender has right to the whole fishings in that portion of the river, and for time immemorial has had exclusive possession and use thereof: Find in law that neither the pursuer nor any other member of the public is entitled to fish in the said part of the river without leave obtained from the said defender: Therefore sustain the defences: Of new assoilzie the defenders from the conclusions of the action, with expenses.”

STURROCK & GRAHAM, W.S.—HUNTER, BLAIR, & COWAN, W.S.—Agents.

No. 126. DAVID SCOTT COWANS AND OTHERS (Daniel Cowan's Trustees), Pursuers
and Real Raisers.—*Salvesen.*

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JAMES COWAN, Claimant (Reclaimant).—*D.-F. Mackintosh—Sym.*

HENRY COWAN, Claimant (Respondent).—*Pearson—Hay.*

Succession—Heritable and Moveable—Conversion—Intestacy.—A direction by a testator to convert will not affect the legal rights of the heir in heritage or the heirs *in mobilibus*, unless the succession is given to some other person.

A trustor, by trust-deed and settlement, directed his trustees (1) to pay his debts; (2) to deliver to his wife his furniture and personal effects; and (3) "as soon after my death as possible, to realise the remainder of my said estate and effects, and divide and pay over the nett proceeds thereof in such manner" as he might direct by any writing under his hand. By subsequent codicil he directed his trustees "to dispose of the nett proceeds" of his estate "as follows:—To my widow an annuity as long as she lives of £70." He further left legacies to a considerable extent. At the death of the widow, and after the purposes of the trust were all fulfilled, the moveable estate was exhausted, but the heritable estate remained unsold. In a competition between the heir-at-law and the next of kin *held* (1) that the direction of the testator to realise the estate must be held to have been carried out, and (2) that the balance of the fund thus formed, after payment of the annuity and legacies, fell to be divided as intestate succession between the heir in heritage and the heirs *in mobilibus* in the proportions in which the fund had been derived from the testator's heritable and moveable estates respectively.

1st Division. DANIEL COWAN, merchant, Broughty-Ferry, died on 19th December 1881.
Lord Trayner. without issue, but survived by his wife, Mrs Isabella Drummond or Cowan.
B.

By trust-disposition, dated 29th December 1880, he disposed to and in favour of his wife, David Scott Cowans, and others, as trustees for the ends, uses, and purposes therein specified, All and Whole his estate, heritable and moveable. He further appointed his trustees to be his sole executors.

The trust purposes were "(First), To pay all my just and lawful debts, sickbed and funeral charges, including suitable mournings to my said spouse, should she survive me, and the expenses of carrying these presents into effect; (Second), To deliver over to the said Mrs Isabella Drummond or Cowan, immediately after my death, in the event of her surviving me, my whole household furniture, personal and other effects whatsoever, within or about my dwelling-house at the time of my death. and (Lastly), As soon after my death as possible, to realise the remainder of my said estate and effects, and divide and pay over the nett proceeds thereof in such a way and manner, and to and amongst such parties as I may direct by any writing under my hand, though not holograph or tested, found lying by me, or in the custody of any other person for my behoof, and which shall be construed with and form part hereof, notwithstanding it may be of an informal nature; and I hereby declare that my said trustees, or those to be assumed by them, besides the powers, privileges, and exemptions conferred on them by statute as gratuitous trustees, shall have full power to dispose of my said estate and effects, either by public roup or private bargain, in such lots and at such prices as my said trustees shall think proper, and generally, in the execution hereof, shall only be bound to act as honourable men."

He further left ten holograph codicils, the first of which was in these terms:—"I, Daniel Cowan, merchant in Broughty-Ferry, and residing there, desire the trustees under my settlement to dispose of the nett proceeds of my estate and effects as follows:—To my widow, an annuity as long as she lives, of £70, payable quarterly in advance, beginning as on the day of my death, for the quarter then commencing, as witness my hand at Broughty-Ferry, Oct. 26, 1880."

By the other codicils he left five legacies of £100 each, and four No. 126.
legacies of £50 each, to persons therein named, of which legacies to the
amount of £450 were to be paid at his wife's death, the rest at his own.

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The trustees accepted office, and ingathered and realised the whole estate with the exception of the heritable property, being house property at Broughty-Ferry.

The annuity of £70 was paid to the widow till her death on 3d May 1884.

The whole of the legacies, and all debts due by the deceased were paid and also the expenses of the trust down to 23d April 1886.

The whole estate (other than the heritable property), together with the income of the moveable and heritable property, was exhausted by these payments, and a balance was at that date due to the trustees of £14, 16s.

In these circumstances, disputes having arisen between James Cowan, the truster's heir-at-law, and his next of kin as to the disposal of the heritable property (which was valued at £350), or of the proceeds thereof, the surviving trustees, on 3d June 1886, raised an action of multiple-poining, in which they called James Cowan, the heir-at-law, and the next of kin, as defenders.

James Cowan claimed the whole fund *in medio*, and pleaded ;—(1) On a just construction of the trust-disposition and settlement, and codicils of the said Daniel Cowan, the heritable property thereby conveyed to his trustees is not converted, and *separatim* the trustees' power to sell not having been exercised, the same remains heritable, and passes, in the circumstances stated, to the claimant as his heir-at-law. (2) The heritable estate remaining unsold, and the whole debts and legacies directed by the truster to be paid having been satisfied, the trustees, real raisers, are bound to convey the said heritable estate to the truster's heir-at-law.

Henry Cowan, one of the four next of kin, claimed one-fourth of the fund.

He pleaded ;—(1) On a sound construction of the trust-disposition and settlement and codicils of the said Daniel Cowan, the said heritable estate falls to be realised by the trustees, and is divisible among the truster's next of kin. (2) The whole estate having been conveyed by the truster with a direction of sale and realisation for division, the same falls to be realised by the trustees, and after defraying the balance of trust debt and expenses, falls to be divided among the truster's next of kin as his heirs *in mobilibus*.

On 9th November 1886, the Lord Ordinary (Trayner) pronounced this interlocutor :—" Finds that the property in Broughty-Ferry, which forms the fund *in medio* in the present process, is to be regarded and dealt with as moveable succession : Therefore repels the claim by James Cowan, as heir-at-law of the truster, and finds him liable in the expenses of process, so far as incurred in the competition between him and the claimant Henry Cowan." *

* " OPINION.—The late Daniel Cowan, by his trust-disposition and settlement, conveyed the whole of his estate, heritable and moveable, to the pursuers as trustees. The estate so conveyed, with the exception of a small property at Broughty-Ferry, was moveable. The purposes of the trust were as follows :—The truster appointed his trustees (1) to pay debts, including the expenses of the trust ; (2) to deliver to his widow the household furniture and other effects in his dwelling-house ; and (3) 'as soon after my death as possible, to realise the remainder of my said estate and effects, and divide and pay over the nett proceeds thereof, in such way and manner and to and amongst such parties' as he might direct by any writing under his hand. By subsequent testamentary writings he directed payment to be made of the annuity to his widow, and of the legacies mentioned in the summons.

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The claimant James Cowan reclaimed, and argued;—The view of the Lord Ordinary was that, where there was a direction to sell, that of itself

“The trustees realised the estate, except the property in Broughty-Ferry, and have paid the annuity (the annuitant is now dead) and the legacies as directed. The heritable property is still in their hands, and the present action is brought to determine to whom that property belongs. The claimant James Cowan, the heir-at-law of the truster, claims it, on the ground that it has not been disposed of by the truster, and that, being heritage, it falls to him. The claimant Henry Cowan claims one-fourth of the fund *in medio*, as one of the truster's next of kin, on the ground that the property in question must, *quoad* this succession, be regarded and dealt with as moveable. This he does on the ground (1) that the truster directed the sale of the property, which operated conversion; or otherwise (2) that the truster gave a power of sale, and that the exercise of that power was necessary to the execution of the trust, which also operated conversion. The heir-at-law maintains, on the other hand, that there is no direction to sell, and that sale was not necessary to the execution of the trust.

“(1) I am of opinion that the trust-deed contains a direction to sell the heritage. After directing his trustees to deliver the household furniture to his widow, the truster directs (the word used is ‘appoint,’ but that means the same thing) his trustees ‘as soon after my death as possible, to realise the remainder of my said estate’—that is, everything conveyed to the trustees beyond the household furniture, ‘and to divide and pay over the nett proceeds thereof,’ as he should subsequently direct. The word ‘realise,’ in its ordinary and popular sense—in which sense I think the truster must be held to have used it—is ‘to convert into money.’ I therefore come to the conclusion that when the truster directed his trustees to convert his estate into money, he expressly directed the sale of his heritage, as it could only be converted into money by a sale. The words ‘divide and pay over’ do not of themselves imply a direction to sell, because division and paying over may be accomplished by a conveyance to the beneficiaries *pro indiviso*. Yet when, in addition to these words, you have the others to be found in this deed, it becomes, I think, plain that what was to be divided and paid is money, and not the estate *in forma specifica*. The direction is to divide and pay over ‘the nett proceeds’ of the estate. Now the proceeds of the estate is not the estate itself, but that which it has produced by the realisation on sale thereof, after deducting the expenses of sale. I think, farther, that the intention of the truster that his heritage should be sold, appears farther from the fact that the whole of the benefits conferred by him on the beneficiaries are payments of money. The whole purpose of his settlement (with the exception of that which has regard to the household furniture) is that his trustees shall pay money. They are to pay his debts, pay the widow's annuity, pay the legacies. They are not even directed to hold the heritage in security of the annuity. They are to get the whole estate into their hands in money, and therewith to pay the annuity and legacies at the time and to the persons as directed.

“It is said that the direction I have referred to cannot be so read, because the settlement in a later clause confers a power of sale, which is superfluous if a direction to sell had already been given. I think a mere power of sale after a direction to sell would have been superfluous; but *superflua non nocent*. Still, as a seeming contradiction or inconsistency, this subsequent power of sale deserves notice. The alleged inconsistency disappears, I think, when the clause is fairly read. It declares that the trustees, ‘besides the powers’ conferred by statute on gratuitous trustees, ‘shall have full power to dispose of my said estate and effects, either by public roup or private bargain, in such lots and at such prices as my said trustees shall think proper.’ I pass over the fact that this is one to a great extent merely of style. Being there, it must receive effect. But, to my mind, it only adds to the direction already given—a power to the trustees to sell, according to their discretion, by public roup or private bargain, at such prices and in such lots as they may think proper. In short, I read this clause not so much as conferring a power of sale, as conferring a discretion on

nade the succession moveable, and conferred rights on the next of kin No. 126.
to the exclusion of the heir. But this was not so, unless the estate was not
only directed to be sold but given away from the heir. The whole move- Mar. 19, 1887.
able estate and the income having been exhausted in paying debts, legacies, Cowan v.
the annuity, &c., and a balance of the whole estate—viz., the house pro- Cowan.
perty—being left, it was conceded that the estate was affected by those
debts and legacies, according to the quality of the estate and the quality
of the debts. The heir would be liable to pay the annuity, or at least so
much of it as the testator had not, by directing the legacies to remain
unpaid till the widow's death, laid by implication on the moveables, but
he was not liable for other debts or legacies, which primarily fell on next
of kin, whom there was nothing in the settlement to relieve. Alter-
natively, the direction here amounted to a direction to the trustees to
mass the estate, and pay the legacies, annuity, &c., out of the massed
estate indiscriminately. Now, if there was no indication to the contrary
in the deed, the annuity would, from its nature, naturally fall on the
veritable property, but after bearing its burden of that annuity the herit-
age, or the price obtained for it, belonged to the heir-at-law. He admitted
that during the continuance of the trust the moveable property had
borne burdens which properly fell on the heritage, and he was willing to
recoup that to those entitled to the moveables. On the heir-at-law pay-
ing this sum, he was entitled to obtain a conveyance of the heritage
unsold. The two kinds of estate should bear the burden rateably. The
direction to sell did not convert the heritage, nor cut out the heir-at-law
and substitute the next of kin. A testator could not, by a mere direction

the trustees to carry out the sale already directed in such mode as they think
best.

"If this view of the truster's settlement is sound, the direction to sell
operated conversion, and the claim of the heir-at-law is excluded.

"(2) But assuming that there was no direction to sell, but merely a power of
sale, I am of opinion that conversion was operated, because the exercise of the
power was indispensable to the execution of the trust.

"The first purpose of the trust was to pay the truster's debts, &c., 'and the
expenses of carrying these presents into effect.' After paying the annuity, the
legacies, and the expenses of the trust management up to 23d April 1886, there
was a debt due to the trustees, to the extent of about £15, 'to which will fall
to be added the expense of the present action, and of winding up the trust.'
This debt and these expenses fall to be provided out of the trust-estate, and to
be paid out of that trust-estate by the trustees. The only part of the trust-
estate still in the hands of the trustees is the property now in question. Ac-
cordingly, out of that property the trustees must provide the money to meet the
debt and expenses I have mentioned. They can only do this by selling the
property, for they have no power to borrow. Indeed, it is only because the
trustees advanced funds of their own that they were able to fulfil the trust pur-
poses up to the 23d April last. If they had not so advanced their own funds,
the property would of necessity have been sold before now to enable them to
fulfil the trust purposes. The sale of the property is therefore indispensable
to the execution of the trust.

"I do not take into account as of any moment the readiness of the heir-at-law
to refund the trustees the amount of their advances, and to pay the expenses of
the action. He is under no obligation to do so, and probably would not offer
to do so if he was not thereby, by a payment of £50 or £60, to secure to him-
self a property worth £350. But the trustees are not directed to take a dona-
tion from the heir-at-law; nor, if they did, can they thereby affect the legal
rights of the next of kin.

"On both the grounds stated, I am of opinion that the property which forms
the fund *in medio* must be regarded and dealt with as moveable."

No. 126. of that kind, disinherit his heir; he could only put heritage past the heir by giving it beneficially to someone else,¹ which he had not done here. Lord Deas' opinion in *Gardner v. Ogilvy*, which was adverse to this view, was a solitary opinion in favour of the argument of the next of kin, and had found no favour elsewhere. In the case of *Dick v. Gillies*,² the opinions of the Court were very divided, and besides this question was never raised there, as that was a case of heritable or moveable in the estate of a beneficiary. In English law, where estates were massed and legacies and annuities were paid out of the massed estate and a balance was left, it was held that the two estates must contribute rateably.³ In the case of *Bowie v. Bowie*,⁴ the view contended for by the claimant was assumed as the law. The question came to be whether the testator had expressly directed that the estate should be massed, and that all the burdens should be paid out of the massed fund irrespective of where the fund came from, and that the balance should be moveable. It required very strong words to shew that,⁵ and there were none such here. The word "realise" was simply inserted to insure easier division and payment, and not with any such marked intention as to lay on heritage what were properly burdens on moveable estate.

Argued for the next of kin;—The question was whether the testator meant the succession, though in his lifetime heritable in form, to go to heirs or executors. He distinctly directed that the heritage should be sold, and that being so, the effect upon succession was precisely the same as if he had sold it himself.⁶ The trustees were bound to convert to meet the annuity, as the payment was to be out of the nett proceeds. The annuity was a burden on heritage, and therefore the heritage should have been sold and applied so far as it would go in paying the burden.⁷ After the fund produced by the heritage was exhausted, the executors would then, of course, have to go on to exhaust the moveable estate. In *Dick v. Gillies* the question, though it rose as regarded the succession of a beneficiary, did not rise owing to her having succeeded under the trust-deed, but *ab intestato* as here. Neither in the case of *Finnie's Trustees*, nor in that of *Neilson v. Stewart*, was any doubt thrown upon the authority of *Dick v. Gillies*, as was generally alleged. In the latter case it was not even mentioned. The claimant here did not argue that the trust-deed amounted to a clear disinherison of the heir, but the words used necessarily amounted to a preference for the next of kin.

¹ *Gardner v. Ogilvy*, Nov. 25, 1857, 20 D. 105, Lord Curriehill's opinion, p. 107, 30 Scot. Jur. 65; *Neilson v. Stewart*, Feb. 3, 1860, 22 D. 646, Lord Neaves' opinion, p. 649, 32 Scot. Jur. 252; *Kers v. Wauchope*, Feb. 21, 1812, 1 Ross' L. C. (Land Rights), 432, Lord Pres. Campbell, p. 438; *Thomas v. Tennent's Trustees*, Nov. 17, 1868, 7 Macph. 114, 41 Scot. Jur. 59; *Finnie v. Lords of the Treasury*, Nov. 30, 1836, 15 S. 165; *M'Laren on Wills*, vol. i p. 212, vol. ii. p. 97.

² *Dick v. Gillies*, July 4, 1828, 6 S. 1065.

³ *M'Laren on Wills*, ii. 495; *Jarman on Wills*, i. 619 and 623.

⁴ *Bowie v. Bowie*, Jan. 16, 1811, Hume's Dec. p. 765.

⁵ *Douglas v. Douglas*, Jan. 17, 1868, 6 Macph. 223, 40 Scot. Jur. 113; *Young v. Martin*, Feb. 6, 1868, 40 Scot. Jur. 181; *M'Laren on Wills*, ii. 491.

⁶ Lord Deas in *Gardner v. Ogilvy*, 20 D. at p. 111; *Dick v. Gillies*, 6 S. 1065.

⁷ *Hill v. Maxwell*, 1663, M. 5473; *Mackenzie v. Mackenzies*, 1777, 5 Fr. Supp. 468; *Mackintosh v. Mackintosh's Trustees*, March 2, 1870, 8 Macph. 627, 42 Scot. Jur. 344, May 19, 1873, 11 Macph. (H. L.) 28, 45 Scot. Jur. 180; *Crawford's Trustees v. Crawford*, 11 Jan. 1867, 5 Macph. 275, 39 Scot. Jur. 145; *Wallace v. Ritchie's Trustees*, July 7, 1846, 8 D. 1038, 18 Scot. Jur. 511.

At advising,—

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LORD PRESIDENT.—The late Mr Daniel Cowan, on 29th September 1880, executed a trust-disposition and settlement whereby he conveyed his whole estate to trustees nominated therein, whom he also appointed his executors. He appoints them (First), “To pay all my just and lawful debts, sickbed and funeral charges, including suitable mournings to my said spouse, should she survive me, and the expenses of carrying these presents into effect; (Second), To deliver over to the said Mrs Isabella Drummond or Cowan, immediately after my death, in the event of her surviving me, my whole household furniture, personal and other effects whatsoever, within or about my dwelling-house at the time of my death; and (Lastly), As soon after my death as possible, to realise the remainder of my said estate and effects, and divide and pay over the nett proceeds thereof in such way and manner, and to and amongst such parties as I may direct by any writing under my hand, though not holograph or tested, found lying by me, or in the custody of any other person for my behoof, and which shall be construed with and form part hereof, notwithstanding it may be of an informal nature; and I hereby declare that my said trustees, or those to be assumed by them, besides the powers, privileges, and exemptions conferred on them by statute as gratuitous trustees, shall have full power to dispose of my said estate and effects, either by public roup or private bargain, in such lots and at such prices as my said trustees shall think proper, and generally in the execution hereof, shall only be bound to act as honourable men.” Now, I think it right, in the first instance, to consider what would have been the effect of that deed if the testator had died immediately after making it and without executing the further deed he contemplated. I do not think it is doubtful what the effect would have been. There is no doubt that he directs his trustees to realise his estate, and to divide and pay over the residue thereof as directed. As I understand the Lord Ordinary’s ground of judgment, the effect of that, in his view, would be to convert his heritable estate into moveable, and in the event of the heritable property remaining unsold, it would be given to his executors instead of to his heir-at-law. I cannot concur in that view. If that deed stood alone it could not, in my opinion, have the effect of disinheriting the heir-at-law, and just as little could it interfere with the rights of the heir *in mobilibus* as regards the executry estate. In short, the rule of law is clearly established, that to disinherit the heir, or to defeat the executor, it is necessary not only so to deal with the estate as to effect conversion, but to give it to some other person. So I think if this deed had stood alone it would only have been effectual as a direction to pay the testator’s debts, and to give his widow the whole furniture, &c., as a specific legacy. On this point I entirely agree in the law stated by Lord Curriehill in the case of *Gardner v. Ogilvy* (20 D. 105), and by Lord Neaves in *Neilson v. Stewart* (22 D. 646).

But Mr Cowan did execute a codicil or codicils, in which he gave several legacies to various people, and provided an annuity to his widow of £70 per annum.

If these bequests had been sufficient to exhaust the entire estate, no question would have arisen for dispute; but the estate is not exhausted. There is a balance left, and to the extent of that balance the testator died intestate. The question then comes to be, how is that balance to be disposed of? It does not affect the question what the amount of that balance is. If Mr Cowan had only

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No. 126. left one small legacy, and had left the great bulk of his property to the question would have been exactly the same. The principle. But so far as the trustor's intentions can receive effect, the directions in the original deed. Those directions are that the trustees are to realise and divide and pay over the residue of the estate, and to mass the proceeds together. The words "realise and pay over" are important. They plainly mean that the main purpose of division. The object, and the only object of the estate shall be the more easily divisible. The heritable estate, point of fact, been realised, but that is of no importance, for the given directions (as he was quite entitled to do) to his trustees to mass his whole estate together, we must, according to the principles of trust law, hold that that has been done which he directed to be done.

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In these circumstances the undisposed of residue is just as much an estate in which, in consequence of the non-disposal of it, there is an interest who would have had an interest if the entire estate had been disposed of—that is to say, the heir and the executors. It seems to me that the realisation of the heritable estate was not necessary to pay the residue; the interest of the heir is not ousted, and so far as the executor's right is concerned for the purpose of enabling the trustees to pay the legacies, his right is not affected. The right of the heir and that of the executor if the estate had been entirely undisposed of would have corresponded to the respective values of the two estates. As it happens, the moveable estate was the more valuable, and the interest of the heir in the case of total intestacy would have been less than that of the executor; and it appears to me that the way in which the balance falls to be divided is to be ascertained by taking into account the relative value of the two kinds of estate before they were disposed of, or before they were disposed of, for the purposes of the trust; and therefore the proportion of the balance is to be divided between the heir and the executor must be in proportion to the proportionate value of the two estates. I therefore propose to make findings to this effect, and remit to the Lord Ordinary to effect to them.

LORD MURE.—The circumstances of this case are peculiar, and it is not to be disposed of according to the general rules applicable to the conversion of heritable estate into moveable estate. Here the main deed is blank as to the disposal of any of the property of the testator, excepting as regards his furniture, and, therefore, if there had been no additional deed, the whole estate would have gone to the heir-at-law. I think, however, that the rule of law referred to by Lord Curriehill, as stated by Lord Curriehill and Lord Neaves in the cases of *Graham v. Neilson*, is well founded, and that the direction here amounts to a direction to realise the whole estate and mass it together for the payment of the annuity. When I first applied my mind to the case I thought it was an occasion for the application of the rule laid down in the case of *Wallace*, 8 D. 1038, in which it was held that, as an annuity is heritable, it falls to be charged on heritage, and legacies, being in the nature of moveables, fall to be charged to the moveable estate. If that rule were applied it would probably leave the heir and the executor in much the same position as they will be in as the result of the course proposed by your Lordships, and I therefore concur in that proposal.

and had left. —I not only concur in the result at which your Lordship has No. 126.
I have been carried everything that has been said in your opinion. The testator
to the trustees that all his estate shall be realised and massed together for Mar. 19, 1887.
the original debt paying legacies and the annuity to his widow. That must be Cowan v.
and divide the legacies have now been paid, and the annuitant having died, it
the proceeds legacies there is still a balance of the estate left for distribution. Now, so
the proceeds legacies As the heir has not been displaced, so far as the balance is
The balance of her heritage he is entitled to get it, and so far as it is the proceeds
more easily divided state the next of kin get it.
and, but that is not

quite entire. —The balance of the estate which is not disposed of belongs to
the heir, as to heritage and the heirs in moveables respectively. As to the propor-
tion to be divided, that is a question of intention. The undisposition here is quite clear, viz., that the whole estate shall be realised and
out of the massed fund, and that out of the massed fund the legacies and annuity shall
be paid without distinction. The testator did not mean that what would natu-
rally fall on the heritable estate should be paid out of heritable, and that what
naturally fall on the moveable estate should be paid out of moveables.
In my opinion, that the legacies and annuity should be paid in-
tegrally out of the whole massed fund. The result is that, if, as is
the case here, there is a balance over, we must ascertain to what extent the
heritable estate has been contributed by the heritable estate, and to what extent
the moveable, and then there will be division according to the proportions
of the two funds contributed to the whole.

COURT pronounced this interlocutor:—"Recall the said inter-
locutor reclaimed against: Find that under the trust-disposition,
settlement, and codicils of Daniel Cowan, the trustees were en-
titled and bound to realise the whole estate, heritable and move-
able, for the purpose of division among the legatees and annuitants
named in the codicil: Find that, although the heritable estate has
not in fact been converted into money, it must, for the purposes
of the present competition, be held to have been so converted:
Find that there is residue of the entire estate, heritable and
moveable, undisposed of, and that, *quoad* said residue, the testator
died intestate: Find that the undisposed of residue falls to be
divided between the competitors, the heir and executors of the
testator, in proportion to the value of the heritable and moveable
estates respectively left by the testator at the date of his death
after fulfilling the two first purposes of the trust, and decern:
Find the reclaimer entitled to expenses since the date of the Lord
Ordinary's interlocutor: *Quoad ultra* find no expenses due, and
remit to the Lord Ordinary to proceed with the cause as shall be
just and consistent with the above findings, and with power to
the Lord Ordinary to decern for the expenses found due."

J. SMITH CLARK, S.S.C.—DAVID MILNE, S.S.C.—REID & GUILD, W.S.—Agents.

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left one small legacy, and had left the great bulk of his property undisposed of, the question would have been exactly the same. The question is one of principle. But so far as the trustor's intentions can receive effect, we must look at the directions in the original deed. Those directions are clear enough. The trustees are to realise and divide and pay over the remainder of the trustor's estate, and to mass the proceeds together. The words "realise and divide and pay over" are important. They plainly mean that the realisation shall be for the purpose of division. The object, and the only object, of realisation is that the estate shall be the more easily divisible. The heritable estate has not, in point of fact, been realised, but that is of no importance, for, as Mr Cowan had given directions (as he was quite entitled to do) to his trustees to realise and mass his whole estate together, we must, according to the well-known rule of trust law, hold that that has been done which he directed to be done.

In these circumstances the undisposed of residue is just that part of the estate in which, in consequence of the non-disposal of it, those parties have an interest who would have had an interest if the entire estate had been undisposed of—that is to say, the heir and the executors. It seems to me that, in so far as the realisation of the heritable estate was not necessary to pay the legacies, the interest of the heir is not ousted, and so far as the executor's right is not ousted for the purpose of enabling the trustees to pay the legacies, his right subsists. The right of the heir and that of the executor if the estate had been altogether undisposed of would have corresponded to the respective values of the two estates. As it happens, the moveable estate was the more valuable, and therefore the interest of the heir in the case of total intestacy would have been smaller than that of the executor; and it appears to me that the way in which the balance falls to be divided is to be ascertained by taking into account the comparative value of the two kinds of estate before they were disposed of, or held to be disposed of, for the purposes of the trust; and therefore the proportion in which the balance is to be divided between the heir and the executor must correspond to the proportionate value of the two estates. I therefore propose that we should make findings to this effect, and remit to the Lord Ordinary to give effect to them.

LORD MURK.—The circumstances of this case are peculiar, and it cannot be disposed of according to the general rules applicable to the conversion of heritable into moveable estate. Here the main deed is blank as to the disposal of any of the property of the testator, excepting as regards his furniture, and therefore, if there had been no additional deed, the whole estate would have gone to the heir-at-law. I think, however, that the rule of law referred to by your Lordship, as stated by Lord Curriehill and Lord Neaves in the cases of *Gardner* and *Neilson*, is well founded, and that the direction here amounts to a direction to realise the whole estate and mass it together for the payment of the legacies and annuity. When I first applied my mind to the case I thought that this was an occasion for the application of the rule laid down in the case of *Ritchie v. Wallace*, 8 D. 1038, in which it was held that, as an annuity is in its nature heritable, it falls to be charged on heritage, and legacies, being in their nature moveable, fall to be charged to the moveable estate. If that rule were applied it would probably leave the heir and the executor in much the same position as they will be in as the result of the course proposed by your Lordship, and I therefore concur in that proposal.

LORD SHAND.—I not only concur in the result at which your Lordship has arrived, but in everything that has been said in your opinion. The testator here has directed that all his estate shall be realised and massed together for the purpose of paying legacies and the annuity to his widow. That must be done. All the legacies have now been paid, and the annuitant having died, it appears that there is still a balance of the estate left for distribution. Now, so far as the proceeds of the massed estate have not been already disposed of, they fall into intestacy. As the heir has not been displaced, so far as the balance is the proceeds of heritage he is entitled to get it, and so far as it is the proceeds of moveable estate the next of kin get it.

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LORD ADAM.—The balance of the estate which is not disposed of belongs to the heir in heritage and the heirs in moveables respectively. As to the proportions in which the balance shall be divided, that is a question of intention. The intention here is quite clear, viz., that the whole estate shall be realised and massed together, and that out of the massed fund the legacies and annuity shall be paid without distinction. The testator did not mean that what would naturally fall as a burden on heritage should be paid out of heritage, and that what would naturally fall on the moveable estate should be paid out of moveables. He intended, in my opinion, that the legacies and annuity should be paid indiscriminately out of the whole massed fund. The result is that, if, as is the case here, there is a balance over, we must ascertain to what extent the whole fund has been contributed by the heritable estate, and to what extent by the moveable, and then there will be division according to the proportions in which the two funds contributed to the whole.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor reclaimed against: Find that under the trust-disposition, settlement, and codicils of Daniel Cowan, the trustees were entitled and bound to realise the whole estate, heritable and moveable, for the purpose of division among the legatees and annuitants named in the codicil: Find that, although the heritable estate has not in fact been converted into money, it must, for the purposes of the present competition, be held to have been so converted: Find that there is residue of the entire estate, heritable and moveable, undisposed of, and that, *quoad* said residue, the testator died intestate: Find that the undisposed of residue falls to be divided between the competitors, the heir and executors of the testator, in proportion to the value of the heritable and moveable estates respectively left by the testator at the date of his death after fulfilling the two first purposes of the trust, and decern: Find the reclaimer entitled to expenses since the date of the Lord Ordinary's interlocutor: *Quoad ultra* find no expenses due, and remit to the Lord Ordinary to proceed with the cause as shall be just and consistent with the above findings, and with power to the Lord Ordinary to decern for the expenses found due."

J. SMITH CLARK, S.S.C.—DAVID MILNE, S.S.C.—REID & GUILD, W.S.—Agents.

No. 127. THOMAS BLACK, Pursuer (Respondent).—*Jameson—M^r Kechnie.*

Mar. 19, 1887. JEHANGEE FRAMJEE & COMPANY, Defenders (Reclaimers).—*Rhind—Orr.*

Black v. *Expenses—Arrestments on the dependence—Maritime cause.—Held that the*
Jehangeer expenses of arresting a ship on the dependence of an action and dismantling her
Framjee & Co. are not recoverable by the pursuer as expenses of process.

1st Division. ON 8th September 1886 the barque "Huron" of Persia was arrested
Lord Fraser. *ad fundandam jurisdictionem* while lying in Lamlash Bay, Arran, at the
M. instance of Thomas Black, sailmaker, Greenock.

On the same day Black raised an action against Bryson, her master, as representing her owners, for payment of £190, 2s. 10d., being the amount of an account for furnishings supplied to the vessel while lying at Ardrossan, and for expenses.

On the same day the pursuer obtained from the Lord Ordinary on the Bills (Fraser) a warrant to arrest the vessel on the dependence of the action. The warrant was to pass on board the vessel, to raise her anchor and "bring her to and moor her in safety in one of the docks of the port of Greenock, and there to dismantle the said vessel."

The warrant was duly carried out, and the vessel dismantled at Greenock.

The owners of the vessel, Messrs Jehangeer Framjee & Company of London, sisted themselves as defenders.

On 5th October 1886 the defenders tendered payment of the account sued for, with expenses of process, as the same should be taxed by the Auditor of the Court. This was refused, and on 8th October the Lord Ordinary (Trayner), on the application of the defenders, loosed the arrestments on condition that £400 was consigned. This sum was not consigned, and on 16th October a renewed application for the loosing of the arrestments was refused in consequence of the previous interlocutor requiring consignation.

On 11th October Black's agent rendered his account of expenses, which amounted to £199, 11s. 9d., and asked the defenders' agents to refer it for taxation to the Auditor. This was done, and on 12th October the Auditor taxed it at £21, 7s. 7½d., disallowing the expenses of arresting and dismantling.

On 15th October the defenders tendered the amount of the account, with interest, and the amount of the expenses as taxed.*

This offer was also declined.

In their defences to the action the defenders did not dispute that the account sued for was due, but set forth the tender above explained.

On 14th January 1887 the Lord Ordinary (Fraser) decerned against the defenders in terms of the conclusions of the summons, and found the pursuer entitled to expenses, and remitted an account thereof to the Auditor to tax and report.

The defenders, Jehangeer Framjee & Company, reclaimed, and the question came to be whether the expenses of arresting and dismantling the ship were proper expenses in the first action.

Argued for the reclaimers;—These expenses were not proper expenses of process. It was well settled that in the ordinary case of arrestments on the dependence the expense of laying on the arrestments was not

* On 11th October Black again arrested the vessel *ad fundandam jurisdictionem*, and on 20th October 1886 raised an action against Jehangeer Framjee & Company for the expenses of arresting and dismantling the ship, which had been disallowed by the Auditor. The ship was again arrested on the dependence of this action.

recoverable as one of the proper expenses of process.¹ It was, however, No. 127. said that this being an Admiralty action, and therefore an action *in rem*, the case was outwith the general rule. But, in the first place, there was ^{Mar. 19, 1887.} *Black v. Jehangeer Framjee & Co.* no case which laid down any such rule, and in the second place, not all Admiralty actions were actions *in rem*. Where the creditor had a lien over the ship, *e.g.*, in actions for seamen's wages, the action was undoubtedly *in rem*, but in actions where, as here, there was no lien over the ship, the action was *in personam*.² It was distinctly laid down in one English case that an action for damages for running down against the owners of a ship was an action *in personam*.³ The expenses of arrestments *jurisdictionis fundandæ causa* were proper expenses of process, because they were necessary to enable the pursuer to obtain decree for his debt, while arrestments on the dependence were only for the pursuer's security—(See Lord President in *Symington's* case).

Argued for the respondents;—The Admiralty Court had quite a different jurisdiction to that of any other Court, and in maritime causes arrestments were a real diligence carried out against the ship herself. Actions in that Court were directed against the ship, and the summons included warrant to arrest and dismantle the ship.⁴ The dismantling had invariably to be carried out skilfully and in a safe port,⁵ and therefore the cost of taking her to such a port (here it was Greenock) was a necessary expense. There was no case settling the practice as to expenses of this kind in Scotland, but in England the marshall's (*i.e.*, the messenger of the Admiralty Court) fees were charged in the bill of costs as expenses of process. Arrestments on the dependence in the ordinary case were merely for the security of the creditor, but in Admiralty causes they were more—they were a real diligence—and therefore the cases of *Symington* and *Taylor* were not in point.

It was admitted at the bar that in practice the expenses of arrestments on the dependence and of dismantling were not charged as expenses of process.

At advising,—

LORD PRESIDENT.—The first action here is at the instance of Thomas Black, sailmaker, against the owners of the ship "Huron," the account sued upon being one for furnishings to the vessel while she lay in port in this country. The "Huron" is a foreign vessel, her owners being also foreigners. On the dependence of that action the ship was arrested and dismantled, and the question which is raised by the respondent is whether the expenses of the arrestments and dismantling can be recovered in this action as part of the expenses of process. The Lord Ordinary has allowed the pursuer his expenses, but he evidently did not intend that that should cover the expenses here in question. In the ordinary case it is fixed quite definitely that the expense of arrestments used on the dependence of an action cannot be recovered as part of the expenses of process. That is settled by two cases, the latest of which is

¹ *Taylor v. Taylor*, Jan. 25, 1820, Fac. Coll.; *Symington v. Symington*, June 11, 1874, 1 R. 1006.

² *Bell's Comm.* 5th ed. p. 98.

³ *Harmer v. Bell* ("Bold Buccleugh" case), 1851, 7 Moore's P. C. Cases, 267.

⁴ *Smith's Maritime Practice*, pp. 24, 78; *Boyd's Adm. Practice*, p. 13.

⁵ *Peterson v. McLean & Hope & Herz*, Jan. 14, 1868, 6 Macph. 218, 40 Scot. Jur. 134; *Kennedy v. McKinnon*, Dec. 13, 1821, 1 S. 210, N. E. 198.

No. 127. *Symington v. Symington*. The rule there laid down is rested on the principle that "the using of diligence on the dependance, however necessary it may be to make a pursuer's decree effectual when obtained, has nothing to do with obtaining that decree, which is the sole object of the action." Now, the way which the pursuer here endeavours to obviate the application of that rule to the present case is by saying that in maritime causes the rule is different, but he has not been able to find any case in which a different rule is laid down as applicable to that class of cases, and he does not deny,—in fact he admits,—that the practice is not what he contends for. In these circumstances I think we must follow the ordinary rule and hold that the expenses here are no more proper expenses of process than they are in the ordinary case of arresting funds in the hands of a third party. It seems to me that as the tender of October 15th is a tender of principal and interest, with the expenses, other than those which I am for disallowing, the pursuer is only entitled to his expenses up to the date of the tender, and that thereafter the defender is entitled to his.

Mar. 19, 1887.
Black v.
Jehangeer
Framjee & Co.

LORD MURE.—I agree in thinking that the expenses of the arrestments and dismantling of this ship must follow the ordinary rule as laid down in the case of *Symington*. That being so, the tender by the defenders is good, and they must be found entitled to their expenses from its date.

LORD SHAND.—I am of the same opinion. The only ground on which it is maintained that the arrestments here differ from ordinary arrestments is that this action was an action *in rem*. Whatever may be said of other actions which were formerly proper to the Admiralty Court, this action is merely a personal claim for furnishings to the ship "Huron," and the arrestments were just arrestments in an action to enforce a personal claim. If the pursuers had had to proceed to a sale of the ship, a question might have arisen as to whether the expenses of the arrestments and dismantling might not have been proper expenses in the process at that stage, just as in a forthcoming and sale. But, however that may be, I agree that those expenses were not proper expenses in this process, and it therefore follows that after the date of the tender expenses must be given to the defenders.

LORD ADAM concurred.

THE COURT granted decree in terms of the conclusions of the summons, found the pursuer entitled to expenses down to the date of the tender of 15th October, and *quoad ultra* found the defenders entitled to expenses.

WILLIAM B. GLEN, S.S.C.—WILLIAM OFFICER, S.S.C.—Agents.

No. 128. THE GLASGOW ROYAL INFIRMARY, Petitioners.—*R. V. Campbell*.

Mar. 19, 1887.*
Glasgow
Infirmary.

Trust—Charitable Trust—Alteration of purposes—Nobile officium.—The Court approved of a scheme by which a trust constituted in the Glasgow Royal Infirmary, "for a fever convalescent home when erected," was altered into a trust "towards payment of the cost of a nurses' home," the purpose of erecting a fever convalescent home, which was in the mind of the directors of the infirmary when the original trust was constituted, having been abandoned as unnecessary.

By his trust-disposition, which was dated in 1858, Mr Alexander Mitchell, merchant in Glasgow, directed his trustees to divide the residue of his estate "among such benevolent and charitable institutions as they may judge most proper, for which purpose I hereby confer upon them the most absolute power and discretion"; and in the exercise of this discretion the trustees, in 1872, allotted the sum in question to the Glasgow Royal Infirmary, "for a fever convalescent home when erected." A receipt was granted by the treasurer of the infirmary, bearing that the money had been received for that purpose, and the money was deposited in bank on a receipt in similar terms. At the time when this was done the managers of the infirmary contemplated the erection of a fever convalescent home. But their scheme was not carried out in consequence of difficulties which arose from the opposition of the inhabitants of the locality in which they proposed to build the home. Subsequently this design was entirely superseded by the action of the Local Authorities, who undertook the treatment of infectious fever cases in the exercise of the powers and obligations created by the Public Health Act of 1867, and erected a Fever Hospital, with accommodation which the managers of the infirmary considered ample for convalescents. The managers of the infirmary therefore ceased to treat fever patients in that institution, and the specific purpose to which Mr Mitchell's trustees had appropriated the sum in question consequently failed.

No. 128.

Mar. 19, 1887.

Glasgow

Infirmary.

1st Division.

Lord Kinnear.

B.

In these circumstances the infirmary managers, being advised that a trust had been constituted in the infirmary corporation for the purpose declared by Mitchell's trustees, and the receipts granted by them, applied to the Court by petition in name of the corporation for their sanction to the fund, now amounting to upwards of £1300, being devoted to another purpose.

The petitioners stated that they were about to build a nurses' home on the infirmary grounds, that the cost of it was estimated at £5000, and that to meet this cost they had already received a donation of £500, and were to apply to the public for the balance. The petitioners stated that the provision of such a home was "among the most pressing necessities of the infirmary." If necessary, they could draw upon the capital stock of the infirmary, which amounted to more than £100,000. They, therefore, submitted to the Court this scheme, viz., "that the whole fund, principal and interest, should be applied towards payment of the cost of a nurses' home to be erected by the petitioners, and that decree and warrant should be granted accordingly."

The Lord Ordinary to whom the petition was presented reported the scheme to the First Division. The petition had been intimated to the Lord Advocate, who had intimated by letter to the petitioners' agents that the proposed alteration of the bequest was one which, under the circumstances, fully met with his approval.

LORD PRESIDENT.—This is quite a reasonable and appropriate mode of disposing of the fund.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT approved of the scheme.

CAMPBELL & SMITH, S.S.C., Agents.

No. 129. **MRS MAGDALENE BROWN OR STEEDMAN, Defender (Reclaimer).—Hay.**
WILLIAM STEEDMAN, Pursuer (Respondent).—C. S. Dickson.

Mar. 19, 1887.
 Steedman v.
 Steedman.

Process—Reponing—Expenses—Husband and Wife—Administration of Justice and Appeals Act, 1808 (48 Geo. III. cap. 151), sec. 16.—Held that the condition imposed by sec. 16 of the above Act upon a person presenting a petition to be reponed against an interlocutor of a Lord Ordinary allowed to become final by mistake, that the petitioner shall be subjected in the payment of the expenses previously incurred in the process by the other party, was inapplicable where the petitioner was a wife seeking to be reponed in an action between her and her husband.

1st Division.
 Lord M'Laren.
 B.

DECREE of divorce on the ground of adultery was on 17th November 1886 granted by Lord M'Laren (Ordinary) in an action at the instance of William Steedman, Lochgelly, against his wife, Mrs Magdalene Brown or Steedman.

The reclaiming days expired without a reclaiming note being lodged, but on 13th January 1887 the Lord Ordinary granted leave to reclaim.

When the cause came before the First Division objection was taken to the competency, and the defender was allowed to lodge a minute stating the cause of the delay in lodging the reclaiming note.

The minute stated that the defender was entitled to be reponed under sec. 16 of the Act 48 Geo. III. c. 151,* on the ground of mistake, she having been informed that she could not reclaim against the interlocutor of the Lord Ordinary without providing money to pay for the expenses of printing the proof, which she was unable to do.

The pursuer maintained on the merits that the defender was not entitled to be reponed, and further, that at all events, the Court was bound to find her liable in expenses up to that point as a condition to reponing her.¹

LORD PRESIDENT.—(After stating his opinion that the defender was entitled to be reponed on the ground of mistake)—With regard to the question of expenses, it is not to be doubted that in ordinary cases the payment of expenses up to date is the condition on which the party to a suit is reponed, but that rule does not apply to the cases between husband and wife, for if we ordained the wife to pay the expenses she might demand that her husband should be ordained to supply her with funds to enable her to obey the order of the Court. The order would, in short, be implemented by the husband, and not by her.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT allowed the reclaiming note, and sent it to the roll for discussion.

N. B. CONSTABLE, W.S.—JAMES SKINNER, S.S.C.—Agents.

No. 130. **JAMES COWAN, Petitioner (Respondent).—Pearson—Low.**

THE LORD PROVOST, MAGISTRATES AND TOWN-COUNCIL OF EDINBURGH,
Respondents (Appellants).—J. C. Thomson—Darling.

Mar. 19, 1887.
 Cowan v.
 Magistrates of
 Edinburgh.

Superior and Vassal—Building restriction—Construction.—A feu-charter provided that the vassal should within three years from the term of entry, "erect

* The Administration of Justice and Appeals Act, 1808, sec. 16, enacts,—
 "If the reclaiming or representing days against an interlocutor of a Lord Ordinary shall from mistake or inadvertency have expired it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs; but declaring always that in the event of such petition being presented the petitioners shall be subjected in the payment of the expenses previously incurred in the process by the other party."

¹ *M'Rae v. Bertwhistle's Trustees*, March 11, 1831, 9 S. 582.

and constantly maintain on the said piece of ground buildings of the value of £12,000 at least, which buildings shall consist of a range of four-storey tenements similar to those already built" in the street. The vassal was further taken bound to form and constantly maintain a foot-pavement "in front of the houses to be built on the said piece of ground . . . the foot-pavement being formed within the area of the said piece of ground to the extent of eight feet." After he had erected houses of the character and value specified, the vassal proposed to erect on a part of the ground as yet unbuilt on stables of one storey in height. He also proposed that these stables should come to the edge of his ground, without leaving eight feet for a foot-pavement. *Held* that he was within his right in both respects, the Court being of opinion (1) that the feu-charter could not be construed to import any restriction on building on the ground feued (except in regard to those buildings the erection of which was stipulated for), and (2) that the buildings which the vassal proposed to erect were not of a character to require him to form a foot-pavement in terms of the second of the clauses above quoted, although if he came to erect buildings of another class his obligation to form the foot-pavement might come into operation.

No. 130.

Mar. 19, 1887.
Cowan v.
Magistrates of
Edinburgh.

By feu-charter dated 31st March and 4th April, and recorded 12th July 1876, the Lord Provost, Magistrates and Town-Council of Edinburgh, as governors and administrators of Trinity Hospital, disposed to William Beattie, architect in Edinburgh, and his heirs and assignees whomsoever, All and Whole that piece of ground, part of the lands of Quarryholes, bounded on the north by the proposed continuation of Albert Street, on the east by the Easter Road, on the south by the Granton branch of the North British Railway, and on the west by the property of Heriot's Hospital, but always with and under the following conditions, provisions, and declarations, and clauses irritant and resolute, and *inter alia*,—“(Primo), that the said William Beattie and his foresaids shall, within eighteen months from the term of entry hereinafter mentioned, erect and constantly maintain on the said piece of ground buildings of the value of £6000 at least, and within the further period of another eighteen months, additional buildings of the value of another £6000, making in all buildings of the value of £12,000 at least, which buildings shall consist of a range of four-storey tenements similar to those already built in Albert Street, on the frontage along the continuation of Albert Street and Easter Road, and of workshops or public works on the remainder of the said piece of ground not occupied by said tenements, or shall consist of tenements fronting Albert Street and Easter Road as above; and the space behind may be occupied by similar tenements having a frontage to cross streets, running southwards from Albert Street; which tenements, or workshops, or public works, and all other buildings at any time to be erected on the said piece of ground, shall be built according to a plan and elevation, and such cross streets, laid out according to a plan to be submitted to and approved of by the said Lord Provost, Magistrates, and Council, and their successors in office, governors and administrators foresaid.” The second clause provided that if Beattie and his foresaids should “fail to erect on the said piece of ground buildings as stipulated for as aforesaid,” the charter, and all that had followed thereon, should become void and null. The third clause further provided, *inter alia*, that Beattie and his foresaids should be “bound to form and constantly maintain a foot-pavement and water-channel, with proper gratings and connections to drains where necessary, in front of the houses to be built on the said piece of ground facing the continuation of Albert Street, Easter Road, and other streets of the same description as those already formed in Albert Street . . . the foot-pavement towards Easter Road being formed within the area of the said piece of ground hereby disposed to the extent of eight feet.”

2D DIVISION.
Dean of Guild
Court, Edin-
burgh
I.

By feu-charter dated 2d and recorded 3d April 1877, Beattie disposed

No. 130. part of the ground thus acquired by him to James Cowan, contractor, Edinburgh, *inter alia*, with and under the conditions and obligations specified in the charter from the Magistrates, the obligation to erect buildings to the value of £12,000 being imposed on Cowan to the extent of £4000.

Mar. 19, 1887.
Cowan v.
Magistrates of
Edinburgh.

In October 1886, Cowan, who by that time had erected buildings on the ground feued to him of the value of £4000, and of the character specified in the feu-charter, presented a petition to the Dean of Guild of Edinburgh for warrant to erect buildings one storey in height on a portion of this ground still unbuilt on fronting Easter Road. These buildings were to be occupied as stabling and premises in connection therewith, and were to be built of brick and slated roof, and they were to be brought up to the extreme margin of Cowan's property fronting Easter Road, but they were not to rise above the top of a low wall which separated Cowan's feu from Easter Road, the level of the feu being considerably below that of Easter Road.

The Magistrates and Town-Council opposed this application, on the ground that the erection of buildings of one storey in height fronting Easter Road was a contravention of the feu-charter. They did not dispute that Beattie and Cowan had duly implemented the obligation to erect buildings to the value of £12,000 at least, but they maintained that "the petitioner is restricted to build a range of four-storey tenements similar to those already built on the frontage along the continuation of Albert Street and Easter Road. . . . The reference in the feu-charter granted by the respondents as to the minimum value of the buildings to be erected on the ground feued did not affect the character of the buildings which were to be erected along the continuation of Albert Street and Easter Road, all of which were to consist of a range of four-storey tenements." They further maintained that the petitioner was bound to leave eight feet of his property fronting Easter Road for a foot-pavement, and was not therefore entitled to build thereon as proposed.

On 9th December 1886, the Dean of Guild pronounced this interlocutor:—"Finds that the operations in question are confined to the petitioner's own property, and can be executed without danger: Finds that the proposed buildings are not a violation of the feu-charter granted by the respondents: Therefore repels the pleas in law for the respondents: Grants warrant as craved: Finds the respondents liable in expenses," &c.*

* "NOTE.— . . . The Dean of Guild is of opinion that the nature of the obligation therein specified was to build, within a certain time, houses of a certain architectural character, and to the value of £12,000, on the frontage along the continuation of Albert Street and Easter Road; and all these requirements have been observed, thereby securing the feu-duty to the respondents. It may be that the respondents meant that after these were built all other houses to be built in Easter Road should be of the same character, but the charter does not say so, either in this clause, or, as will appear directly, in the other clauses of conditions. On the other hand, all that is actually stipulated for is a range of buildings of £12,000 value, and the respondents must have known that such a sum would only provide buildings of such a character on a part of the frontage of the area disposed, and ought to have expressed clearly their intention that even after the stipulated buildings were built, none were to be erected on the rest of the frontage but buildings of a similar character.

"If this is so in regard to the first of these clauses, the question comes to be,—Is there anything in the other clauses of the charter to support the respondents' contention that the petitioner can build along the Easter Road nothing else than four-storey houses as aforesaid? The second clause of the charter is an irritant clause, declaring that the feu shall be forfeited 'if the said William Beattie and his foressaids shall fail to erect on the said piece of ground buildings as stipulated for.' Now, this draws back to the first clause of the deed, which

The Magistrates appealed, and argued;—The object of the first clause of the feu-charter was to preserve the uniformity of Albert Street and Easter Road, and that object had been attained by prohibiting the erection of other than four-storey buildings similar to those already built in Albert Street. That was the plain intention of the parties, and the Court ought therefore to give effect to it, even if the prohibition were not express, but the true construction of the clause was to read the passage from “of the value of £6000 at least,” down to “of the value of £12,000 at least” as a parenthesis; the “which buildings” which followed then referred back to the “buildings” first mentioned in the clause, and made the obligation as to the character of the buildings to be erected universal. Even if the clause merely had reference to the value of the buildings, the value of those already erected might be depreciated below £12,000, if the petitioner were allowed to erect inferior or objectionable buildings. In any event, under the third clause the petitioner was bound to leave eight feet of frontage to Easter Road.

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Mar. 19, 1887.
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Argued for Cowan;—The first clause was not prohibitory, merely obligatory,—obliging the feuar to erect buildings of a certain value, which had been done. That of course was to secure the feu-duty. Except in so far as he was expressly restricted in the feu-charter, a vassal was at liberty to put up such buildings as he pleased on his ground.¹ There were well-known styles of restriction, which ought to have been used if restriction was intended. On third clause the petitioner did not maintain that he was not bound to leave eight feet for the foot-pavement, if (whether in implement of the obligation or not) he *de facto* proposed to erect houses fronting Easter Road, but he contended that these stables were not houses, and secondly that they did not “front” Easter Road, as they were below its level.

LORD JUSTICE-CLERK.—In this case I see no reason for differing from the judgment of the Dean of Guild.

LORD YOUNG.—I have had great difficulty in regard to this case I must say; but I rather think, although I should gladly have thought otherwise, that the view of the Dean of Guild is the right one. I think that this is a blundered deed, and that the whole matter is rightly put by the Dean of Guild’s assessor when he says,—“It may be that the respondents meant that after these were built all

certainly stipulates that the buildings shall be of four storeys, but also that they shall be of the value of £12,000, the proportion of which transmitted against the petitioner he has more than made good.

“The Dean of Guild is of opinion that there is nothing in this clause to extend the view of the disponee’s obligations which he has already expressed. The third clause provides in certain proportions for the expense of forming roadways and drains therein. By this clause also, Beattis is bound to form and maintain foot-pavement and water-channel in front of the houses to be built on the said piece of ground facing the continuation of Albert Street, Easter Road, and other streets, like those already made in Albert Street; the foot-pavement towards Easter Road being kept eight feet within the area of the ground disposed.

“So far as the petitioner’s range of building turns into Easter Road, this condition has been implemented, but it will be observed that the clause only demands that the pavement shall be laid ‘in front of the houses to be built,’ leaving it to be determined by the first of the clauses prescribing the nature of the buildings what the character and extent of the buildings are to be.

“In the view which the Dean of Guild has taken of the titles, the use which the petitioner now proposes to make of his ground cannot be considered a contravention of the conditions of his grant.”

¹ Russell v. Cowpar, Feb. 24, 1882, 9 R. 660.

No. 130. other houses to be built in Easter Road should be of the same character, but the charter does not say so." I cannot resist the argument that that was the intention of the framers of this charter, but the charter does not say so, and we are not at liberty to gather the intention of the parties apart from the words of the charter. I therefore think we should adhere.

Mar. 19, 1887.
Cowan v.
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LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—I am of the same opinion. I cannot find in this deed any prohibition such as that on which the appellants in this case must rely. Any such prohibition must be clearly expressed, but I cannot find any clear expression of it—indeed I doubt if there is any expression of prohibition in the deed at all. It is said that we may gather what may have been the intention of the framers of the deed, and from that intention may gather what the deed proposed to do. That is a mode of construing a feu-charter to which we are unaccustomed, and there is here nothing in favour of that mode of construction; on the contrary, the rule is in favour of liberty to the vassal. All such clauses of prohibition must be strictly construed. The more troublesome question is as to the footpath, but neither here do I find any clause of prohibition on which the appellant may rely. It may be that if the petitioner comes to erect buildings of the sort specified in the charter which require an access to Easter Road, he may be obliged to leave the required space for a footpath, but until he does so, I do not think that we can enforce this clause. I think the note of the assessor is not only well put, but is sound law.

THE COURT adhered.

DONALD MACKENZIE, W.S.—MILLAR, ROBSON, & INNES, S.S.C.—Agents.

SUMMER SESSION.

No. 131. ROBERT BETHUNE AND OTHERS (on behalf of the St Andrews Ladies' Golf Club), Pursuers (Respondents).—*D.-F. Mackintosh—G. R. Gillespie.*

May 13, 1887.
St Andrews
Ladies' Golf
Club v.
Denham.

JAMES GLOVER DENHAM, Defender (Appellant).—*M. Kechnie—C.S. Dickson—Salvesen.*

Property—Servitude—Golfing Links—Possessory judgment.—In 1799 the Magistrates of St Andrews granted a feu-disposition of a large part of the Pilmour Links, belonging to the burgh, "reserving the bleaching ground, as particularly marked out by march-stones placed therein, on which the inhabitants of St Andrews are to have the liberty and privilege of bleaching in all time coming"; and also, *inter alia*, "under the reservation always that no hurt or damage shall be done thereby to the golf links, nor shall it be in the power of any proprietor of said Pilmour Links to plough up any part of said golf links in all time coming, but the same shall be reserved entirely, as it has been in times past, for the comfort and amusement of the inhabitants and others who shall resort thither for that amusement."

In 1881 the successor of the original disponee, with consent of his grazing tenant, let a portion of the ground to the St Andrews Ladies' Golf Club for seven years from Martinmas 1880, at a rent of £4 per annum, payable to the grazing tenant. The lease excepted "from said piece of ground hereby let any portion thereof over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching" under the feu-disposition, and declared that "the piece of ground hereby let is to be made use of for the purpose of golfing or putting by the members of St Andrews Ladies' Golf Club, and by such other persons as the said club may allow, but by no others," the

pasturage being reserved to the grazing tenant. The club had from 1867 had possession of the same piece of ground under a missive offer of lease with similar conditions. No. 131.

In 1885 the club brought an action in the Sheriff Court to have an inhabitant of St Andrews, who was not a member of the club, interdicted from golfing on the ground let to them. May 13, 1887.
St Andrews
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The defences were (1) that the lease was *ultra vires* of the granter, in respect that the right of golfing reserved in the original feu-disposition extended over the whole Links, or at all events over the ground said to have been let to the pursuers; (2) that the lease expressly excluded the bleaching ground, and that the bleaching ground included the whole or a part of the ground claimed by the pursuers; (3) that the pursuers had not proved exclusive possession.

It was, in the opinion of a majority of the Court, proved in point of fact that the public golf course was defined and marked out by march-stones, that the ground in dispute formed no part of that course, and that since 1880 the pursuers had had exclusive possession of that ground under a lease granted by the proprietor thereof, and for thirteen years previously under a missive of lease with him.

Held (diss. Lord Young) that the pursuers were entitled to a possessory judgment.

PRIOR to 1799 the Magistrates of St Andrews, in virtue of successive charters granted by the Scottish Kings, and by the bishops and arch-bishops of St Andrews, were proprietors of the Links of St Andrews, otherwise called Pilmour Links, an area of about 280 acres in extent, lying along the sea-shore to the west of the city. On 4th December 1799 the Magistrates granted a feu-disposition of the portion of these Links (amounting to about five-sixths of the whole) lying to the west of a burn called the Swilkin Burn, in favour of Charles and Cathcart Dempster, merchants, St Andrews. This feu-disposition contained the following clause:—"Reserving always to the town of St Andrews the whole ground to the eastward of the Swilkin Burn, . . . as also reserving the bleaching ground to the west thereof, as particularly marked out by march-stones placed therein, on which the inhabitants of St Andrews are to have the liberty and privilege of bleaching in all time coming; as also reserving to the burghesses of said city standing on the stent-roll alienary power and liberty to cast and win divots upon the said Links and commonalty for flanking and rigging, conform to use and wont, as also for repairing the town's mill-leads and dams, under the reservation always that no hurt or damage shall be done thereby to the golf links, nor shall it be in the power of any proprietor of said Pilmour Links to plough up any part of the said golf links in all time coming; but the same shall be reserved entirely, as it has been in times past, for the comfort and amusement of the inhabitants and others who shall resort thither for that amusement." 2d Division.
Sheriff of Fife-
shire.
1.

In 1820 the ground thus feued to the Dempsters was acquired by Mr Cheape of Strathtyrum, under the same reservations and conditions.

By lease, dated 15th and 19th February and 2d March 1881, Cheape, with consent of John Millar, his grazing tenant of this ground, let a portion of it to Lieutenant-Colonel Robert Bethune of Nydie, Major Robert Tod Boothby, and Henry S. Crawford Everard, both residing in St Andrews, on behalf of the St Andrews Ladies' Golf Club, in the following terms:—"All and Whole that small piece of ground forming part of said Links, and lying on the east side of the golfing course of St Andrews, and immediately northward from the Swilkin Burn at the point where said burn discharges into the sea on the West Sands of St Andrews, said piece of ground being bounded as follows:—On the west by a line extending in length 158 yards or thereby, measuring from the west end of

No. 131.
 May 13, 1887.
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the retaining wall erected on the north side of the said burn (near to the mouth thereof), northwards along the east side or margin of the ordinary or public golfing course; on the north by a straight line drawn from the north end of the said western boundary as before defined, eastwards to the West Sands; on the east by the West Sands or sea beach; and on south by the Swilkin Burn, all lying in the parish of St Andrews and shire of Fife: But excepting from said piece of ground hereby let any portion thereof over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of the said Links granted by the Town-Council of St Andrews in favour of the proprietor's authors and predecessors, and declaring that the said inhabitants shall not be interrupted or molested in exercising such liberty and privilege, and also that burgesses of the city of St Andrews standing on the stent-roll allenarly shall have power and liberty to cast and win divots on said piece of ground for the purposes specified in said feu-rights, conform to use and wont"; the lease to be for seven years from Martinmas 1880, but with power to Cheape or his successors in the subjects to terminate it at any prior period of Martinmas on giving one month's notice. The lease then continued:—"Which piece of ground hereby let is to be made use of for the purpose of golfing or putting by the members of the St Andrews Ladies' Golf Club, and by such other persons as the said club may allow, but no others; the pasturage of the ground being hereby reserved to the said John Millar and his heirs and successors in the lease of the pasturage of the said Links." The lessees then bound themselves to pay Millar, or the grazing tenant of the Links for the time being, during the currency of the tack, the sum of £4 yearly as the rent of the subjects let.

The St Andrews Ladies' Golf Club was formed in 1867, and prior to the date of the lease the piece of ground thereby let, or substantially the same ground, had been held by or for behoof of the club from its formation, under a missive offer of lease, dated March 1868, for five years from Martinmas 1867, at a rent of £2 per annum, payable to the grazing tenant, which was followed by possession during these five years, and was continued by tacit relocation from its expiration to the commencement of the lease just quoted.

The club was a voluntary association, with a membership of 1000, of whom not more than one-half might be ladies, the remainder being men. Admission was obtained by election by the committee, and the annual subscription was half-a-crown.

In June 1885 Colonel Bethune and the other lessees on behalf of the club brought an action in the Sheriff Court at Cupar against James Glover Denham, of No. 3 Pilmour Place, St Andrews, who was not a member of the club, praying for interdict against the defender golfing or putting on the piece of ground leased to them under the above lease, or in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the possession of the same.

The pursuers, after setting forth their lease, averred,—(Cond. 3) "A golf course has been formed on the said piece of ground, and the exclusive right of golfing or putting thereon is by said lease confined to 'the members of the St Andrews Ladies' Golf Club, and by such other persons as the said club may allow.' Denied that the defender has been in the habit of golfing or putting on the Ladies' Golf Course or ground in question ever since it was formed. The St Andrews Ladies' Golf Club was instituted in 1867, and since that time, or for at least seven years prior to June 1885, the pursuers and the said club have been tenants of and paid

rent for the ground in question, and have enjoyed uninterrupted peaceable possession of the same for golfing or putting. *Quoad ultra denied.* No. 131.

The defender answered,—(Ans. 3) “Admitted that a golf course has been formed on the said piece of ground. Denied that the granter of the said pretended lease had power to confine the exclusive right of golfing or putting on said piece of ground to the members of the St Andrews Ladies’ Golf Club, and such other persons as the said club may allow. May 13, 1887. St Andrews Ladies’ Golf Club v. Denham.

Not known, and not admitted, that the St Andrews Ladies’ Golf Club was instituted in 1867. Denied that since that time, or for at least seven years prior to June 1885, the pursuers and the said club have been tenants and paid rent for the ground in question, and have enjoyed uninterrupted peaceable possession of the same for golfing or putting. The ground in question is part of the bleaching ground reserved to the inhabitants of St Andrews.”

The parties further averred and answered,—(Cond. 4) “On or about the 13th day of June 1885 the defender, after being duly warned by Thomas Morris, golf-club maker, St Andrews, the custodier of said golf course, golfed or putted on the said piece of ground or golf course, and refused to desist, although requested by Morris to do so. Counter statements denied.” (Ans. 4) “Denied that on or about the 13th day of June 1885 the defender trespassed on the said piece of ground or golf course here mentioned. Denied that Thomas Morris, golf-club maker, St Andrews, is the custodier of said golf course. Admitted that the defender golfed or putted on said course on or about said 13th day of June, as he had been in the habit of doing in common with the other inhabitants of St Andrews for many years. Admitted that he refused to desist when requested by Morris, and averred that Morris had no right or authority to make such a request.” (Cond. 5) “The defender is not a member of the St Andrews Ladies’ Golf Club, and had no authority from the pursuers or the St Andrews Ladies’ Golf Club, or right of any kind, to golf or put on the said piece of ground or golf course, and his doing so is injurious and prejudicial to the pursuers as representing the St Andrews Ladies’ Golf Club. Denied that the defender is either an inhabitant or citizen of St Andrews.” (Ans. 5) “Admitted that the defender is not a member of the St Andrews Ladies’ Golf Club. Averred that he did not require any authority from the pursuers or the St Andrews Ladies’ Golf Club to golf or put on the said piece of ground. Averred that as one of the inhabitants of St Andrews he has an inalienable right to golf or put on said ground, and that neither the proprietor, Mr Cheape, nor the pursuers, can deprive him of that right. Denied that by putting or golfing on said ground the defender in any way injured or prejudiced the pursuers or the rights and interests of his fellow-citizens.”

In his statement of facts the defender also averred that “the golf links” referred to in the clause of reservation in the feu-charter of 1799 were co-extensive with the Pilmour Links. The pursuer in answer stated “that the golf course or golf links, over which the inhabitants of St Andrews and others have a good and undoubted right and title to exercise the privilege and enjoy the amusement of playing golf, extends from 10 to 12 acres, and is specially marked off by march-stones.”

The pursuers pleaded;—(2) The pursuers and the St Andrews Ladies’ Golf Club having been tenants of the ground in question and having enjoyed uninterrupted, peaceable, and exclusive possession thereof for golfing or putting since the institution of the club in 1867, or for at least seven years prior to 13th June 1885, they are entitled to a possessory judgment.

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The defender pleaded;—(2) No title to sue. (4) The ground in question forming part of the Links of St Andrews, otherwise called Pilmour Links, having been conveyed to Mr Cheape's predecessor, and being held by him under the condition that no part of said golf links should be ploughed up at any time, but that the same should be reserved entirely as it had been in times past for the comfort and amusement of the inhabitants of St Andrews and others who should resort thither for that amusement, it was *ultra vires* of Mr Cheape to grant the lease No. 5 of process conferring the exclusive right of golfing or putting on said ground on the members of the St Andrews Ladies' Golf Club, and such other persons as the said club might allow, and the same must therefore be held *pro non scripto*. (5) The inhabitants of St Andrews and others having enjoyed the right of bleaching clothes, of walking, of playing golf, and of otherwise amusing themselves on the ground in question from time immemorial, the pursuers are not entitled, by interdict or otherwise, to prevent the defender exercising these rights. (6) The rights of the defender and of the inhabitants of St Andrews in and over said Links, and the said portion thereof, being as hereinbefore set forth, the defender is entitled to absolvitor, with expenses. (7) The defender not having trespassed on the ground in question, and not having done anything but what he was legally entitled to do, interim interdict ought not to have been granted against him, and the same will fall to be recalled, and the defender assolizied, with expenses.

A proof was allowed. The import of the evidence sufficiently appears from the interlocutor and note of the Sheriff. The evidence bearing on the averments in cond. 4 is quoted in the opinion of Lord Young.

On 6th November 1886 the Sheriff (Mackay *) pronounced this interlocutor (after findings setting forth the pursuers' and the defender's titles):—Finds “(5) That the piece of ground in question, although situated within that part of the Links now commonly called the St Andrews or Pilmour Links, which form a portion of the subjects contained in the feudisposition of 1799, is entirely outwith the ordinary golf course marked out on the Links at some date prior to the year 1821, and also outwith the course now used, which, with one or two deviations in the form of widening the course, is the same as that so marked out; (6) that some portion of the said piece of ground in question was at one time used for the purposes of bleaching in respect of the servitude of bleaching contained in the title of the proprietor of the Links, but that the practice of bleaching has considerably diminished in recent years, and, so far as regards the ground in question, practically has ceased for nearly twenty years; (7) that no person has come forward to assert the claim of the inhabitants to any part of the ground in question for bleaching purposes, and that there are neither the parties nor the materials in the present process necessary for defining the extent of the bleaching servitude; (8) that the defender has not proved possession, by himself or any of the inhabitants of St Andrews, of the piece of ground in question for the purpose of playing the short or putting game of golf, or any possession by him or them of such a kind as to restrict the proprietor from granting the exclusive use thereof to the pursuers' club for the purpose of playing the said short or putting game; (9) that the defender has not proved that the use of this piece of ground for the purpose of the short or putting game is inconsistent with, or will in any way interfere with, the ordinary and habitual practice of the game of golf as played from time immemorial, or, at all events, for much more than the prescriptive period, by

* Both the Sheriff-substitutes of the county declined.

the inhabitants of St Andrews and others, on the golf course and parts of the Links adjacent thereto: In these circumstances, finds in law that the pursuers are entitled to interdict against the defender: Recalls the interim interdict granted on 21st July 1885, and in lieu thereof interdicts the defender from playing the putting or short game of golf on the piece of ground described in the prayer of the petition, or from in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the possession or occupation of the said piece of ground for the purpose of playing the putting or short game of golf: Finds the defender liable in expenses," &c.*

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* "NOTE.—This is a petition for interdict against the defender golfing or putting on a part of the Links of St Andrews belonging in property to Mr Cheape of Strathtyrum, and let by him to the pursuers, the St Andrews Ladies' Golf Club. The defender, who is an inhabitant of St Andrews (for the plea against his title has been waived), claims, as such, a right to golf on any part of the Links, and to use any holes, by whomsoever and wherever made, for the purpose of the game. He accordingly played, on the occasion referred to in condescendence 4, upon the ground here in question, and was turned off by Thomas Morris, who has been employed since the commencement of the Ladies' Club in 1867 to take charge of the ground for it. He still asserts his right to play the putting game at this place, although not a member, and without leave of the club, and the present action has been brought to prevent him. His defence is founded upon a reservation contained in the title of Mr Cheape, whose author, Dempster, acquired this part of the Links which lies west of the Swilkin Burn under the reservations quoted in the first finding of the interlocutor. The reservation in favour of golfing is that which the defender specially seeks to vindicate for himself and the other inhabitants. But he refers to the other reservations, and specially that in favour of bleaching, in support of his argument. He also led proof as to the possession for the prescriptive period in support of his construction of the title.

"The pursuers put their case chiefly—indeed, almost exclusively—upon their right to a possessory judgment, but their proof also covered the prescriptive period. They have a lease from the late Mr Cheape of Strathtyrum of the piece of the Links in question, for the purpose of golfing or putting by the members of the St Andrews Ladies' Golf Club, 'and by such other persons as the said club may allow,' but under an exception of any portion over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching, and a declaration in favour of the burgess' right of casting and winning divots according to use and wont. Prior to their entry at Martinmas 1880 under this lease, the term of which is seven years, the Ladies' Club had possessed the ground for five years under a missive offer, dated 'March 1868, agreeing to take the ground in question (or almost the whole of it) for the purpose of golfing and putting by the members of the Ladies' Golf Club, and by such other persons as the club may allow, for five years from Martinmas 1867.' Tacit relocation followed on the expiry of the five years down to the commencement of the present lease. It is contended by the pursuers that their possession has been in conformity with the leases, and that the Ladies' Club has had exclusive possession for the special purpose claimed since its formation in 1867, and certainly for the last seven years. A lease is a sufficient *prima facie* title to support a possessory judgment—*Hume v. Scot*, Dec. 1, 1676, Mor. 10,641; *Young v. Cunningham*, June 22, 1839, 8 S. 959; *Anderson v. McCallum*, Nov. 3, 1857, 20 D. 2; *Begbie & Co. v. France*, Nov. 24, 1857, 20 D. 81; and on the question of possession the Sheriff is of opinion that the pursuers have proved exclusive possession of sufficient quality for such a judgment. It is needless to go into the details of the proof. There is undoubtedly evidence of toleration of play by others, and a good deal of play appears to have gone on at times and seasons when the members of the club were not playing. But it is very clear that the only habitual and regular play in assertion of a

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The defender appealed, and argued ;—The form of interdict which was asked, and had been granted, was so vague that it was impossible for the

right was by the members of the club, and there was constant practice of challenge when strangers or persons ignorant of the club rules played so as to interfere with the play of the members of the club. No one refused to leave when challenged, according to the evidence of Thomas Morris, and his evidence on this point is confirmed by the pursuers' other witnesses, and not contradicted by the defender's. The evidence as to the players of the ordinary game following their ball when it lit on the ground in question is irrelevant, for this is not the right either asserted or denied in the present case. The right asserted is a right to use the holes made, and the ground prepared, by the Ladies' Club for the short or putting game. If the case had been one of heritable property, the Sheriff would therefore have held the pursuers clearly entitled to a possessory judgment.

"But the question relates to a servitude. No doubt the point has been mooted whether the right of golfing is a proper servitude, and there may be cases where it is, strictly speaking, rather a qualification or condition of a trust title like that of the magistrates for behoof of the community, but where, as here, it is imposed by reservation on the property title of a third party in favour of the inhabitants of a burgh, there is a dominant and servient tenement, the latter of which is subject to a burden in favour of the former restricting to that extent, but not otherwise, the right of property. This is just a description of a real servitude, and there appears no reason why it should not be called by that name. It is in fact included in the category of servitudes, both by Judges and legal writers in modern times. It is not a servitude known to the Roman law, but it has become well known in Scots law, and though its character differs from ordinary servitudes, in respect that its immediate object is amusement merely, it does not appear to differ in any other essential respect.

"Now, the Sheriff Court Act of 1878 extends the jurisdiction of the Sheriff to questions touching either the constitution or the exercise of real or prædial servitude, and it was held in *Gow's Trustees v. Mealls*, May 28, 1875, 2 R. 729, that where it was competent for the Sheriff to decide on the merits on a claim for servitude, it was incompetent for him to decline and confine himself to merely a possessory judgment. The question of the merits was raised in that case by the pursuer, and it is here raised by the defender, but the proprietor's titles have been produced, and proof has been led relative to the prescriptive period as well as to the possessory period. It may be a disadvantage for the defender that no decision in the present case will be *res judicata* in a question with the proprietor of the Links, but it is the defender who asks for a judgment on the effect of the titles and prescriptive possession. No motion has been made by him to have the proprietor sisted, or intimation made to him of the present process. The Sheriff, though with some difficulty, has come to be of opinion that he is not entitled to decline to consider the larger question which the defender has raised. The case appears to come within the rule stated by the Lord Justice-Clerk in *Gow's Trustees*,—'When a possessory judgment regarding an heritable right is made the foundation of action in the Sheriff Court, it is implied that the Sheriff is not in a position to settle the ultimate dispute between the parties, but he can only regulate possession *ad interim* until the parties have obtained a decision of the Supreme Court on the merits of their case. But here the question is one of servitude; the Sheriff is competent to deal with it unreservedly, and ought to have entertained and disposed of the merits of the question.'

"It at one time occurred to the Sheriff that, as a declarator before the Supreme Court would undoubtedly have been a more appropriate mode of settling the question as to the exact limits of the rights of property and servitude respectively in this portion of the Links, and as neither the Magistrates of St Andrews, nor the proprietor of this part of the Links, are parties to the present proceedings, he might, without deciding the case expressly upon the possessory judgment, hold that the *status quo* should be preserved until a declarator had been brought. But to decide nothing except the question of the appropriate form of action would scarcely be satisfactory to anyone, and certainly not to the defender.

respondent to know when he might be infringing it. He might walk on this ground or bleach his clothes upon it; would that be an interference

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It is not his fault that, contrary to the more usual practice, the interdict process has been brought in the name of the tenant only, without the concurrence of the landlord. The parties have supplied the Sheriff with materials and argument sufficient to decide, in a question at all events with the defender, the issue he has raised, and the Sheriff has felt bound to decide it. His opinion is, that the servitude of golfing imposed upon the property title of the Links is not such as to prevent the proprietor from granting the possession of the portion here in question to the pursuers' club, for the purpose of playing the short or putting game, to the exclusion of its use for that purpose by the defender, as an inhabitant of St Andrews, so long as the possession so granted does not interfere with the ordinary course of the game on the Links, as played by golfers generally, and required for the number of persons who are in the habit of playing. The Sheriff further thinks that the evidence of possession during the last forty years is not in the least inconsistent with, but, on the contrary, confirms this view of the title.

"It was contended for the pursuers that the 'Golf Links' in the proprietor's titles were not identical with the Pilmour Links, and did not include the piece of ground in question, which is admittedly outwith the golf course, as pointed out by the stones placed there prior to the year 1821, and they tried to limit the term 'Golf Links' to the 'Golf Course.' There is certainly room for argument on the question, whether the Golf Links are not a more restricted area than Pilmour Links in the widest sense of the term. But for the purpose of this case it is sufficient to say that, in the opinion of the Sheriff, the term 'Golf Links' cannot be restricted to the 'Golf Course,' or strips of the Links varying from 72 to 195 yards in breadth, marked out by stones, on which the ordinary game is generally played. A golf course is not like a race course, a limited space, passing beyond which is the loss of the game. It happens frequently with bad players, and sometimes in bad weather with good, that the ball falls outside of the course. This, in fact, is one of the hazards of the game, and the practice of following the ball wherever it falls on the Links has always been allowed, and is the only penalty on the unskilful or unfortunate player. The title from the burgh in favour of Mr Cheape's authors is quite wide enough to cover under the expression 'Golf Links' the whole Links on which any part of the game is played, in the manner in which it is played, according to use and wont, and this includes a much larger tract of ground than the course proper, and cannot be held to exclude in this sense that part of the Links here in question, where the ball has frequently to be followed. But it does not follow that the extent of the servitude over the Links outside the golf course and that over the course itself is the same. This point was very carefully considered in the recent case of *Paterson v. The Magistrates of St Andrews*, 27th July 1881, H. of L. 8 Rettie, p. 117, particularly by Lord Watson. That learned Lord observed,— 'Then it is said you must leave untouched everything outside of that course which can be shewn to be a part of the Links to which a ball may be driven in playing the game of golf. I entirely demur to that proposition. The contention to which I am prepared to give effect really comes to this, that whatever is outside of the proper golfing course may be turned to various purposes so long as these are not inconsistent with the game of golf.' If this observation had been merely an *obiter dictum* of so distinguished a lawyer, it would have been entitled to the highest respect, and the Sheriff would have been very slow to decide anything which could conflict with it. But it was in reality the ground of judgment in that case, which is a binding, and the Sheriff thinks a conclusive, authority on the present. For the decision in that case was that the Magistrates of St Andrews were entitled to use or allow the use of a portion of the Links outside of the proper golf course for the purpose of a road, so long as this use did not interfere with the game of golf, to which that part of the Links, including the site of the road, had been dedicated by immemorial usage. It is true that case related to part of the Links east

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of the Swilkin Burn retained by the magistrates, and not to the part here in question, which they alienated to a third party. It is settled law, and was assumed by all the Judges, both in the Court of Session and House of Lords, that such alienation, if absolute and total, as in the case of feus for houses, though open to challenge prior to the years of prescription, was not so after they had run. Here the alienation to Mr Cheape's author was not absolute or total, for while the magistrates in 1799 transferred the property, they reserved certain uses for behoof of the inhabitants, one of which was golfing, as the inhabitants had exercised it according to the use and wont of such exercise. It necessarily follows that the measure of the burden or restriction on the property of their disponee is precisely the same in extent as the qualification of their own title prior to the disposition. The use of a portion of the Links as a private or semi-private ground for the practice of the short or putting game, without interfering with the right of the golfers to follow their balls outside of the course, cannot be said to be in any way inconsistent with the game of golf as habitually played on the Links. If the defender had considered this case, the course of which was followed with great interest by the golfing public, and its necessary consequences, the Sheriff cannot help thinking that he would not have challenged the present proceeding, in which, though nominally defender, he is really the pursuer, for on the occasion referred to in the pleadings and proof he played or attempted to play the putting game on this ground for the purpose of being, and with the knowledge that he would be, prevented.

"It is unnecessary to enter minutely into the evidence of possession during the prescriptive period. The Sheriff does not doubt that, with such titles as are here in question, a servitude right might be modified either by extension or restriction, upon clear proof that there had been the exercise of a wider right by the persons entitled to the servitude, or a further limitation of the right of property by the owner of the property subject to it. But there is no evidence whatever adduced by the defender to shew that the proprietor of the ground, who *prima facie* on the titles has the whole uses not reserved, was restricted *de facto* by the exercise of such a right as the defender here claims. His claim amounts to this, that any inhabitant of St Andrews might make on any part of the Links outwith the golfing course a set of holes for the purpose of playing the short or putting game, without the consent of the proprietor of the ground. Nothing of this sort has ever been attempted. The ground was open, and no one was prevented from walking on it. Games, such as football and cricket, which are played on the surface, and require no operations on the soil by digging, were challenged, though not always with complete success, by the Strathtyrum watchman, Robert Hunter. But no one tried to play the short game of golf at this place, which implies cutting holes in the ground, and dressing and preparing the green, until the pursuers' club did so with the sanction of the proprietor and the grazing tenant. It would be a more delicate question whether, if the number of players, or possibly improvements in the game, required an extension or enlargement of the course, this might not be claimed on the part of the inhabitants; but no such question has been raised. Apart from the decision in the case of *Paterson*, the view of the law to which effect has been given in the present judgment derives strong support from the opinion expressed by Lord Eldon in the case of *Dempster v. Cleghorn*, Nov. 29, 1813, 2 Dow's App. 40, as to the Links here in question, and the procedure adopted by the Court of Session in the case of *The Magistrates of Earlsferry v. Malcolm*, June 12, 1829, 7 Shaw, 755, Nov. 23, 1832, 11 Shaw, 74.

"In the case of *Dempster* there was no final decision, but Lord Eldon's opinion, when he remitted the case to the Court of Session, was very adverse to any limitation of the proprietor's right of property, except what was established by the actual exercise of the servitude right.

"It appears probable from the evidence of Mr Grace in the present case that

off, and ran along the edge of the golf links, which confessedly was open for all to golf on. The Court would not fence ground in such a position

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the defining the course by stones may have been a consequence of that remit, and of some arrangement between the parties as to the course upon which the game was to be played. This, however, is not established by proof, and all that is certain is, that no further judicial proceedings were taken by the pursuers to limit the proprietor's right. As to the decision in the Court of Session (*Cleghorn v. Dempster*, M. 16,141), which was practically superseded by the remit, it may be observed that it proceeded upon the basis, whether well or ill-founded, that the golf ground had been damaged by the rabbits of the proprietor,—that is to say, damaged for the purposes of golf. There is no room in the present case for pretending that there has been any damage done by the use the proprietor has granted of a portion of the Links to the Ladies' Club. In the *Earlsferry* case, in which it was decided that the burgh of Earlsferry had a servitude of golfing over the Ferry Links, the property of which was claimed by Malcolm, the Court itself took the necessary steps for marking out a course. A remit was at first made 'to Mr Jameson, then Sheriff-substitute of Fife, to settle the best and most convenient track for the exercise of golfing,'—7 Shaw, 755, and the burgh having thereafter objected to his report, and craved a new remit to experienced golfers, 'the Court remitted to Messrs Walter Cook, W.S., and John Taylor, Attorney in the Exchequer, to examine the ground in question, to lay out a proper course thereon sufficient for the due exercise of that amusement, having a due regard to all the circumstances of the case, and to the mutual rights and claims of the parties,' and their report being returned, the Court decreed in terms of it—11 Shaw, 74.

"The defender raised a side issue, which, although it bulked a good deal in the proof and argument, is of a somewhat singular character. He contended that part, or possibly the whole, of the ground now used by the Ladies' Golf Club was subject to the servitude of bleaching, and had been constantly used for that purpose, and that it was impossible that the short game of golf could be played consistently with the exercise of the servitude of bleaching. The result of success in this argument would be to exclude not only the Ladies' Club but also the defender from the ground, or so much of it as is subject to the bleaching servitude, although the object of the defender is to obtain for himself and the other golfers the right to play the short game there. There is undoubtedly a servitude of bleaching on part of the Links, and one of the reservations in the title of Mr Cheape's author is of the bleaching ground to the west of the Swilkin Burn, as particularly marked out by march-stones placed therein, on which the inhabitants of St Andrews are to have the liberty of bleaching in all time coming. The proof as to bleaching, shortly, was that about twenty years ago there was a good deal of bleaching on both sides of the Swilkin Burn, and, in particular, on a part of the ground now used by the Ladies' Golf Club, which went by the name of the dining-room, as marked on plan No. 39 of process, and probably also on other convenient spots within that ground. The neighbourhood of the burn from which water was got naturally made this a suitable place for bleaching. The evidence as to the march-stones defining the bleaching ground is by no means clear and consistent. Some of them have been removed, and there is a conflict about at least one still extant, whether it was a march-stone of the bleaching-green. It would be a waste of time to go into *minutiae* on these points, but the Sheriff thinks that the three stones in a line still remaining tend to confirm the fact deducible from the other evidence that a part of the ground in question had been used for bleaching. They indicate the line, or a portion of the line, of the south boundary, and the Swilkin Burn may be taken as the east boundary in a question with the proprietor of this part of the Links. But the northern and western boundaries are not made out by existing march-stones or any other clear evidence. The parties described the boundaries in this way, as the Swilkin Burn is called the east boundary in the titles, and the Sheriff has followed their example, although more strictly, according to compasses, this part of the burn would be called the

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of the Swilkin Burn retained by the magistrates, and not to the part here in question, which they alienated to a third party. It is settled law, and was assumed by all the Judges, both in the Court of Session and House of Lords, that such alienation, if absolute and total, as in the case of feus for houses, though open to challenge prior to the years of prescription, was not so after they had run. Here the alienation to Mr Cheape's author was not absolute or total, for while the magistrates in 1799 transferred the property, they reserved certain uses for behoof of the inhabitants, one of which was golfing, as the inhabitants had exercised it according to the use and wont of such exercise. It necessarily follows that the measure of the burden or restriction on the property of their disponent is precisely the same in extent as the qualification of their own title prior to the disposition. The use of a portion of the Links as a private or semi-private ground for the practice of the short or putting game, without interfering with the right of the golfers to follow their balls outside of the course, cannot be said to be in any way inconsistent with the game of golf as habitually played on the Links. If the defender had considered this case, the course of which was followed with great interest by the golfing public, and its necessary consequences, the Sheriff cannot help thinking that he would not have challenged the present proceeding, in which, though nominally defender, he is really the pursuer, for on the occasion referred to in the pleadings and proof he played or attempted to play the putting game on this ground for the purpose of being, and with the knowledge that he would be, prevented.

"It is unnecessary to enter minutely into the evidence of possession during the prescriptive period. The Sheriff does not doubt that, with such titles as are here in question, a servitude right might be modified either by extension or restriction, upon clear proof that there had been the exercise of a wider right by the persons entitled to the servitude, or a further limitation of the right of property by the owner of the property subject to it. But there is no evidence whatever adduced by the defender to shew that the proprietor of the ground, who *prima facie* on the titles has the whole uses not reserved, was restricted *de facto* by the exercise of such a right as the defender here claims. His claim amounts to this, that any inhabitant of St Andrews might make on any part of the Links outwith the golfing course a set of holes for the purpose of playing the short or putting game, without the consent of the proprietor of the ground. Nothing of this sort has ever been attempted. The ground was open, and no one was prevented from walking on it. Games, such as football and cricket, which are played on the surface, and require no operations on the soil by digging, were challenged, though not always with complete success, by the Strathtyrum watchman, Robert Hunter. But no one tried to play the short game of golf at this place, which implies cutting holes in the ground, and dressing and preparing the green, until the pursuers' club did so with the sanction of the proprietor and the grazing tenant. It would be a more delicate question whether, if the number of players, or possibly improvements in the game, required an extension or enlargement of the course, this might not be claimed on the part of the inhabitants; but no such question has been raised. Apart from the decision in the case of *Paterson*, the view of the law to which effect has been given in the present judgment derives strong support from the opinion expressed by Lord Eldon in the case of *Dempster v. Cleghorn*, Nov. 29, 1813, 2 Dow's App. 40, as to the Links here in question, and the procedure adopted by the Court of Session in the case of *The Magistrates of Earlsferry v. Malcolm*, June 12, 1829, 7 Shaw, 755, Nov. 23, 1832, 11 Shaw, 74.

"In the case of *Dempster* there was no final decision, but Lord Eldon's opinion, when he remitted the case to the Court of Session, was very adverse to any limitation of the proprietor's right of property, except what was established by the actual exercise of the servitude right.

"It appears probable from the evidence of Mr Grace in the present case that

off, and ran along the edge of the golf links, which confessedly was open for all to golf on. The Court would not fence ground in such a position

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the defining the course by stones may have been a consequence of that remit, and of some arrangement between the parties as to the course upon which the game was to be played. This, however, is not established by proof, and all that is certain is, that no further judicial proceedings were taken by the pursuers to limit the proprietor's right. As to the decision in the Court of Session (*Cleghorn v. Dempster*, M. 16,141), which was practically superseded by the remit, it may be observed that it proceeded upon the basis, whether well or ill-founded, that the golf ground had been damaged by the rabbits of the proprietor,—that is to say, damaged for the purposes of golf. There is no room in the present case for pretending that there has been any damage done by the use the proprietor has granted of a portion of the Links to the Ladies' Club. In the *Earlsferry* case, in which it was decided that the burgh of Earlsferry had a servitude of golfing over the Ferry Links, the property of which was claimed by Malcolm, the Court itself took the necessary steps for marking out a course. A remit was at first made 'to Mr Jameson, then Sheriff-substitute of Fife, to settle the best and most convenient track for the exercise of golfing,'—7 Shaw, 755, and the burgh having thereafter objected to his report, and craved a new remit to experienced golfers, 'the Court remitted to Messrs Walter Cook, W.S., and John Taylor, Attorney in the Exchequer, to examine the ground in question, to lay out a proper course thereon sufficient for the due exercise of that amusement, having a due regard to all the circumstances of the case, and to the mutual rights and claims of the parties,' and their report being returned, the Court decreed in terms of it—11 Shaw, 74.

"The defender raised a side issue, which, although it bulked a good deal in the proof and argument, is of a somewhat singular character. He contended that part, or possibly the whole, of the ground now used by the Ladies' Golf Club was subject to the servitude of bleaching, and had been constantly used for that purpose, and that it was impossible that the short game of golf could be played consistently with the exercise of the servitude of bleaching. The result of success in this argument would be to exclude not only the Ladies' Club but also the defender from the ground, or so much of it as is subject to the bleaching servitude, although the object of the defender is to obtain for himself and the other golfers the right to play the short game there. There is undoubtedly a servitude of bleaching on part of the Links, and one of the reservations in the title of Mr Cheape's author is of the bleaching ground to the west of the Swilkin Burn, as particularly marked out by march-stones placed therein, on which the inhabitants of St Andrews are to have the liberty of bleaching in all time coming. The proof as to bleaching, shortly, was that about twenty years ago there was a good deal of bleaching on both sides of the Swilkin Burn, and, in particular, on a part of the ground now used by the Ladies' Golf Club, which went by the name of the dining-room, as marked on plan No. 39 of process, and probably also on other convenient spots within that ground. The neighbourhood of the burn from which water was got naturally made this a suitable place for bleaching. The evidence as to the march-stones defining the bleaching ground is by no means clear and consistent. Some of them have been removed, and there is a conflict about at least one still extant, whether it was a march-stone of the bleaching-green. It would be a waste of time to go into *minutiae* on these points, but the Sheriff thinks that the three stones in a line still remaining tend to confirm the fact deducible from the other evidence that a part of the ground in question had been used for bleaching. They indicate the line, or a portion of the line, of the south boundary, and the Swilkin Burn may be taken as the east boundary in a question with the proprietor of this part of the Links. But the northern and western boundaries are not made out by existing march-stones or any other clear evidence. The parties described the boundaries in this way, as the Swilkin Burn is called the east boundary in the titles, and the Sheriff has followed their example, although more strictly, according to compasses, this part of the burn would be called the

No. 131. by an interdict, when no harm could be done to anyone by the alleged trespass.¹ If the Court were to consider the question, a large question of

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south boundary, and the other boundaries relatively altered. If this case had been a declarator to establish the extent of the bleaching area it would probably have been necessary to dismiss it for want of sufficient evidence. But no such declarator has been raised. On the contrary, the persons interested in the servitude of bleaching have from motives of good neighbourhood or policy abstained from interfering with the sport of the Ladies' Club, and changed to some extent the part of the Links used for bleaching. The bleaching here practised was never for wholesale or manufacturing purposes, but only for family purposes. The old-fashioned mode of exposing clothes or linen for a considerable period in the open air, to whiten the colour, has gradually become little more than ordinary washing and drying. Other sources of water supply and facilities for washing have to some extent lessened the use of the Links for this last purpose, but it is still practised to a considerable extent. Those practising it probably suffer a little inconvenience from now using part of the Links somewhat further from the burn, but, on the other hand, they are nearer the whins on which the clothes are dried. While the Sheriff thinks it right so far to explain the practice disclosed by the proof led in this case, he feels bound, in the absence of the proper parties raising the proper issue, not to express any opinion as to the local limits of the servitude of bleaching, or how far these might be altered by custom short of the years of prescription, or be subject to regulation by the Court. He thinks it enough to say for the disposal of this part of the case, that the defender is not here vindicating the right of the inhabitants of St Andrews to a bleaching ground, but is asserting a right to play golf in a particular way on a portion of the Links outside the ordinary course. His right to do so either upon the titles alone or upon the titles and prescriptive possession are the issues which he has raised, and, in the opinion of the Sheriff, failed to establish. A special argument with reference to the bleaching servitude was founded upon the terms of the pursuers' lease, which excepts from 'the ground let any portion over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of the said Links granted by the town in favour of the proprietor's authors and predecessors, and declares that the said inhabitants shall not be interrupted or molested in exercising such liberty and privilege.' It was argued upon this clause that the present pursuers had no title to sue, in so far as the ground used by them, or part of it, was *de facto* part of the portion of the Links subject to the servitude of bleaching. This no doubt is the most plausible mode of bringing the bleaching question into the present case. It must be kept in view, however, that bleaching is not practised at all times and seasons, and possibly the clause of exclusion may be qualified by the declaration of its purpose, namely, 'to prevent the inhabitants from being interrupted or molested in exercising the privilege of bleaching.' But however this may be, the clause was evidently inserted for the benefit of persons claiming the bleaching privilege, and for the protection of the proprietor in case any claim was made by them. No claim has been made, and the present judgment will not affect such claim if made by the proper parties. The present position of matters is that the ground in question is not used for bleaching. There are not, as explained in a former part of this note, materials in the present process for defining the limits of the bleaching servitude. Nor is this the proper process for doing so. In these circumstances it does not seem legitimate to the Sheriff for the present defender to use this clause as a defence to the present action. The pursuers are therefore, in the opinion of the Sheriff, entitled to interdict, but the terms in which it is to be granted require careful consideration. The prayer originally was to interdict the defender from 'trespassing and golfing or putting' on the ground in question, or in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club, in the possession of the same. The words 'tre-

¹ Winans v. Macrae, June 3, 1885, 12 R. 1051.

public right was raised. It was said there was nothing but a possessory question raised, but even in such a question the character of the possession and its origin might be looked at.¹ As a matter of fact the complainers had not had exclusive possession, but, even if they had, it was unlawful, for the title of their author was *funditus* bad, resting as it did upon an alienation of burgh property by the magistrates. They could not grant any such right, as *Grahame's* and *Sanderson's* cases shewed.² *Grahame's* case was of great importance, because it fortified the respondent in affirming that the conveyance by the magistrates, which was admitted to be under some reservation, must be under the reservation of the public rights over the whole territory, which had been enjoyed by the inhabitants both before the sale and since. A minor point was to be found in this, that the bleaching green which was reserved, *i.e.*, the property of which was reserved from the grant, had been shewn to form part of the ground here in dispute. If that were so, Mr Cheape could not grant the title he was said to have granted, nor could the complainers maintain their case, for the bleaching green was excluded from their lease.

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Argued for the complainers;—The Court could pronounce no more than a possessory judgment here, for the proprietor was not a party to the case. The case of *Mealls*³ referred to by the Sheriff was distinguished from the present by the fact that in that case both parties were proprietors of the tenements connected with the servitude claimed. No doubt the complainers must shew a colourable title. They had, however, satisfied that obligation, for in the title of their author, Mr Cheape, only two restrictions were found, and neither of them affected the present case. First, his right of property in the "golf links" was not absolute. But the "golf links" was obviously not co-extensive with Pilmour Links, and as he was a limited owner of the golf links so he was unlimited owner of the rest, and might plough them or let them for what purpose he pleased. That they had in part been cropped was proved by the interlocutor of the Court in 1806.⁴ Even if the course was not defined by the titles it would be restrained by the Court within reasonable limits, as in the *Earlsferry* case,⁵

passing and' were deleted by amendment before the record was closed, and the pursuers explained at the debate that by the word 'golfing' was meant only putting or playing the short game. An interdict should, however, be free from any possible ambiguity, and the right of following the ball in the ordinary game is not intended, any more than walking on this part of the Links, to be prohibited. The only things which the defender is prohibited from doing are playing the short game at the set of holes and on the ground prepared and kept up by and at the expense of the Ladies' Club outwith the ordinary course, and from interfering with the members of the Ladies' Club in their play. The interdict will accordingly be slightly modified in its terms. The Sheriff has considered whether this modification and the original prayer having been too wide should lead to any modification of expenses, but the defender having failed in the substantial issue in the case, which he himself raised, the Sheriff is of opinion that he must bear the whole expenses."

¹ *M'Kerron, &c. v. Gordon*, Feb. 15, 1876, 3 R. 429.

² *Grahame v. Magistrates of Kirkcaldy*, June 19, 1879, 6 R. 1066, July 26, 1882, 9 R. (H. L.) 91; *Sanderson v. Lees*, Nov. 25, 1859, 22 D. 24, 32 Scot. Jur. 14.

³ *Gow's Trustees v. Mealls*, May 28, 1875, 2 R. 729.

⁴ *Dempster, &c. v. Cleghorn, &c.* 2 Dow, 40, *cf.* interlocutor, at p. 46.

⁵ *Magistrates of Earlsferry v. Malcolm*, June 12, 1829, 7 S. 755, and Nov. 23, 1832, 11 S. 74, but see exposition of the case by Lord Justice-Clerk Hope in *Dyce v. Hay*, July 10, 1849, 11 D. 1266, L. J.-C., at 1276-7, 21 Scot. Jur. 506.

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where an undoubted right of golfing over the whole links was limited to a reasonable course. The same principle had been approved by the House of Lords in the recent *St Andrews* case.¹ Whatever incapacity there might have been in the magistrates to sell the Links had been cured by the long prescription, but it could not be maintained that magistrates were absolutely incapacitated from selling the town's patrimony; that depended on circumstances, for where there was a vast stretch of land it would be absurd to retain it all for amusement. The second restriction had reference to the bleaching green. On the evidence that had been shewn to be outside this piece of ground, but in addition the reservation was the reservation of a privilege merely, with which the complainers had no desire to meddle. If the complainers had shewn a colourable title they had shewn also peaceful possession. It had been said that the present case involved an important question of public right. That was not so, for there were several other places on the Links where the respondent might play as he pleased.

At advising,—

LORD JUSTICE-CLERK.—This is a case relating to certain proceedings as to the Links of St Andrews. The pursuers of the action are the representatives of a certain association called the St Andrews Ladies' Golf Club, the object of which is to provide and maintain a green for the playing of the short game of golf by the ladies who are members, and to secure not only that the ground shall be made fit for that purpose, but that there shall be a certain amount of protection and privacy in the pursuit of the game. That is the object of the association, and although called a ladies' club, it is an association to which men as well as ladies are elected. The persons who make this application to the Sheriff are members and office-bearers of this club, and the object of the application is to prevent the defender from using the ground in question for the purpose of playing the short game, and from obstructing the members of the club and the persons who have the charge or control of the green in the exercise of what they regard as their proper rights.

It seems that the title of this club, and of their representatives and office-bearers, who are the pursuers of the action, to the ground in question is a lease to the club from the tenant of Mr Cheape, the proprietor, who holds a title to the Links as a whole. The direct right on the part of the association is that of tenants under a sublease granted by the agricultural tenant of a certain portion of the Links for the purposes I have mentioned. I do not know that we have any distinct statement as to the actual extent of the ground, but out of a large portion of waste ground running along the sea-margin for a couple of miles or so, I suppose there cannot be more than a couple of hundred yards which are dedicated to the purposes of this Ladies' Association. The defender, Mr Denham, appears on the part of himself and the public, and he says that as a member of the public he is entitled when he pleases, and as he pleases, to walk over this portion of the Links, and use it for playing golf or in any other way in which it is capable of being used, and that the members of the association have no right, and that the tenant has no right, to exclude anybody from any part of the Links for such purposes.

I must say that I regret that a question of this kind, which really after all is nothing but a social dispute, and involves no practical or substantial right that

¹ *Paterson, &c. v. Magistrates of St Andrews*, July 12, 1881, 8 R. (H. L.) 117.

I can see, should have been made the subject of litigation. It appears to me— and I make the remark with reference to both sides—that a little tact, a little gentleness, and a little good feeling on either side, might have adjusted this very keen dispute without the intervention of a Court of law. But since we have it here, we must decide it.

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On the whole matter, I agree with the Sheriff, and substantially on the grounds on which he has placed his judgment. I shall only make one or two remarks on the more salient points.

In the first place, I think that it is not unimportant to keep in view that there is no large legal question here involved—I mean no right of a substantial interest. Mr Denham does not say that he himself suffers any injury through what is being done. He does not say—at all events he could hardly say—he wants to play on this ground at the short holes, for he says in his record, and he has led proof to establish it, that this part of the Links is used as a bleaching green, which of course he does not mean to use for the purpose of playing golf, for it would then be as much interfered with by him as by this association. That is not the nature of his case. He says that the public have a general right, a *jus spatiandi*, over the whole of these Links, and that nobody is entitled to obstruct him or them in the exercise of that right.

In the next place, this is a possessory question, and the question to be answered is, Has there been possession upon the alleged right, and for what period? The right itself, as I have already had occasion to remark, depends upon the lease which the agricultural tenant granted to this Ladies' Club. The lease is dated 15th and 18th February and 2d March 1881, and it professes to proceed between George Clarke Cheape, Esquire, of Strathtyrum, proprietor of Pilmour Links, with consent of John Millar, sometime residing at Luthrie House, by Cupar, the tenant of the said Links, of the first part, in favour of trustees for behoof of the St Andrews Ladies' Golf Club, on the second part. Therefore both proprietor and tenant unite in giving this right. The ground is described as lying on the east side of the golf course. The period of entry was at Martinmas 1880, and the lease was to endure for seven years. But there is this exception—"But excepting from the said piece of ground hereby let any portion thereof over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of the said Links granted by the Town-council of St Andrews in favour of the said proprietor's authors and predecessors, and declaring that the said inhabitants shall not be interrupted or molested in exercising such liberty and privilege, and also that burgesses of the city of St Andrews standing on the stant-roll alienarly shall have power and liberty to cast and win divots on said piece of ground for the purposes specified in said feu-rights, conform to use and wont, . . . which piece of ground hereby let is to be made use of for the purpose of golfing or putting by the members of the St Andrews Ladies' Club, and by such other persons as the said club may allow, but by no others." As far as a direct right is concerned, I assume that this right of occupation for five years and use for the purposes therein described is sufficient. Whether the tenant and proprietor had a right to grant it is another affair; but that there is an ostensible apparent colourable title on the part of the persons who have made this application seems to be undoubted. The defence to the action is substantially a defence to the effect that there was no power on the part either of the tenant or the proprietor to grant the right, but if there has

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This Ladies' Association has now existed for twenty years. It was formed in 1867, and it has remained in the exercise of these or similar rights ever since, and that without any challenge, and therefore I think that it may very fairly be maintained that in this possessory action the grantees, the Ladies' Association, were entitled to maintain their title till the title of their authors had been directly challenged and set aside. I do not think it necessary to found very strongly upon that view, however, because apart from it I can see no ground upon which the prayer of this petition can be refused.

As regards the right of Mr Cheape, the proprietor, and the agricultural tenant to grant this right, the question seems to stand thus :—It is not pretended, and cannot be pretended, that the agricultural tenant is bound to keep the Links which are under his lease free from all obstruction to persons who were walking on the Links. There are two conditions in his title, and of any breach of them no doubt the public would be entitled to complain. But beyond that, I imagine that for the fair purposes for which the lease was granted, it is impossible to say that he was bound to prevent all obstructions to the public using the Links. The reverse is quite manifest, because he is entitled to plough up the ground—he is entitled to use it for cropping. There was no restriction of any kind or description upon that use of the ground. The restrictions which do exist are, in the first place, that the tenant must not interfere with the golfing course, and secondly, that he must not interfere with the bleaching green. Apart from these restrictions he is entitled to crop the ground and to use it for any purpose available to an agricultural tenant holding the ground. If that be so, then this proposition on the part of the defender must be thrown aside. The defender has no right to say that he has an absolute right to walk over every part of this ground. He may walk over it if it is not used for a purpose which renders walking over it improper or inexpedient, but the right of the proprietor, and of the tenant acting in the proprietor's right, entitled them to possess and enjoy the ground in all respects not inconsistent with the rights of golfing and bleaching belonging to the inhabitants.

This is not the first time that the nature of these golfing links has been the subject of judicial inquiry. As far back as 1814 there was a case with a predecessor of Mr Cheape's, the well known case of *Dempster v. Cleghorn*, which went to the House of Lords, 2 Dow's App. 40. The complaint there was on the part of the persons acting for the golfing public, that an inroad of rabbits had taken place in consequence of the tenant's operations, which threatened to destroy the golfing-course itself, and put an end to the enjoyment of the inhabitants in that particular. That case came to an end apparently by the rabbits coming to an end. But there are some remarks by Lord Eldon in remitting the case to this Court that are not unworthy of notice. The title of the *Dempsters* was substantially conceived in the same terms as those which we have here, and Lord Eldon made this remark about the right of the public as in a question with the proprietor and tenant after stating all the views that had been suggested on the part of the complainer,—“But the question was whether the right to play golf was not to be enjoyed only consistently with all the uses to which the land could be properly applied,” and he goes on,—“The strong impression on my mind was that this right could not be supported to the extent of depriving the defenders of the use of their property.” So I conclude that if the golf course is kept unimpaired.

and the bleaching is not interfered with, there is no such limit as the defender contends for to the proprietor's or tenant's use of the subject. It is not the law of the case, and it is not the nature or principle of the right that the tenant can do nothing to prevent the public from walking over such parts of the Links as are neither part of the golfing course nor of the bleaching green. No. 131.
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Some criticisms have been made on Mr Cheape's title and the tenant's title as to what the golfing links consist of. Mr Cheape's right comprehends a larger area than the golfing links. The "golfing links" mean the golf course, and the tenant is taken bound not to plough that up, implying that he may plough up the rest. The bleaching green again is protected, and the tenant has no right to encroach on it. If there were any good ground of complaint on the part of the bleachers, that would be a breach of this condition on which the ground is held. Something also was said implying that the magistrates had no right to bestow on Mr Dempster—Mr Cheape's predecessor—or on Mr Cheape, anything of the kind—that the public had entire control of the Links. I am afraid it is too late to maintain that. The long possession is sufficient, at all events, for this case.

Now, if all that be so, the next question is—Does the use of this ground, let for the purposes I have mentioned to the Ladies' Club, interfere with golfing, or with the bleaching to which the inhabitants are entitled? I am of opinion that it is proved, as clearly as anything can be proved, that playing the short game on this ground does not interfere in the slightest degree with the golfing course. There has been no complaint from any quarter that it does, and the description of the Links which we have in the evidence makes that very plain. If by any chance a high wind is blowing, a ball may be blown on to the ladies' ground, and the golfer may have to follow it in order to play it off; but beyond that there has been no interference with the public, and there cannot well be, because the ladies' course is between the general course and the sea, in a detached and remote portion of the Links. Then, if that is so, what is the complaint? It is simply this, that Mr Denham is not allowed to go upon the course which has been made on behalf of the Ladies' Club, and is prevented from playing golf there. But the question is, whether it was a reasonable use for the tenant or proprietor to set apart this piece of ground, which did not interfere with the bleaching green in any reasonable way, for the purpose of securing the comfort and privacy which were essential if the objects of the Ladies' Club were to be carried out. I think it was, and when I find that this use has existed for twenty years, and that no injury, intelligible or stateable, has been sustained by anyone; when I find, on the contrary, that it has been found to be a proper and pleasant mode of enabling ladies to take part in the great social staple, if I may so say, of St Andrews, I must own that I do not come to the consideration of the question with any prejudice or bias in favour of the defender. It seems to me that it was an unnecessary question to raise, and that there is no substantial interest involved in it. But, apart from that, I am of opinion that this was a just and legal use of the tenant's right and possession. I will not say what the case might have been if the ground had been of any material extent. That might have raised another question, but that the tenant might for his own use have set apart a lawn-tennis ground, for example, or a cricket ground, or anything of that kind, I do not for a moment doubt, or he

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might have enclosed a part of it and put it under crop, without making himself liable to interference on the part of the public. Although the case here in question is not of the nature of an agricultural use, I think the tenant's right of possession, as long as his landlord is satisfied, is amply sufficient to maintain him in what he has done.

That is the general view of the case which I take. The question is an interesting one, and I think it has been well decided by the Sheriff.

LORD YOUNG.—If the appellant has no legal right to go upon the piece of ground in question, or (assuming his right to go upon it) has no right to play the short game of golf upon it, he may no doubt be interdicted from going, or playing as the case may be, at the instance of the proprietor or any other having lawful title to prevent him. But the interdict complained of is—from playing the short game of golf on the ground—"or from in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the possession or occupation of the said piece of ground for the purpose of playing the putting or short game of golf." Now this language which I have quoted from the Sheriff's interlocutor creates a confusion of which I think the case ought to be cleared. If the question regards the appellant's right to be on the ground at all, it is simple enough, whatever difficulty there may be in answering it. If again it assumes his right to go upon it, and only negatives his right to play short golf on it, it is still simple, although the answer may be more difficult. But if it is only sought to negative his right to "interfere with and disturb" others in making a similar use of it—I have to observe that the appellant never asserted, and before us distinctly disclaimed any such right, so that there is no question before us at all, and we should only have to recall this negative by interdict of a right to interfere with and disturb others, which was never asserted.

I did what I could in the course of the argument, but unsuccessfully, to bring the case to a single issue. The respondents' counsel seemed to me to maintain their case thus, 1st, The appellant is not entitled to go on the ground at all; 2d, at least he is not entitled to play short golf on it; 3d, and still further, at least he is not entitled to disturb or interfere with the members of the Ladies' Golf Club in so playing, and has in fact done so or asserted a right to do so. Each of these three contentions was of course accompanied by the further contention, that the respondents are entitled to prevent him by interdict at their instance.

The ground which is thus sought to be fenced and protected by interdict is a part of the Links of St Andrews, not enclosed or defined by any natural or apparent boundaries. Something was said in the course of the argument about its being formed ground. It is not formed ground in any sense. The outside limit of the expenditure on it may have been £10 for many years; and it may have cost a few pounds to clear away hillocks and whins, but ground formed so as to present a different appearance from the rest of the Links it is not. The limits of it, however, are capable of being ascertained by measurement. It was in 1881 let by the proprietor of the Links to three gentlemen "on behalf of the St Andrews Ladies' Golf Club," for seven years from Martinmas 1880, "for the purpose of golfing or putting," but terminable by the proprietor at any term of Martinmas on a month's notice. These lessees are the pursuers of this action, and their title is the lease. They have no other.

It is therefore to be observed at the outset that the pursuers' only title, terminable at any term of Martinmas on a month's notice, absolutely expires at Martinmas 1887. The Sheriff nevertheless is at pains to inform us that he has not considered or dealt with the case as of a possessory character to protect the pursuers against disturbance while their very temporary and indeed precarious title subsists, but as involving the decision of a question between the proprietor of the Links of St Andrews and the public. No. 131.
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It is a feature of the case, and in my opinion of first-rate importance, that the defender does not question the pursuers' right to use the ground let to them for the purpose specified in their lease, but on the contrary admits it, and, as I have already noticed, does not assert, but emphatically repudiates, any right on his part to interfere with or disturb them when so using it. It is not indeed averred or suggested by the pursuers on the record that the defender denied their right thus to use the ground, or that he ever interfered with or disturbed them when so using it, or threatened to do so. The only case presented to us by the pursuers on the record is that by their lease this piece of ground is club premises, from which accordingly the club is entitled to exclude all who are not members of the club; and the defender's only case is a denial of this, together of course with the affirmative contention (on which indeed the denial rests), that the ground is part of the public Links of St Andrews, and incapable of being made club premises with an exclusive right of use by the club members. I think this so important in the case that I must take leave to direct attention to the pursuers' condescendence. Their only averments regarding the defender's conduct are in art. 4, and this is the averment upon which they justify their application for interdict to prevent him interfering with or disturbing them,—“On or about the 13th day of June 1885 the defender, after being duly warned by Thomas Morris, golf-club maker, St Andrews, the custodier of said golf course, golfed or putted on the said piece of ground or golf course, and refused to desist, although requested by Morris to do so. Counter statements denied.” There is not another averment about him, except that he is not a member of the golf club. Let me also call attention to the only evidence regarding his conduct upon which this interdict—which I should myself have regarded as of an offensive character—is asked. In the first place let me take the account of Mr Morris, the custodier of the club; he says,—“I don't remember ever seeing Denham playing on the ladies' ground before 13th June 1885.” He had played there often before, but Mr Morris says he does not remember ever having seen him. Therefore the conduct in respect of which he is challenged in this action is his conduct on 13th June, and here it is in Mr Morris' words,—“He was at my shop door, which is nearly opposite the ladies' ground, that day. Somebody spoke about some ladies having been asked to go off the ladies' ground, and Denham asked me whether I would check him. I said I would if he went and played there. He said he would go, and he went with Robert Kirk and played on the ladies' ground. I asked him if he was a member of the club, and he said, No. I asked him to go away, and he said, No, he would not go. I don't know if he said he had a right to be there. I told him I would report him to the secretary of the club.” Then here is his own account of it, which I think it not unimportant to attend to. “In June 1885”—that is the 13th of June, for it is obviously the same day—“the wife of the town-clerk of Musselburgh and another lady were ordered off. I was very angry, and I told Tom Morris he ought not to attack strangers—he ought to attack me. He said he would report me if I played there. I

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went and borrowed a club and played. I was reported, and then these proceedings were taken." Now, these passages constitute the whole averments and evidence upon which this application is founded. I think, therefore, that it is impossible to doubt that the action was brought in order to have this question, and no less or inferior question tried and decided—the question namely, whether they were entitled to prevent him from playing there at all, even when they were not there themselves, and when their playing could not by possibility be interfered with or disturbed.

But this is manifestly a very large question, and of interest to the proprietor of the Links on the one hand, and the people of St Andrews, and indeed the public at large, on the other. Is it fitting that it should be tried between the parties before us, and determined by a judgment which cannot be other than ephemeral? Had the pursuers presented a case of any rude, or even unmannerly, acts and conduct of the defender, whereby they were interfered with or disturbed when playing on the ground, it would I think have been one of another character from that which they have presented.

I should myself have been disposed, in this case and between these parties, to decline deciding this large legal question involving the considerations of title-deeds and evidence of ancient possession and usage continued to the present day, and affecting the proprietor, the burgh of St Andrews, and the public at large. But if this question is to be entered on and decided to any effect whatever, I think it right to say at the outset that we must be on our guard against allowing our minds to be affected by any such consideration as that right feeling ought to restrain any individual or number of individuals from throwing obstacles in the way of the appropriation of an inconsiderable part of these public links (assuming them to be public) to the exclusive use of a Ladies' Golf Club. It is indeed called a Ladies' Golf Club, but it consists of 1000 members, of whom only one-half may be ladies, the other half being men. There are obvious enough considerations on both sides of the question of good feeling. Ladies and their male companions for the time when playing any game on open public ground will always be treated courteously and allowed all proper precedence by gentlemen, and there is no averment, suggestion, or trace of evidence that any such courtesy was violated by the defender. On the other hand, the assertion of an exclusive right or privilege on open public ground by the members of a private self-constituted club is not unnaturally regarded as invidious, and resisted accordingly. But I repeat that in my opinion we cannot take any account of this topic in considering what is the legal character of the ground, and the rights of the public over it looking to the titles and the usage.

The Links of St Andrews are very well and generally known. They consist of a tract of rough and comparatively barren ground, extending to some hundreds of acres quite open and unenclosed. They may have been, and no doubt were, diminished in extent by enclosing and cultivating, and even building on, parts at periods more or less remote. Of such diminution of area I take no account. It has occurred with regard to all open ground, not unfrequently in gross violation of the rights of the public, and still more frequently of the inhabitants of burghs and towns. In such cases where the inclosure and appropriation to private use has existed for the prescriptive period, any original wrong, however clear, is irremediable. There are familiar instances of this in the neighbourhood of Edinburgh, Musselburgh, and many other places. I accordingly confine my attention and observations to the open and unenclosed Links of St Andrews as

now existing. To these the inhabitants of St Andrews and the public at large have always had access—free and unrestricted for all purposes of legitimate and healthy recreation and amusement, the proprietor taking no other use of them than such pasturage as did not interfere with the public use. The most notable public use has been playing golf—for which a course has always been marked off—a course being necessary for the game. But the course has been varied and extended from time to time, according to the exigencies of the day, and the course is no limit to the players any more than to the balls which the players follow over the Links to any distance off it—playing back from wherever the ball alights. Nor is it, so far as I can see, anything to the purpose to say that only bad players or bad shots send the balls far off the line of the course—for bad players are probably as numerous as good, and bad shots are certainly as much part of the game as good shots. Over the whole Links there is, and always has been, all sorts of exercise and recreation by grown people, boys, and children,—walking, running, leaping, football playing, sitting, lying, lounging,—indeed, every thing that the public may do without manifest impropriety on perfectly open and unrestricted ground.

Now, what is the first and leading proposition of the pursuers which they ask us to affirm as essential (according to this their first and leading contention) to the interdict which they ask? It is that this public use of the Links from time immemorial and continued without question or interruption down to the present time, has been, and is, not of right, but by the mere tolerance and permission of the proprietor, and revocable by him at pleasure. I asked whether there was any distinction between the piece of ground immediately in question and the rest of the Links, and the answer was, None whatever, with perhaps the exception of the marked-out golf course. Again, I asked if there was any distinction between Mr Denham (the defender) and any other man, and the answer was, None. The pursuers' counsel accordingly faced the proposition, and maintained it, that their lessors may, if their lease is good, exclude the public from the whole Links, except, perhaps, from the golf course. When, therefore, the pursuers defend and maintain the exclusive right and privilege which, as they contend, their lease gives them by pleading the lessor's title, they must, and in fact do, carry their argument on that title the length which I have now stated. And indeed it is clear that if (leaving out of view the golf course) the proprietor of the Links may, by virtue of his property title, make club premises of the piece of ground in question for the privileged exclusive use of the pursuers, he may also deal in the same manner with the whole Links and make them all club premises, with the like privileged and exclusive use granted to a club or any number of clubs, or he may, for it is really the same proposition, take them all into his own occupation and exclude the public therefrom either by a wall or by an interdict, or by making a use of them, as by building, which would exclude any public resort or use such as has heretofore been enjoyed.

The argument is that the lessor's title is a fee-simple property title, and that the terms of it are not such as to put him under any restriction or limitation as to the use of it, or to permit the continuance longer than he sees fit of the use hitherto made of it by the inhabitants of St Andrews and the public. I have examined the title, and do not think this proposition by any means clear, and, on the contrary, looking to the source from which it came, viz., the Magistrates of St Andrews, and the proved and, indeed, admitted fact that, with

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respect to the whole Links now open and unenclosed, there has never been any interference with the public use, I incline to the opinion that it is unsound. There is much in the title which admits of and requires construction, and the actual use and possession which has been had of the subject of it ever since its date may, as between the parties to it,—I mean the Magistrates of St Andrews and the present owner,—be appealed to as influencing the construction. I cannot pronounce it a *prima facie* unsound argument, that neither the inhabitants of St Andrews nor the public shall be prejudiced by the mere existence of a grant, in whatever form, which was never used to their prejudice, their actual use, and enjoyment never being interfered with. But neither the magistrates (the authors of the title, and the proper guardians of the public rights) nor the proprietor by the title are before us, and although they will certainly not be affected by any decision we pronounce as a judgment making a *res judicata* binding on them, yet they will be, and the one or other very prejudicially, by a decision in this Court of the very question between them, or in which they are interested as involved in the determination of this paltry, and I rather think personal dispute between the parties actually before us. I must therefore decline for myself to take part in the decision of this large question which the pursuers' counsel argued before us as essential to the remedy asked, or to say more on it than I have done. Indeed, I have said so much only to point out its extent and importance and the inexpediency,—I venture to think, the impropriety,—of entertaining an application by a party whose right is so temporary that it will expire in about six months, for an interdict the granting of which would involve the decision of it.

I have spoken of the respondents as “lessees,” and perhaps the name is not inappropriate. But I have to point out that they are not lessees of land. The land was already let for pasture (and it could be let for nothing else), and what the respondents call their lease is in truth and legal effect nothing more than a permission, which the owner and pasture tenant concur in giving them to play a certain game on it. The words are, “which piece of ground hereby let is to be made use of for the purpose of golfing or putting by the members of the St Andrews Golf Club, and by such other persons as the said club may allow, but by no others.” To say that the ground is let, and that the respondents are tenants of the ground is, I think, an erroneous use of language. Is it doubtful that a simple leave or permission written on a card or slip of paper to play golf or to put on the ground would have had exactly the same effect? The words “but by no others” are curiously introduced, but the meaning may perhaps be taken to be that the lessors warrant the lessees against the existence of any right in others to golf or put on the ground.

But is this a kind of right to which the doctrine of possessory judgment is applicable? for this is the doctrine to which the respondents' appeal in the alternative and minor view of their case. I venture to think not. In the first place, their lease gives them no title whatever to exclude others from the ground, and they have never attempted to do so, though the ground is a place of common resort by the public at large, and with seats erected on it for the use of all comers. In the second place, the respondents' right to golf and put on the ground is not questioned, and so requires no protection by possessory judgment, even if that remedy were otherwise applicable. In the third place, it is, to me at least, a novel proposition that such a warranty by the lessor, as I have assumed to be imported by the words “but by no others” can be the ground

of a possessory judgment, or of any remedy whatever, except an action on the No. 131.
warranty against the grantor of it.

But the respondents' enjoyment—for I think the term "possession" inapplicable—of the exclusive permission which they allege to have been guaranteed to them, has not been peaceable and uninterrupted—not that they were ever hindered from making the use permitted to them, but that their claim to hinder others was not by any means universally or even generally allowed or assented to. But it is this claim to exclude others which is alone in dispute, and for the vindication of which alone the protection of a possessory judgment is claimed. The facts proved are in my opinion sufficient to negative it. It is said that no other—no inhabitant of St Andrews or member of the public has a title which can *prima facie* compete with their permission from the proprietor. But this, it will be observed, is simply returning to the argument on the proprietor's title as exclusive of any right in the inhabitants of St Andrews or the public, which, if sound, requires no aid from the doctrine of possessory judgment. Apart from that argument, the public have a *prima facie* right founded on the possession and usage of ages.

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I may say that I am unable for any practical purpose in the case before us to distinguish between long golf and short golf. I regard both as simply golf, which may, I suppose, be lawfully played in various ways. The use prescribed in the respondents' lease is "golfing or putting," and the name of the club is the Ladies' "Golf Club." The right asserted, if good at all, must, I think, be good for "golf" in general. No principle was stated to us, and none occurs to me, on which the proprietor of the Links may appropriate a part or the whole of them (excepting "perhaps" the existing golf course) to the exclusive use of clubs or individuals for short golf, but not for long golf. I must therefore regard the respondents as contending and struggling for the proposition that the proprietor of these Links is legally entitled to appropriate the whole or any part of them to the exclusive use and enjoyment of such persons or clubs as he may from time to time be pleased to favour. This, in my opinion, is the proposition which, as urged by the respondents on their temporary and precarious permission, the appellant resists, and which he is, in my opinion, justified and well founded in resisting.

I am of opinion that the judgment granting interdict ought to be recalled, and that the application ought to be dismissed, with expenses.

LORD CRAIGHILL.—The history of this case is fully related by the Sheriff in the note annexed to his interlocutor, and it will not be necessary for me to present anything like a full recapitulation of the facts as introductory to the grounds of my opinion. A comparatively brief statement of some particulars seems to be all that is required.

The pursuers are the trustees of the St Andrews Ladies' Golf Club, and to them in that character there was granted in February 1881 a lease for seven years from Martinmas 1880, by Mr Cheape of Strathclyde, the proprietor of the Links, of the piece of ground described in the record, the purpose for which this was granted being that the ground so let is to be made use of for golfing or putting by the members of that club, and by such other persons as the club may allow, but by no others. There was excepted, however, from the said ground "any portion thereof over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of

No. 131. the said Links granted by the Town-Council of St Andrews in favour of the proprietor's authors and predecessors." An earlier lease of what was substantially the same subject was for the same purpose granted to the trustees of the Ladies' Club in 1868. That lease was for seven years, and from its expiry the right thereby conferred was continued by tacit relocation till the lease still current was granted. Possession of the ground was taken, and has been continued till the present time, peaceably and without any interruption. The ground was put into order at considerable expense, and the funds of the club were the source from which this cost was defrayed. There was no contributory outside the club. Shortly prior to the institution of the present action, which was brought in June 1885, the appellant made pretensions to participation in the use of the ground which had been thus converted into a green for putting, or for the short game of golf. This the club thought an intrusion, and it was complained of, but was persevered in, and the defender not only played round the course himself, but sent friends who happened to be visitors to him at St Andrews to enjoy themselves on this green. The consequence was that Morris, the keeper, turned them off, and it was for the purpose of preventing such disagreeable occurrences that the present action was instituted. The Sheriff has given interdict, not precisely in the terms prayed for in the pursuers' petition, but in the terms set forth near the end of his interlocutor. He "interdicts the defender from playing the putting or short game of golf on the piece of ground described in the prayer of the petition, or from in any other way interfering with or disturbing the pursuers and the members of the St Andrews Ladies' Golf Club in the possession or occupation of the said piece of ground, for the purpose of playing the putting or short game of golf." The pursuers are satisfied with what the Sheriff has done, but the defender is not satisfied, the consequence being the present appeal at his instance to this Court for a review of the interlocutor.

I agree in the result at which the Sheriff has arrived, and adopt most, if not all, of the grounds on which he has proceeded. But the judgment, I think, ought merely to be of a possessory character, which indeed was all that was asked or expected by the pursuers, for it is explained by the Sheriff that the pursuers put their case chiefly, indeed almost exclusively, upon their right to a possessory judgment. But he adds that their proof also covers the prescriptive period, and in this situation he thought, having in view the case of *Gow's Trustees*, 28th May 1875, 2 R. 729, that it was not only right but necessary for him, in fulfilment of the relative provision of the Sheriff Court Act, 1878, to pronounce what should be an ultimate judgment upon the rights of those concerned in the litigation. The Sheriff, however, in so concluding, overlooked the manifest distinction between the present case and the case of *Gow's Trustees*. In the latter case both competing proprietors were parties to the action. In the present case the proprietor is not a party, and any judgment effectually to be an ultimate judgment on the question or questions in controversy would not, for this plain reason, be obligatory upon the proprietor of the Links. The plain course is to deal with the case as one in which all that is asked or ought to be granted is a possessory judgment.

Upon the proof it is plain that the Ladies' Golf Club, represented by the pursuers, have been in possession of the ground in question for the last eighteen years, and indeed this was not disputed, but on the contrary was admitted by the counsel for the defender. Possession, however, is of itself not all that is

required to make out a right to a possessory judgment. There must be a competent title as well as possession. And in truth the controversy between the parties is not whether there has been possession, but whether the title on which possession has followed, is available as a ground on which they have a right to be protected till the contrary is established in an action of reduction or declarator, or one where the two are combined.

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The chief ground on which the pursuers' title is objected to is the reservation from the lease of any portion of said ground over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching under the feu-rights of the said Links granted by the Town-Council of St Andrews in favour of the proprietor's authors and predecessors. None of the ground in question has been claimed by anyone as a portion of the bleaching green, and before the lease to the pursuers could be invalidated by this reservation it behoved to be shewn by those who founded upon this clause that the bleaching green, or a portion of it, was within the ground. There has been a proof upon this subject, and the result, as I think, is that this part of the defender's case has not been established. But, besides, there has been the possession of the pursuers. Not only has there been no bleaching, but there has been possession by the pursuers of such a kind as excludes the idea that any part of what was let to them was part or parcel of the bleaching ground, marked by march-stones, which was reserved by the magistrates from their feu-disposition to the Dempsters, who are the authors of the present proprietors of the ground. This last consideration is of itself decisive, for continuous, uninterrupted, peaceable possession for the period requisite to give right to a possessory judgment leads presumptively to the conclusion that the bleaching green referred to was outside the ground leased to the pursuers.

The defender further pleads the invalidity of the lease, maintaining that the ground in question forming part of the Links of St Andrews, otherwise called Pilmour Links, was conveyed to Mr Cheape's predecessor, and was held by him under the condition that no part of the said golf links should be ploughed up at any time, but that the same should be reserved entirely as it had been in times past for the comfort and amusement of the inhabitants of St Andrews and others. There are obvious grounds for which this plea in this action must be rejected. In the first place, the right of the pursuers to a possessory judgment cannot be affected by anything which is presented in this plea. The landlord had a title; he granted a lease to the defenders, which formed a title; and there is the possession on both titles. In the second place, the ground in question is not part of the golf links. There is evidence as to this. The Sheriff went and he viewed the ground; and on consideration of the case as presented in the proof and in the Sheriff's explanatory note, it is plain to me that what I have just stated and what he has found is the true conclusion.

In this plea the defender also contends that Pilmour Links were reserved entirely as they had been in times past for the comfort and amusement of the inhabitants of St Andrews and others who should resort thither for the game of golf. An examination of the feu-disposition to the Dempsters suggests, or rather shews, that Pilmour Links and the golf links do not cover the same area. They are different things—the one being larger than the other—the golf links, in other words, being within Pilmour Links. This interpretation is not new. It is that which is involved in the decision of the case of *Paterson*, 27th July

No. 131. 1881, 8 R. (H. L.) 117. Speaking of the golfing links, Lord Watson observed,—
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 "Then it is said you must leave untouched everything outside of that course which can be shewn to be a part of the Links to which a ball may be driven in playing the game of golf. I entirely demur to that proposition. The contention to which I am prepared to give effect really comes to this, that whatever is outside the proper golfing course may be turned to various purposes, so long as these are not inconsistent with the game of golf." The ground in question is admittedly,—at any rate upon the clearest evidence must be held to be,—outside of the golfing links. To play upon this putting ground does not interfere with the play of those who follow the regular game, and therefore there is not even a plausible pretext for this part of the contention which the defender has urged.

These, shortly stated, are the views of the case on which I proceed, and they seem to me to be full justification of the interlocutor of the Sheriff, against which the defender has appealed to this Court. There is, I think, no difficulty whatever in the way of such a decision.

LORD RUTHERFURD CLARK.—The lands called Pilmour belonged at one time to the patrimony of St Andrews, but they were sold to the Messrs Dempster in 1799, and were acquired about 1820 by Mr Cheape of Strathtyrum, to whom they now belong.

In the disposition to the Dempsters there was reserved to the town of St Andrews the bleaching ground to the west of the Swilkin Burn, as marked out by march-stones, on which the inhabitants of St Andrews were to have the right and privilege of bleaching. It was contended by the defender that the ground itself was excepted from the conveyance. But in my opinion this is not the true construction of the disposition. I think that nothing more was reserved than a servitude. I notice this matter, as some argument was founded on it, though in my judgment it has little relation to the question which we have to decide.

The disposition contains a further reservation, which is thus expressed:—"Under the reservation always that no hurt or damage shall be done thereby to the golf links; nor shall it be in the power of any proprietor of said Pilmour Links to plough up any part of said golf links in all time coming, but the same shall be reserved entirely, as it has been in times past, for the comfort and amusement of the inhabitants who shall resort thither for that amusement."

The same reservations are contained in the title of Mr Cheape, and though he is not a party to this process, it may be taken as certain that they are binding on him. As I have already said, we are not concerned with the servitude of bleaching. The matter with which we have to deal is the right or privilege of golfing, which is reserved to the inhabitants of St Andrews and others who may resort to the Links for that amusement.

After Mr Cheape had acquired the lands of Pilmour, or, as they are otherwise called, the Pilmour Links, a plan of these Links was prepared by A. Martin, surveyor, dated 8th December 1821, "with the golfing course thereon, as marked off with stones." It is probable that the golfing course so defined was the part of the Pilmour Links on which the public were at that time accustomed to play golf. It is certain that, with some trifling exceptions which it is not necessary to notice, the public have since that time been in use to play

golf on this course, and on no other part of Pilmour Links. It is true, as we are informed, that from the unskilfulness of the player, or from the force of the wind, the ball is sometimes driven beyond the course, and that on these occasions it is played from the place where it lies. I see no reason to doubt that in doing so the player is within his right. The golfing course was defined as the part of the Links on which the game was to be played, but having regard to the inveterate usage I do not think that we can be called to construe the limitation so strictly as to hold that the player may not play his ball from a place beyond the course when from the causes to which I have alluded it may lie beyond it.

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With the qualifications to which I have referred, the game of golf has been strictly confined to the golfing course. I cannot doubt that the golfing course is not coextensive with the Pilmour Links. The whole usage which has followed on the conveyance of 1799 is inconsistent with that idea; and the expression of the disposition itself is equally inconsistent with it. For the proprietor of Pilmour Links is prohibited from doing any damage to the golf links and from ploughing any part of the said golf links, prohibitions which in my judgment cannot by possibility be extended to the whole subjects which were conveyed.

As Mr Cheape is not a party to this process we cannot determine what his rights are, or what are the rights of the public. But, *prima facie*, and in the absence of the proper parties, I can say no more. The right of the public to play golf is confined to the golfing course, with such aberrations, as I may call them, as are incidental to the game. This has been the usage, and for the purposes of this case I take the usage to be the measure of the public right.

Some twenty years ago Mr Cheape let a portion of the Links to certain gentlemen, as trustees of the Ladies' Golf Club, with the exclusive right of playing what is called the short or putting game of golf thereon. It is quite certain that this ground does not form part of the golfing course. Indeed, the defender does not say that it does. The ground so let was made suitable for the practice of the game, and it was somewhat enlarged by the present lease, which was granted in 1881. I think that it has been proved that the members of the club have been in the exclusive possession of the right or privilege which they acquired by the leases. It is possible that persons other than members of club have played on the ground so let. But this has been so exceptional that to my mind it requires no notice. It is certain that no right could be thereby acquired, and it is equally certain that the public have had no possession of which they would be deprived by the interdict which is asked by the pursuers.

The defender conceived that he had a right to play the short game of golf on the ground let to the pursuers, and in that belief he proceeded to play it. I do not question his good faith. I believe that he honestly thought that he was entitled to do so. He was warned off, and as he insisted on his right the present action was raised.

It seems to me that the defender cannot succeed unless he can shew that the public have a right to play golf elsewhere than on the usual golfing course. He contends for this right. But from what I have said it will be seen that I see no ground for thinking that such a right exists. It is possible that it may, notwithstanding the usage to the contrary, but if it does the defender must establish

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Ladies' Golf
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the existence of it in a declarator to which Mr Cheape is a party. This is a mere possessory action. We cannot determine any question of right. We can only maintain the possession as it has been in the by-past years.

In saying that the defender has no right to play golf except on the usual golf course, I do not dispossess him of any right of which he or any member of the public has been in possession. It is said that the public have been in use to walk over the whole of the Pilmour Links without restraint. Probably that may be true. But whether they have done so in the exercise of a right or by the tolerance of the proprietor, I cannot judge. No such question can be raised or determined in the present process. But this *jus spatiandi*, if it exist, is a very different thing from playing golf, and though the one may belong to the public the other may not. It is enough for me that our judgment is limited to the playing of golf on the ground in question, and in interdicting the defender from doing so we do not interfere with any other right which he may possess.

It was urged that the ground over which the pursuers claimed right included a portion of the bleaching green, and that it is not included in their lease. I do not think that this is so. But we are not much concerned with this question. There is no complaint that the right of bleaching has been interfered with. If the contentions of the defender were well founded, it would only prove that the pursuers had no title to a small portion of the ground on which they are in use to play, but the defender would take no benefit thereby. The true question is whether the defender can play golf beyond the usual course, and inconsistently with the settled usage; this I think he cannot do.

THE COURT pronounced the following interlocutor:—"Find in fact (1) that the golfing course of the Links of St Andrews is defined and marked out by march-stones; (2) that the piece of ground described in the prayer of the petition does not form part of the course; (3) that since the term of Martinmas 1880 the St Andrews Ladies' Golf Club, the association represented by the pursuers, has had exclusive possession of the said piece of ground under a lease granted by the proprietor thereof to the pursuers, and had such possession during the thirteen years preceding the said term under a missive of lease with him: Find in law that the defender is not entitled to disturb the said association in their possession of the said piece of ground: Therefore dismiss the appeal: Affirm the judgment of the Sheriff appealed against: Find the pursuers entitled to expenses in this Court: Remit," &c.

MACKENZIE & KERMAK, W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 132.

WILLIAM MASTERTON AND OTHERS, Petitioners.—*J. C. Thomson—Salvesen.*

May 14, 1887.
Masterton v.
Erskine's
Trustees.

REVEREND JOHN ERSKINE AND OTHERS (Mrs Erskine's Trustees) AND OTHERS, Respondents (Reclaimers).—*John Burnet—G. W. Burnet.*

Judicial Factor—Appointment under Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 164—Insolvency of estate—Recall.—At the instance of certain heritable creditors, a judicial factor was appointed under the 164th section of the Bankruptcy Act, 1856, upon the estate of a person deceased who had died intestate, and whose representatives, two brothers and a sister, were then in America. One of the brothers returned temporarily to Scotland, where he was decerned executor-dative, and the other sent instructions

to have his title as heir made up. The brothers and sister then presented a petition for recall of the factor's appointment, but while the petition was pending the executor returned to America. The heritable creditors opposed the recall. The Court made a remit to the Accountant in Bankruptcy, who reported that it was doubtful whether the property would realise enough to pay off the bonds in full. The Court *refused* the petition for recall.

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Masterton v.
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Process—Judicial Factor—Recall—Competency—Distribution of Business Act, 1857 (20 and 21 Vict. c. 56), sec. 6.—Held by Lord Trayner (Ordinary) that a petition for recall of the appointment of a judicial factor may be competently presented to the junior Lord Ordinary.

JOHN MASTERTON, C.E., Edinburgh, died on 9th October 1886, intestate and childless, and his next of kin were William and James Masterton, his elder and younger brothers, and a sister, who were then all in America.

1st Division.
Lord Trayner.
B.

On 6th November 1886, on the application of certain heritable creditors over subjects which had belonged to the deceased in Leith, to the amount of £5216, with concurrence of his widow, the Court appointed Mr E. E. Scott, C.A., to be judicial factor on the estate under the 164th section of the Bankruptcy Act, 1856.

On 2d December following, William Masterton having returned to Scotland, a petition for recall of Mr Scott's appointment was presented in name of the two brothers and their sister, who were the whole parties—exclusive of the widow—entitled to succeed to the estate.

It was stated in this petition that William had been appointed executor *qua* next of kin of the deceased, and that he was ready to perform the duties of his office; that James, the heir in heritage, had given instructions to have a title made up in his name; and that the value of the estate, heritable and moveable, was about £11,000, while the total indebtedness was under £6000, thus leaving a margin of free estate of probably over £5000. In these circumstances it was submitted that the appointment of the judicial factor was no longer necessary, and that his continuance in office would entail expense in the completion of a title in his person and conveyance to the heir and otherwise.

The heritable creditors and the judicial factor lodged answers, in which they disputed the value put upon the estate by the petitioners, the heritage being worth very little more than the amount of their debt, leaving out of view the widow's terce, and the moveable property being to a large extent hypothecated to the Clydesdale Bank. But, whether the estate was solvent or not, they submitted that without payment of their debt the petitioners were not entitled to oust them from the statutory position they occupied. In any view, the petition ought not to have been presented to the Junior Lord Ordinary, the Inner-House alone being competent to deal with it in the exercise of its *nobile officium*.

The Junior Lord Ordinary (Trayner), on 25th January 1887, recalled the appointment of the judicial factor.*

* "OPINION.—It is objected by the respondents that the present application is incompetent before me, and should have been presented in the Inner-House as the only Court competent to deal with the recall of a factory. The Act 20 and 21 Vict. cap. 56, provides (sec. 4) that 'all summary petitions and applications to the Lords of Council and Session, which are not incident to actions and causes actually depending at the time of presenting the same, shall be brought before the Junior Lord Ordinary officiating in the Outer-House, who shall deal therewith and dispose thereof as to him shall seem just,' and in particular all petitions and applications of the kind described in the Act. For some time the

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The respondents reclaimed, but did not press the objection to the competency further.

During the hearing the Court ordered the petitioners to produce a statement shewing the position of the estate, and explaining how they proposed to realise it, having in view the protection of the interests of the heritable creditors. The statement when prepared was called in question by the respondents, and the Court remitted to the Accountant in Bankruptcy to make inquiry, and report.

The Accountant reported that the moveable estate was more than enough to meet the debts upon it, but only on the footing that the possibility of certain contingent liabilities was left out of view.

In regard to the heritage, which consisted of house property in Bonnington and Leith, the rental had been declining, and amounted only to £352, 4s. 5d. in 1885-86. The subjects appeared to be in bad repair, and to be not very substantially built, and there was a difficulty in finding tenants. The amount of the bond was £5216, and the Accountant stated that he "is not in a position to report whether or not the property if exposed for sale would realise enough to pay off the bonds in full."

Before the case was heard the executor returned to America.

The respondents argued;—The appointment of a judicial factor under the 164th section of the Bankruptcy Act was entirely for the discretion of the Court. Here the factory should be continued. The heritable creditors had a clear interest to have it kept up. There

practice of the Court to some extent proceeded upon a construction of that Act which limited the power of the Junior Lord Ordinary to deal with the cases falling within those specially enumerated in the Act. But a broader construction has since been adopted, as an illustration of which reference may be made to the case of *Tweedie*, 24 S. L. R. 155, 14 R. 212. As a summary petition not incident to an action or cause presently depending in Court, I think I can competently deal with the present application, and therefore I repel the objection stated.

"On the merits of the application I entertain no difficulty. The petition for the appointment of a factor set forth, *inter alia*, that Mr Masterton had died intestate, that there was no one interested in his estate then resident in Scotland to manage or administer that estate, and that certain rents had to be uplifted and disbursements made, or otherwise the estate might suffer injury. In this state of circumstances, it was obviously for the advantage of all concerned that a factor should be appointed, and such an appointment was accordingly made. Since then the circumstances have materially changed. The heir-at-law and the executor of Mr Masterton have both come to this country, and are now ready to undertake the duty of administering and managing the estate for behoof of all concerned. The continuance of the factory is therefore no longer necessary, nor is it expedient to burden the estate with the expenses of a factory which is unnecessary. The respondents' claims on the estate of Mr Masterton can suffer no damage by the recall of the factory. So far as these claims affect directly the heritable estate, they cannot suffer; because the heritable estate will remain subject to these claims just the same whether there is a factor or not. If the respondents wish to call up their debt, they can do so; that remedy is always in their own hands. As regards the moveable estate and the claims upon it, the executor will have to account for all the estate he can recover; and will, besides, on confirmation, be required to find caution for his intrusions.

"I therefore recall the appointment of factor, an appointment which I would probably not have made had Mr Masterton's executor been in this country and willing to administer at the date when the petition for appointment was presented.

"I shall allow the expenses of both parties to be paid out of the estate."

was no doubt an *obiter dictum* by Lord Deas in the case of *Macfarlane*,¹ No. 132. to the effect that where the heir and executor of a deceased made up a title, judicial management could not be insisted on. But there was no notice of any such difficulty in the Act of Sederunt of 25th November 1857, which was subsequent to the case. Further, although the heir and executor stated that they had completed, or were to complete, their title here, they were both in America, and the management of the estate would for the future be in the hands of an agent appointed by them. The expense would thus not be decreased by the proposed change. But, besides, the result of the Accountant in Bankruptcy's report was to shew that the estate was, to say the least, barely solvent, and in any case, if the estate was solvent, it was surely possible for the present petitioners to arrange for an assignation of the bonds, and so to pay off the respondents. The petitioners, at anyrate, had not made out a case for recall of the factory.

The petitioners argued;—It was admitted that it was not necessary to justify an appointment of a factor under the 164th section of the Act that the estate should be insolvent. The fact here was that the deceased's representatives had come home, and if they had not already made up a title, they were engaged in doing so. No doubt they had now returned to America, but they had left a factory with a law-agent here, who would manage the estate in future. The management by a judicial factor was cumbrous and expensive.

LORD PRESIDENT.—There can be no doubt that the original application for appointment of a judicial factor was very properly made. There was no one to represent the estate in this country, and it obviously required the intervention of an administrator of some kind in order to prevent it from going to pieces. The petitioners were the heritable creditors, who clearly have a very deep interest in seeing that the most is made of the estate, because it is very doubtful whether the heritage will be sufficient to provide for the payment of the debts there are upon it. Indeed the Accountant in Bankruptcy tells us he is not in a position to say whether the property, if realised, would meet the amount of the bonds. The estate is therefore in a somewhat dubious position as to the extent to which it will pay off the debts and leave a surplus.

The basis upon which the Lord Ordinary has founded his interlocutor is this:—"The heir-at-law and the executor of Mr Masterton have both come to this country, and are now ready to undertake the duty of administering and managing the estate for behoof of all concerned. The continuance of the factory is therefore no longer necessary, nor is it expedient to burden the estate with the expenses of a factory which is unnecessary." If the facts had been exactly as so stated by the Lord Ordinary, and both the heir-at-law and the executor had come home *animo remanendi*, and with the intention of administering the estate, a great deal might have been said in support of their application. But the state of the fact is that one of them came from America on a most transitory visit, and, so far as we can gather, he came for the purpose of appointing a factor to manage the estate, because after completing the appointment he forthwith returned to America, and it is not alleged that he has any intention of returning to this country. That is a very different thing from coming

¹ *Macfarlane*, March 6, 1857, 19 D. 656, 29 Scot. Jur. 656; cf. also *Alexander*, July 15, 1862, 24 D. 1334, 34 Scot. Jur. 652 (Lord Justice-Clerk Inglis, p. 1339).

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home and taking upon himself the management of the estate ; and it seems to me to reduce the matter at issue to this single question, whether the estate is to be managed by the nominee of the heir and executor, or by the factor.

The application was made under the 164th section of the Bankruptcy Act, 1856, and under that section it is certainly not imperative upon the Court to appoint a judicial factor where a creditor applies to have this done. It is further not necessary that the estate should be insolvent. That has been already settled by decision, and it is therefore a matter entirely within the discretion of the Court whether such a factor shall be appointed or not. In the present case it is for the Court to say, in reference to the existing state of circumstances, whether the judicial factor, who is at present engaged in administering the estate, and was regularly appointed thereto, should be continued, or whether the change of circumstances which has taken place is enough to induce us to recall the appointment.

I am of opinion that we should be exercising our discretion in a very doubtful way if we yielded to the arguments which have been addressed to us by the petitioners. The estate is in such a position that it ought to be in the hands of an officer of Court in whom all parties can have confidence, and who would be under the supervision of the Court. If the estate could be realised, the matter in dispute would be very easily arranged. The simple way would be to pay off the debts due to the heritable creditors. But the heir and executor will not undertake to do this. The fact is that they are unable to find the necessary funds. If the subjects were a good marketable security, the money required to discharge the bonds could be borrowed and the bondholders could be got rid of. But these persons very naturally say that as they cannot get payment of their debts they have a very material interest—indeed a primary interest—in the control and management of the estate, and that they are entitled to insist that its control and management shall be placed in the hands of those who will inspire them with confidence. In justice to the creditors, and having regard to the interests of all concerned, I am of opinion that the present judicial factory should be continued.

LORD MURE concurred.

LORD SHAND.—There can be no doubt that when the heritable creditors made the application they were quite entitled to have a judicial factor appointed over this estate, under the provisions of the 164th section of the Bankruptcy Act, on account of the absence of anyone who could administer it. On the other hand, I think the present petitioners would have been in a position to have the judicial factory recalled if they had been able to shew that a surplus could be realised, and that there was no fear that the bondholders would lose any part of their debt. But the material circumstance in the case is that the estate is in a doubtful position, and that we cannot tell whether it would realise the amount of the bonds or not. The moveable property is hypothecated for debt, and it is not clear that even including it the estate is solvent.

In these circumstances, this is just a case which the Lord Ordinary, if he had known the whole facts, would have held justified the appointment of a factor. But in addition to the facts I have mentioned, the next of kin are resident abroad. The condition of the estate, however, is in my view the most important consideration. I agree further in your Lordship's observation that if

the estate is able to meet its liabilities, there ought to have been no difficulty in arranging for a transfer of the bonds. This apparently cannot be done because the security offered seems somewhat doubtful.

I think that is just a case where the deceased having died intestate, and having left no one to undertake the management, the 164th section of the Bankruptcy Act directly applies, and the appointment of the factor ought therefore to be upheld.

LORD ADAM.—I concur with your Lordship in thinking that the appointment of a judicial factor like the present is a matter entirely for the discretion of the Court, and I have only to say that if this had been an application for the appointment of a judicial factor I should, with the facts now before us, have been for granting such an appointment, and therefore *a fortiori* I think that the appointment already made should be continued.

THE COURT accordingly recalled the Lord Ordinary's interlocutor, and found the reclamer entitled to expenses.

FODD, SIMPSON, & MARWICK, W.S.—**KNIGHT WATSON, Solicitor—Agents.**

FERGUSON BEQUEST FUND, First Parties.
COMMITTEE OF MINISTERS OF QUOAD SACRA CHURCHES BELONGING TO THE
CHURCH OF SCOTLAND, AND OTHERS, Second Parties.
COMMISSIONERS UNDER THE EDUCATIONAL ENDOWMENTS ACT, 1882, Third
Parties.—*Darling—G. R. Gillespie.*

No. 133.

May 17, 1887.

Ferguson Bequest Fund v. Commissioners on Educational Endowments.

Process—*Amendment of interlocutor.*

In this special case the question as originally put was altered in the course of the discussion by an amendment on the process copy, initialed by counsel for the parties, so as to read in the manner reported *supra*, p. 627. The alteration made was not brought under the notice of the Court when the interlocutor was framed, and an answer in the affirmative was returned to the question as originally put. The answer so returned was inapplicable to the question as altered. The Endowment Commissioners now presented a note to have the interlocutor varied. They cited certain precedents,¹ and urged that there was the additional element in this case that the judgment of the Court of Session was final under the Endowments Act, 1882, and that there was no right of appeal to the House of Lords.

The Court (consisting of the Lord President, Lord Mure, and Lord Adam) *held* that, as the party aggrieved could not here appeal to the House of Lords, the only remedy was for the Court to amend the interlocutor.

The amended interlocutor is reported *supra*, p. 633.

DONALD BEITH, W.S., Agent.

¹ *Moncreiffe v. Perth Police Commissioners*, June 4, 1886, 13 R. 927; *Hard v. Anstruther*, Nov. 14, 1862, 1 Macph. 14, 35 Scot. Jur. 19; *Cuthill v. Burns*, March 20, 1862, 24 D. 849, 34 Scot. Jur. 426; *Harvey v. Lindsay*, July 20, 1875, 2 R. 980.

No. 134.

May 18, 1887.
Glasgow
Feuing and
Building Co.
Limited v.
Watson's
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THE GLASGOW FEUING AND BUILDING COMPANY, LIMITED, Pursuers
(Respondents).—*M'Kechnie—Sharv.*

ARTHUR WATSON AND ANOTHER (Watson's Trustees), Defenders
(Reclaimers).—*Asher—R. Johnstone—Alison.*

ARTHUR WATSON AND ANOTHER (Watson's Trustees), Pursuers
(Reclaimers).—*Asher—R. Johnstone—Alison.*

THE GLASGOW FEUING AND BUILDING COMPANY, LIMITED, AND OTHERS
Defenders (Respondents).—*M'Kechnie—Sharv.*

Expenses—Several defenders—Common defence.—Certain subfeuars from A were called and appeared as defenders, along with A, in an action by the over-superior for reduction of the feu-contract, *quoad* certain obligations imposed on him. With this action had been conjoined a petitory action by A alone against the over-superior for payment of a sum of money in respect of the non-implement of the obligations sought to be reduced. The defences of the subfeuars caused no additional expense. The over-superior having been successful in the conjoined actions, *held (diss. Lord Young)* that, having appeared as defenders in the action of reduction, the subfeuars were liable in expenses along with A.

(SEE *supra*, p. 610.)

2D DIVISION.
Lord Fraser.
I.

On 26th February 1885 the Glasgow Feuing and Building Company, Limited, brought an action for payment of £334, 10s. 7d. against the trustees of the late Arthur Watson, and on 12th June 1885 Watson's trustees brought an action for reduction of the feu-contract on which the Feuing Company based their claim in the petitory action. Besides the Company certain subfeuars from them were called as defenders in the action of reduction, two of whom—Messrs William Barr Crawford and James Pollock—entered appearance as defenders, and adopted the defences of the Company. The action of reduction and the petitory action were conjoined on 14th November 1885, and on 25th November two other subfeuars—Hugh Herron and David Bird—were, in terms of a minute for them, sisted as defenders in the conjoined actions. These defenders likewise adopted the defences of the Feuing Company, and all the defenders were represented by the same counsel and agent.

On 16th June and 7th July 1886 the Lord Ordinary (Fraser) pronounced interlocutors—in the action of reduction assoilzieing the defenders, and in the petitory action granting decree for £112, 19s., with expenses to neither party.

On 11th March 1887 the Court pronounced this interlocutor:—"Having heard counsel for the parties on the reclaiming note against Lord Fraser's interlocutors of 16th June and 7th July last, recall the said interlocutors: In the action of reduction reduce, decern, and declare, in terms of the conclusions of the libel, and in the petitory action assoilzie the defenders from the conclusions thereof: Find the said trustees entitled to expenses in each of the said actions, and in the conjoined actions; remit," &c.

On 18th May Watson's trustees moved for the approval of the Auditor's report, and for decree against all the defenders who had appeared.

The appearing defenders, other than the Feuing Company, objected to being found liable in expenses, on the ground that the Company were the principal defenders, and that the other defenders had caused no additional expense by their appearance.

LORD JUSTICE-CLERK.—The defenders other than the Feuing Company maintain that although they have failed entirely in their defence they ought not to

be found liable in expenses. It is clear that there is no ground for freeing from liability these defenders, who appeared to maintain their freedom from the consequences of the action. They had an interest in the action, and thought that it was a sufficient interest to induce them to put obstacles in the pursuers' way, and they continued to oppose them throughout the litigation. I might perhaps have been disposed to agree to some modification, but I understand that a majority of your Lordships are of a different opinion.

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LORD YOUNG.—The proceedings here began by the Feuing Company raising an action against the late Mr Watson's trustees for payment of a sum of money in respect of the non-implement of an obligation to construct roads throughout the whole property feued by the late Mr Watson to the authors of the Feuing Company, and there is no doubt that according to the letter of the contract there was such an obligation. The suggestion was made therefore in the Outer-House that the question could be better tried in a reduction, and an action of reduction was raised accordingly. The pursuers in that action called as defenders, not only the Feuing Company, but also certain of their feuars. Two of these feuars—feuars of infinitesimally small portions of the ground—appeared, and other two feuars of equally small portions subsequently sisted themselves as defenders by minute, but all they did was to appear by the same counsel and agent as the Feuing Company, and say that they concurred in the company's plea. Watson's trustees, the pursuers, succeeded in their action and were therefore found entitled to their expenses; but they could not have got their decree, and would not have got their expenses except by calling the company as defender. The company must therefore have been the leading defender. Why the feuars came forward I do not know, and if they had caused a farthing of expense to the pursuers I would have found them liable in expenses. But admittedly they have not caused one farthing of expense to the pursuers. So that we are asked to find those four feuars, for instructing the agent and counsel for the Feuing Company, liable in fourth-fifths of the expenses. I cannot assent to the justice of that, or to the law of it. The Court has a discretion in the matter, and I think it would be a sound exercise of that discretion to give Watson's trustees decree for expenses against the Feuing Company alone.

LORD CRAIGHILL.—The right of Watson's trustees to decree for expenses is not disputed. The question in controversy is—Are they entitled to decree for expenses against the defenders other than the Feuing Company, against the defenders who appeared along with the Feuing Company and fought the same battle along with it? Besides the Feuing Company two individual feuars from them also appeared as defenders, and in the course of the litigation other feuars were also sisted in that character. All these defenders maintained that the ground of reduction alleged by the pursuers was unsound. It is true, as Lord Young has said, that their whole interest was in the Company, but they all came forward and stated one defence. I think it was for these defenders to say whether it was worth while so to come forward and take their place along with the principal defenders. Having done so they must take the consequences. They were put upon their guard. In any event, there must be decree against the company, but the form of the summons as regards the individual defenders is this,—“And the other defenders, in the event only of their appearing and opposing the conclusions hereof,” should be found liable in expenses. They ought therefore to have weighed well what would be the result to them, and

No. 134. must be taken to have done so. The one question is, who were the antagonists of the pursuers in the action? and when these are found, then according to reason and the practice of the Court the pursuers are entitled to expenses against them.

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LORD RUTHERFURD CLARK.—I concur with your Lordship and Lord Craighill.

THE COURT approved of the Auditor's report and gave decree for £540, 4s. 3d., the taxed amount of expenses in both actions, against all the defenders who had appeared.

R. AINSLIE BROWN, S.S.C.—THOMAS CARMICHAEL, S.S.C.—Agents.

No. 135.

May 18, 1887.
Williamson v.
Begg.

JOHN WILLIAMSON, Pursuer (Reclaimer).—A. J. Young—Liddall.

ROBERT BURNS BEGG, Defender (Respondent).—Pearson—C. J. Guthrie.

Personal or real—Whether legacy made real burden on heritage generally conveyed by settlement—Titles to Land Consolidation Act, 1868 (31 and 32 Vict., cap. 101), sec. 19, schedule L.—In a general settlement the testator conveyed to his son his whole means and estate, heritable and moveable, “but declaring that the above conveyance is granted with and under the following provisions, burdens, limitations, and declarations, viz.”—(Here followed obligations on the disponee to pay certain annuities and legacies)—“declaring that the said provisions . . . shall form real burdens over the heritable estate hereby conveyed.”

The title of the disponee was completed by a notarial instrument (in terms of schedule L, sec. 19, of The Titles to Land Consolidation Act, 1868), which, after setting forth the conveyance in the general disposition, bore, “but always under the provisions, burdens, limitations, and declarations mentioned in said general disposition and deed of settlement.”

A legatee having failed to obtain payment of his legacy from the disponee, who had become bankrupt, brought an action of damages against the agent who had been employed by the deceased and by the disponee, alleging that he had been guilty of a breach of professional duty in not constituting the legacy a real burden when making up the disponee's title to the heritage.

Held that the general conveyance did not create a real burden, and that there was no obligation upon the disponee or his agent to create one, and action dismissed.

Opinion (per the Lord President), that neither a general disposition without a description of the lands conveyed, nor a notarial instrument following thereon in terms of schedule L of the Titles to Land Consolidation Act, 1868, can create a real burden on the lands.

Agent and Client—Agent's responsibilities.—Observations, per curiam, upon the responsibilities of agents in protecting rights conferred by their clients upon third parties.

1ST DIVISION.
Lord McLaren.
M.

JAMES BEVERIDGE of Balado, Kinross-shire, died in June 1879, leaving a general disposition and settlement, whereby he assigned and disposed to his eldest son, **Thomas Beveridge**, his “whole means and estate, heritable and moveable, real and personal, wherever situated.” Then after a nomination of his said son as sole executor, the deed proceeded,—“But declaring always that the above conveyance is granted by me in favour of the said **Thomas Beveridge** and his foresaids with and under the following provisions, burdens, limitations, and declarations, viz.”—(After certain obligations to pay annuities and legacies)—“Third, the said **Thomas Beveridge** shall be bound to pay to **John Williamson** £200; declaring that the said provisions hereinbefore contained in favour of the said **Mrs Agnes Beveridge** and **Alexander Beveridge**, and **John Williamson**, shall form real burdens over the heritable estate hereby conveyed.”

Mr Robert B. Begg, solicitor, had prepared the above settlement on **Mr Beveridge's** instructions, and after the testator's death he completed **Mr Thomas Beveridge's** title by notarial instrument in his favour, recorded

on 4th November 1879. That instrument, after setting forth the testator's infetment and the general conveyance in his settlement, bore, "but always under the provisions, burdens, limitations, and declaration mentioned in said general disposition and deed of settlement, whereupon this instrument is taken," &c. "in the terms of the Titles to Land Consolidation (Scotland) Act, 1868," and the warrant of registration was in these terms,—“Register on behalf of Thomas Beveridge, Esquire, of Balado, in the register of the county of Kinross.”

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Mr Thomas Beveridge having granted various bonds over the estate, and having subsequently executed a trust-deed for behoof of his creditors, Mr Williamson brought an action of damages for the amount of his legacy against Mr Begg, alleging that he had been guilty of gross neglect or breach of professional duty, and that he was responsible for the loss he had sustained.

He averred that the defender had omitted to constitute the legacy a real burden upon Balado, as directed by the testator. “The defender, in completing the title of the said Thomas Beveridge, was acting, and was bound to act, not merely for him or in his interests, but also for or in the interests of the beneficiaries under the said general disposition and settlement, and it was his duty to see that the said notarial instrument was properly executed, and that in particular all the necessary steps were taken to make the legacy of £200 in favour of the pursuer effectual as a real burden. The defender, however, failed to provide, as he was bound to do, for the constitution of the said real burden by engrossment in the said notarial instrument and entry on the record.” (Cond. 4) “Until the present dispute arose, and for at least ten years before that, the defender has acted as sole legal adviser of the pursuer, and in that capacity has had numerous business transactions with the pursuer. The pursuer, as the defender was well aware, relied upon the defender doing what was necessary to secure his interests under the said general disposition and settlement, and in particular, relied upon his taking such steps as were proper and necessary for securing said legacy. The defender frequently led pursuer to believe that the legacy was effectually secured, and would be duly forthcoming. The pursuer was not informed by the defender, and was not in fact aware until recently of the defender's failure to secure said legacy as a real burden upon the estate of Balado.”

The defender averred that in the whole transactions subsequent to the testator's death he had acted only for Mr Thomas Beveridge, and that he was not employed by the other representatives of the deceased.

The pursuer pleaded, *inter alia*;—(1) The defender, as agent for the pursuer, or at least as agent for the beneficiaries under the said settlement, was bound to do what was necessary for the said legacy being properly constituted a real burden. (2) The defender was not entitled to omit from the said notarial instrument the insertion of the burdens imposed by the said general disposition and settlement, and therein expressly declared real. (4) The defender having been guilty of gross neglect, or breach of professional duty, is responsible to the pursuer for the loss he has thereby sustained.

The defender pleaded;—(1) The averments of the pursuer are irrelevant. (5) No loss having been sustained by the pursuer, the summons ought to be dismissed.

The Lord Ordinary (McLaren), on 23d November 1886, pronounced this interlocutor:—“Finds that under this action the pursuer claims damages against the defender for failure in the professional duty alleged to be undertaken by him, to have a legacy due to the pursuer effectually made a real burden on the heritable estate: Finds that the pursuer has not

No. 135. taken legal measures to have it determined in a question with heritable creditors whether the legacy is effectually constituted a real burden: Finds that until the pursuer's right is tested by eviction or decree, he is not entitled to sue for damages on the assumption that loss has been sustained: Therefore dismisses the action, and decerns: Finds the defender entitled to expenses.*

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The pursuer reclaimed, and argued;—The averments were such as to entitle the pursuer to an inquiry. A duty was laid on the defender to make the legacy a real burden on the heritable estate conveyed under the disposition, and the defender had neglected that duty. He ought to have taken care that when Thomas Beveridge took the lands he only took them under the burden of the legacy. This ought to have been done in the notarial instrument, and in terms of schedule L appended to the Titles to Land Consolidation Act, 1868 (quoted in the Lord President's opinion, *infra*). The specific amount of the burden, and the creditor's name, ought to have appeared in the instrument. The pursuer conceded that as the record stood, the ground on which the Lord Ordinary had decided the case could not be pleaded. The pursuer was entitled to look to the defender to protect his interests, and his averments on this matter were well founded in law.¹

The defender argued;—(1) There was no relevant case of damage. No claim had been made against the alleged competing creditors,—and until that had been done the action was premature. Besides, the declaration in the settlement did not constitute a proper real burden. In order to this, there must be a specific conveyance, and an obligation in the dispositive clause to constitute the provision in question a real burden upon the subject so conveyed.² Accordingly the pursuer had no such right as he claimed here. (2) But assuming he had, there was no liability on the part of the law-agent for neglect to complete the security, unless it was laid on contract or employment.³ There was no such averment here.

LORD PRESIDENT.—This is an action of damages against a law-agent for failing in his duty to his client, and, so far as I can understand from the record,

* “NOTE.—The action is instituted against a law-agent to recover the value of a legacy alleged to be lost by reason of not being effectually made real in the notarial instrument following on the truster's disposition. It is urged that every conveyancer warrants a security so far as it can be made good by the exercise of his professional skill.

“But in the present case the action appears to me to be premature. The loss has not been constituted, and the pursuer has not sustained the eviction of his legacy. He must first ascertain, in a question with the competing creditors, whether their right is preferable to his, and if he fail, he will then be in a position to assert his claim against the agent for failure to give him a good security over the testamentary estate. But there are two pleas which, I think, the pursuer may maintain in a question with the heritable creditors—(1) that he has an effectual real burden under schedule L; and (2) that the heritable creditors were affected by the notice of the testamentary character and purposes of the deed which appears in the notarial instrument.”

¹ Fleming v. Robertson, Feb. 19 and June 17, 1859, 21 D. 548 and 982, H. L., 1861, 4 Macq. 167 (Lord Chancellor Campbell, 177); Struthers v. Lang, Feb. 2, 1826, 4 S. 418, affd. H. L., 2 W. & S. 563.

² Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), sec. 19 and schedule L (quoted in Lord President's opinion).

³ Fleming v. Robertson (Lord Wensleydale's opinion), 4 Macq. 199; Goldie v. Goldie & Threshie's Reps., July 8, 1842, 4 D. 1489, 14 Scot. Jur. 591.

the allegation is that there was a failure on the part of the defender to have the legacy to which the pursuer was entitled under his grandfather's settlement made a real burden on his estate. The deed of conveyance by the grandfather was a general disposition conveying not only heritage, but also moveables, in fact his whole heritable and moveable estate. Undoubtedly the effect of the deed was to make the legacies and annuities left by the testator personal obligations against the disponee. There is no doubt he was under a personal obligation to pay these. The deed also contained this clause,—“Declaring that the said provisions hereinbefore contained in favour of the said Mrs Agnes Beveridge and Alexander Beveridge, and John Williamson, shall form real burdens over the heritable estate hereby conveyed.” If the effect of that clause was to create the legacies real burdens on the estate, no doubt the making up the title under the general disposition should have been so arranged as to feudalise the estate subject to these real burdens. But looking to the deed, I am of the opinion—which indeed hardly seemed to be disputed—that this declaration is of no avail as creating a real burden. A general conveyance of all the granter's lands without specifying any lands—which is what is generally understood by a general disposition—cannot possibly create a real burden, because in order to create a real burden there must not only be a very precise specification of the amount and nature of the burden which is to be created, but also as precise a specification of the lands over which it is to extend. There is no such specification in a general conveyance. But there is a further reason why this declaration cannot receive effect. It cannot be followed by infeftment. The only way of effectually constituting a real burden is to insert a provision to this effect in the dispositive clause, so that it shall enter the sasine. But I do not think that in the end it was seriously contended that the declaration had the effect of creating a real burden.

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The next position taken up by the pursuer is that the legacy should have been made a real burden in the notarial instrument. But could this have been done? The schedule of the Titles to Land Consolidation Act, 1868, which has been referred to for the purpose of shewing that real burdens could be created in this way, does not advance the argument very far. There is no doubt this provision in schedule L, appended to that Act, which deals with a notarial instrument in favour of a general disponee,—“*If the deed be granted under any real burden or condition or qualification, add here, but always under the real burdens,*” &c. No doubt, if there is a real burden created by the deed it is right it should be inserted, because that is the proper mode of feudalising lands which are subject to such a burden. But if no real burden is created, then the direction contained in the schedule does not apply.

But then it is said that the statute contemplates that a real burden may be created in this way. That leads us back to a consideration of the 19th section of the Act, which authorises the adoption of the procedure provided by schedule L. The provisions of that section are not confined to the case of a general disposition, but they apply to many other cases under which real burdens may be created. It reads thus,—“Where a person shall have granted or shall grant a general disposition of his lands, whether by conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing within the sense and meaning of the 20th and 21st sections of this Act, and whether such general disposition shall extend to the whole lands belonging to the granter, or be limited to particular lands belonging to him, with or without full description of such lands, and

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whether such general disposition shall contain or shall not contain a procuratory or clause of resignation, or a precept of sasine, or an obligation to infeft, or a clause expressing the manner of holding, it shall be competent to the grantee under such general disposition to expedite and record in the appropriate Register of Sasines a notarial instrument in, or as nearly as may be in, the form of schedule L hereto annexed." That shews that a notarial instrument may be recorded under schedule L upon a general disposition, containing a full description of the lands conveyed to the general disponee, and there is no doubt that by such a deed a real burden may be effectually created. Accordingly, the words of the schedule which I have quoted above are completely satisfied by referring them to such notarial instruments as may be executed in creating real burdens where these have been properly constituted. The argument upon that section accordingly fails. The possibility of creating a real burden by some proceeding under schedule L, where there has been a failure to constitute it properly by the principal deed, is a different matter. In this case, as I have said, there is no such right constituted, although the Lord Ordinary seems to have had some doubts.

But even supposing that there was a failure on the part of the defender to create a real burden, would he be answerable for neglect of duty? I do not think we are in a case of that nature. Because I do not see that the defender undertook any such duty without consideration and without any employment by the pursuer. It would be very strange if he had. But that is perhaps hardly the nature of the pursuer's case. It must rather be this, that it was in the power of the defender, being a sort of family agent, and acting for the pursuer as well as for the other members of the family, to make the clause in the general disposition effectual in his favour in some way or other so as to give him a real security over the estate. It appears to me that this was impossible. I do not know how it could be done, and therefore I do not think the defender can be held responsible for not doing what he could not do.

I do not adopt the narrow ground of judgment taken by the Lord Ordinary. As both parties are agreed that the legacy cannot be recovered owing to the bankruptcy of the disponee, it seems desirable that we should decide the case on the footing that if the pursuer had a right to a real security for the legacy, he has lost that right. But as I have shewn I do not think he ever had such a right.

LORD MURK.—It is better, I think, that this case should be decided upon the broader ground, and I am also of opinion that the payment of the legacy in question was not effectually created a real burden by the testator. There is no doubt a declaration to that effect in the deed, and there may have been a personal obligation imposed on the disponee to pay the debt, but the deed is a general conveyance of heritage, without any special conveyance of any particular estate, with directions that the legacy should be secured as a real burden over it. That being so, it is clear that under the rules of law which were in operation at the date of the passing of the Titles to Land Consolidation Act, 1868, no real burden was constituted; and I see nothing in the provisions of that statute which can be said to have relaxed or altered those rules. In these circumstances, the only other question is whether the defender was under any obligation *qua* agent of the family, and without any special employment from the pursuer, to see that the legacy was properly secured as a real burden; and I am of opinion that he was not.

LORD SHAND.—The view upon which this action is brought is that the pursuer **No. 135.**
 was entitled to have the amount of his legacy made a real burden upon the
 property conveyed to Mr Thomas Beveridge. The ground of the claim I under-
 stand to be that the defender, as the pursuer's agent, undertook to have the
 legacy made a real burden, having it in his power to do so, and that he has not
 done so, and has therefore deprived the pursuer of the power of recovering pay-
 ment out of the property, Mr Beveridge's estate being now bankrupt, and the
 property heavily burdened by deeds executed by him. This is not a case of
 conveyance to trustees with directions to do certain things, where, looking to the
 truster's intention, there might be a duty upon the trustees or upon an agent to
 protect the legatee's interest. The estate is conveyed absolutely to a disponee
 by a general conveyance, subject to certain conditions, which are expressed on
 the face of the deed. Whatever may have been the testator's intention, he cer-
 tainly did not create this legacy a real burden. He conveyed his estate abso-
 lutely, and made his disponee personally liable to pay certain annuities and
 legacies. No doubt he added a declaration that these provisions should form
 real burdens over the heritable estate thereby conveyed. But that declaration
 did not make the legacy a real burden. No infeftment followed upon
 the deed, and the deed was not capable of being followed by infeftment,
 otherwise than by notarial instrument duly registered. And there being no
 condition or declaration that the disponee should create the legacy a real
 burden he was not bound to do so. He took the estate, not in trust, but for
 his own behoof, and he could not be compelled to make it a real burden. This
 being so, there can be no action against the defender for having failed to perform
 an act which he was neither entitled nor authorised to perform.

Upon these grounds I think the defender should be assoilzied.

LORD ADAM concurred.

THE COURT recalled the Lord Ordinary's interlocutor, sustained the
 first and fifth pleas in law for the defender, and of new dismissed
 the action.

FRANCIS J. ROBERTSON, W.S.—HENDERSON & CLARK, W.S.—Agents.

DONALD M'MURCHY, Pursuer (Reclaimer).—*Rhind—A. S. Paterson.*

PETER CAMPBELL, Defender (Respondent).—*Forsyth.*

J. C. MACLULLICH, Defender (Respondent).—*M'Kechnie.*

No. 136.

May 21, 1887.
M'Murphy v.
Campbell.

Reparation—Slander—Privilege—Malice.—A police-officer brought an action
 of damages for slander against an inspector of police and a procurator-fiscal, stating
 that they, acting in concert, or one or other of them, had maliciously and without
 probable cause prepared and sent to the pursuer's superior officer, the chief-con-
 stable of the county, a report, falsely stating that there were current in certain parts
 of the county rumours to the effect that he had been guilty of immoral conduct,
 and that an official investigation as to his conduct was required, in consequence
 of which report he had been suspended for a time from duty, and had suffered
 in feelings and reputation. *Held*, having regard to the nature of the report and
 its privileged character, that in order to the relevancy of such an action a
 specific statement of the grounds on which malice was to be inferred was
 required, and that such not being given, the action was irrelevant.

Opinion that an action will not lie against a public officer in respect of
 defamatory statements made in a report sent in the discharge of his duty to his
 superior officer.

No. 136.

May 31, 1887.
M'Murphy v.
Campbell.

2D DIVISION.
Lord Lee.
M.

AN action of damages for alleged slander was raised by Donald M'Murphy, formerly a sergeant of police at Oban, against Peter Campbell, formerly inspector of police there, and J. C. MacIullich, procurator-fiscal of Argyllshire at Inveraray, "conjunctly and severally, or otherwise severally, or according to their respective liabilities."

The pursuer averred;—(Cond. 2) "On or about the 19th day of September 1885 the defenders, acting in concert together or separately, or one or other of them, prepared a report or written statement of and concerning the pursuer, in which it was stated, 'I have to report you alleged misconduct on the part of Sergeant M'Murphy, Oban, which, if found on investigation to be true, will seriously affect his moral character. What I am about to state is well known at Inveraray among all classes (including P. F.), at Taynafead public-house, and the post-boys at Dalmally Hotel. On the 1st or 2d January 1884 M'Murphy took Alexander Gillies, a boy prisoner, from Bonaw to Inveraray, charged with theft, and it is alleged that while at Inveraray on that occasion, and in broad daylight, he had a woman, named . . . who is considered a prostitute, with two or three illegitimate children, in Buntine's Hotel; that he pulled down the blinds, got whisky, and locked the door, and had the woman there for about two hours, and I need hardly say what is supposed to have taken place. . . ' These statements regarding the pursuer are unfounded and malicious falsehoods, and represented the pursuer to have acted as an immoral and dissolute person, and to be unworthy of employment in the police force. The defenders, on or about said 19th September 1885, transmitted the said false and malicious statement or report, signed by the defender Campbell, to Colin M'Kay, chief-constable of Argyllshire, in consequence of which the said Colin M'Kay suspended the pursuer for two weeks. He was reinstated after the said false and calumnious charges had been investigated by the police committee of Argyllshire at Inveraray, and found to be entirely without foundation. Denied that any report affecting the pursuer's moral character was ever current, as alleged in Ans. 2 for defender Peter Campbell." (Cond. 4) "The above-mentioned false and calumnious charges against the pursuer were made and circulated by the defenders maliciously, and without any just or probable cause. The defenders were actuated by a feeling of ill-will against the pursuer, and a desire to damage his character and deprive him of his situation in the police force. The proceedings above detailed have seriously injured the pursuer in his feelings, credit, and reputation, and have occasioned the loss of his situation as police sergeant."

The pursuer pleaded;—The defenders having maliciously and without probable cause made and circulated false and calumnious charges against the pursuer, they are liable in reparation, with expenses.

Both defenders pleaded that the action was irrelevant.

The pursuer proposed issues for the trial of the cause.

The Lord Ordinary (Lord Lee), having heard counsel on the issues proposed, found that the pursuer's allegations were not relevant or sufficient to support the action, and therefore assoilzied the defenders from the conclusions of the summons.*

* "NOTE.—When issues were ordered in this case, it was understood that the question of relevancy was to be raised upon the issues; and, accordingly, a discussion upon the relevancy took place.

"The case is a peculiar one, but as it involves a question of general importance in actions of slander based upon statements contained in an official report, or what purports to be an official report, I shall state the grounds upon which I have arrived at the conclusion that the action is irrelevant.

"The pursuer was a sergeant in the Argyllshire police, the defender Camp-

The pursuer reclaimed, and argued that there was a sufficient and relevant averment of malice. The pursuer's statements, fairly read, amounted to this, that the defenders, there being no real reports against him, had invented and sent to his superior a false story to the effect that reports were in circulation against him, which ought to be investigated. An issue ought therefore to be allowed.¹

Counsel for the defenders were not called upon.

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LORD JUSTICE-CLERK.—I am of opinion that the Lord Ordinary has taken a

bell was an inspector of police in the same force, and the defender MacLulich was, and is, procurator-fiscal of the county. The only slander complained of in the issues proposed is that set forth in the condescendence, art. 2, and it is said to have been contained in the written report or statement there referred to. That statement or report bears to be written by the defender Campbell, and to be addressed to the chief-constable of the county. It is not said that the other defender (the procurator-fiscal) either signed it or authorised it; and it does not bear to have been written on the responsibility of any person excepting the defender Campbell. All that is alleged, in order to connect with it the defender MacLulich, is, that 'the defenders acting in concert together or separately, or one or other of them, prepared a report or written statement,' and in reply to MacLulich's statement in answer, it is 'averred that the said defender acted in concert with the defender Campbell, and was in full cognisance of, and party to, the writing of the alleged report.'

"In this state of the record, and looking to the terms of the letter, I think that there is no sufficient allegation that the slander was uttered by the defender MacLulich, and that on this ground alone the action fails as against him. Assuming the fact to be that he was cognisant of it and was consulted about it, and a party to it in the sense of approving of Campbell writing it, this would not be sufficient to make him responsible for its contents, unless he knew that the statements contained in it were falsehoods, which is not averred.

"As to the case against Campbell, the record discloses the fact that the report was made by him in his official capacity, and to his superior officer, the chief-constable. It does not profess to vouch for the truth of the statements concerning the pursuer, but only that such misconduct was alleged, and that the allegation was current at Inveraray. It assumes and states that 'of course an independent investigation must be made.'

"In this state of matters, I think that the case is one in which it was not enough for the pursuer to allege malice in general terms; and that it was incumbent on him to set forth the facts and circumstances from which he is to maintain that malice may be inferred. He avers that the statements 'are unfounded and malicious falsehoods,' and he denies that any report affecting his moral character was ever current 'as alleged in ans. 2.' But he does not allege that the alleged rumours were inventions by the defenders, or that the report was made to the chief-constable recklessly, or without probable cause. He states that the information referred to in condescendence 3 was given without probable cause, as well as maliciously, but no issue is proposed as to that matter, and no want of probable cause is alleged as regards the report in question. My opinion is, that the statements contained in the report to the chief-constable, being made by a person within whose duty it was to report matters affecting the character and efficiency of the police force, and as statements requiring investigation, are not actionable if there was probable cause for so reporting them. I therefore think that the general averment of malice is insufficient, and that the action cannot be maintained.

"The case of *Craig v. Peebles* (3 Rettie, 441), and the opinion of the Judges in that case, though relating to an action against a procurator-fiscal, for slander in a complaint before the Justices of the Peace, appear to me to apply with equal force to slanderous statements contained in an official report. I may refer also to the case of *Green v. Chalmers*, Dec. 12, 1878, 6 R. 318, on this point."

¹ *Adie v. Gowans & Ferguson*, Jan. 16, 1847, 9 D. 495, 19 Scot. Jur. 200.

No. 136. perfectly right view of this case. The statement of the pursuer necessarily is that the defender Campbell was acting in the discharge of his duty, and not only so, but so far as the admitted facts of the case go, I think it would have been culpable if he had not done as he did.

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The whole matter consists in this, that there were rumours that scandalous conduct on the part of the pursuer had taken place in the district of the defender Campbell. He made out a report as to these rumours, which he sent to the pursuer's superior officer for investigation. I think that, looking to the averments as they stand, without any intelligible allegation of malice, we ought not to countenance this action.

LORD YOUNG.—I am of the same opinion. As to the case against the procurator-fiscal, I am clearly of opinion with your Lordship and the Lord Ordinary, that no relevant case is stated against him; and as to the case of the police officer also, I am of opinion that the action is not relevant. Our law as to defamatory statements by public officers in the discharge of their duty, which are alleged to be untrue, or even malicious, is not very fully matured, and it is probably creditable to public officials that it is not, because cases of the kind are of the rarest occurrence. The great majority of cases of slander arise in the ordinary circumstances of life among private citizens, and it is really within living memory that it was decided that an action will not lie against a Judge of this Court for statements made on the bench. The law on that subject was first solemnly laid down in an action against Lord President Hope,¹ in respect of serious allegations made by him on the bench. It was finally and solemnly decided on general grounds of expediency and public interest that no action will lie on such averments—that a Judge is at liberty to make any observations he may see fit in the discharge of his duty without fear of an action of damages. If his judicial duty is transgressed, there is a remedy of a constitutional character through the action of Parliament, but there is no remedy by way of an action at law.

Again, with respect to public prosecutors, I do not know that the law stands on any decision, but rather on generally received opinion. For example, no action will lie against the Lord Advocate for averments made by him in the discharge of his duty, even though they are said to be malicious. The public interest will not allow such actions. I think I am right in saying it is only within the last ten years that it has been decided in England that an action will not lie against witnesses for slander contained in statements made in the witness-box on the allegation that they are false and malicious. There again it is on grounds of public interest and high expediency that a witness shall not be deterred from giving evidence by any apprehension of an action for libel. No doubt great suffering may arise from such statements to the persons whom they affect, but the public interest prevents any remedy by way of an action.

Though it is not, for the purposes of this action, necessary to decide the point, I have for my part no objection to indicate my opinion that it is not in the public interest that an action for libel should lie against a public officer for a report made in discharge of his duty to his superior officer. It may cost great suffering to the person who is affected by these statements that they should be

¹ Haggart's Trustees v. Hope, June 1, 1821, 1 Shaw, 46, N. E. 49, aff. April 1, 1824, Shaw's App. 125.

made, and that he should be without redress, but it is in the interest of the public that the police should make investigation into such charges, and it would require a very exceptional statement indeed, a statement very different from what we have here, to induce me to allow such an action to proceed. I therefore concur in dismissing the action.

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LORD CRAIGHILL.—I concur. There is no difficulty whatever as to the fiscal, and I am surprised that the statements in regard to him were put on record. As to the other defender there is more difficulty, but I have no hesitation in concurring with the Lord Ordinary.

LORD RUTHERFURD CLARK.—I concur. I think we are doing a great deal for the pursuer himself in adhering to the decision of the Lord Ordinary, for it is plain that he could not possibly succeed if he went to trial.

On the case against the defender Campbell, I have some hesitation, because it may be inferred from the pursuer's statement that there was no report of any kind against his character. It is to be inferred, we are told, that the pursuer means to aver that Campbell, in order to make the report, invented the charges and sent in to his superior officer for investigation invented charges. That would be a remarkable case, but it is possible to conceive of such a case. If, however, the pursuer meant to make such a case as that, he ought to have made it much more plain than he has done, and to have brought out clearly his special grounds for inferring malice. There is authority for the proposition that it is necessary to aver special circumstances from which malice can be inferred. I am not sure that I agree with that proposition, stated broadly, but I am entirely of opinion that it is a statement which may be made of this particular case.

THE COURT adhered.

J. D. MACAULAY, S.S.C.—ROBERT EMSLIE, S.S.C.—THOS. CARMICHAEL, S.S.C.—Agents.

INCORPORATION OF TAILORS IN GLASGOW, Petitioners.—*R. V. Campbell*—*Ure*. No. 137.

INLAND REVENUE, Respondents.—*Lord-Adv. Macdonald*—*Sol.-Gen. Robertson*—*Darling*—*A. J. Young*.

May 26, 1887.
Incorporation
of Tailors in
Glasgow v.
Inland
Revenue.

Revenue—Corporation duty—Customs and Inland Revenue Act, 1885 (48 and 49 Vict. cap. 51), sec. 11—Exemptions—Charitable purpose.—The Customs and Inland Revenue Act, 1885, imposed a duty of five per cent upon corporate property, but exempted "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

Held that funds belonging to an incorporated body, which were derived from the entry-moneys of members and were solely applicable as pensions to decayed members and widows of members at the absolute discretion of certain office-bearers, were not to be regarded as funds appropriated "to a charitable purpose" in the sense of the statute.

THE COMMISSIONERS OF INLAND REVENUE, acting under the provisions 1st Division. B.
of the Customs and Inland Revenue Act, 1885, assessed the Incorporation of Tailors, one of the fourteen incorporated trades of Glasgow, whose earliest charters were dated in 1546 and 1569, on their property to the extent of £2602 of annual income, with duty at the rate of five per cent.

The Incorporation thereupon appealed against the assessment, and main-

No. 137. tained that their property was exempted from duty in terms of subsection 3 of section 11.*

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They stated, *inter alia*, that their funds "are all destined and appropriated, after defraying necessary expenses of management, to charitable purposes, including relief against want of the means of livelihood, provision of medical relief, and of education, for poor persons—being members of the Incorporation or their widows or children, or, in some cases, grandchildren. All allowances, of whatever nature, to the poor of the Incorporation are left to the charitable discretion of the Deacon and Master Court, and are payable and paid only during their pleasure, it being specially declared by the bye-laws of the Incorporation that no person shall have or acquire a legal right to share the funds of the Incorporation as a member, pensioner, or otherwise. The greater part of the estate of the Incorporation was originally derived, it is believed, from entry-moneys, which are presently paid at the rates set forth in the existing bye-laws and regulations of the Incorporation. The destination of the corporate funds to charitable purposes is settled, not only by the charters of the Incorporation above mentioned and prescriptive usage thereon, but also by Acts of Parliament."

The following was one of the bye-laws approved by the Court of Session in 1880:—"It is declared and enacted that pensions may be awarded to decayed members, and the widows and children of deceased members in indigent circumstances, or an amount expended for their behoof, to such extent as the deacon and masters consider suitable; and this allowance shall be payable only during their pleasure, and no person shall have or acquire a legal title to share the funds of the Incorporation as a pensioner or otherwise."

The Commissioners of Inland Revenue denied that the property or the income thereof fell under the exempting clause founded on.

It was admitted at the hearing that a sum of £320 or thereby was acquired within thirty years as a legacy for educational purposes, and that the amount of the income thereof, being £16, fell to be deducted from the assessable sum above named.

The petitioners argued;—Under the charter of 1546 the entry-money and fines which formed the funds of the Incorporation were to be dedicated to religious purposes. Under the charter of 1569 they were to be devoted no longer to religious but to charitable purposes, and these were still the objects of the Incorporation, as defined in the bye-laws of 1880. Since 1846, when the Act 9 and 10 Vict. c. 17, for the abolition of exclusive trading within burghs was passed, the object that members had in joining the Incorporation was because it gave them a certain position and dignity, and a pension in the case of necessity. But no contributor had an absolute right to share in the funds either as a pensioner or otherwise,—the dispensation of the funds was purely charitable, and was made to decayed members and the widows and children of deceased members in indigent circumstances, and in this respect the Incorporation was distinguished from a prudential assurance company. Nor could it be said that the benefits to be obtained from the Incorporation were in any way

* Section 11 of the Customs and Inland Revenue Act, 1885, provides for the levying of a five per cent duty upon the annual value of property accruing to corporate or unincorporate bodies after deducting all necessary outgoings, &c., "subject to exemption from such duty in favour of property of the descriptions following (that is to say) . . . (3) Property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts. . . ."

commensurate with the payments of entry-money. Indeed, there was no relation between the payment and the return.¹ Corporations would be restrained if they misapplied their funds, which must be devoted to their proper uses.² The funds in the present case were "legally appropriated" to charitable purposes, because any single member might interfere to prevent a misappropriation or a bad exercise of the discretion which was vested in the Deacon and Master Court.³ Both the rights of the corporators to participate in the benefits of the Incorporation, and the obligation on the Incorporation to extend these benefits were general. It was not a case of individual right on the part of a member.

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The respondents argued;—There was a right here on the part of the members to participate in the benefits of the Incorporation under certain circumstances.⁴ If there was this right, then the objects were not charitable, and the fund did not fall within the exemption of the 3d subsection. If there was no such right on the part of the members, then the funds of the Incorporation were not "legally appropriated" in the sense of the 2d subsection as defined by the Court in the recent case of the *Writers to the Signet*.⁵

At advising,—

LORD PRESIDENT.—This is a question arising under the 11th section of the Customs and Inland Revenue Act, 1885, under the authority of which the Commissioners of Inland Revenue have assessed the property of the petitioners, the Incorporation of Tailors of Glasgow, as chargeable to the extent of £2602 of annual income, with duty at the rate of 5 per cent. The notice of assessment was duly served upon the petitioners, and they bring this petition and appeal under the authority of the Succession Duty Act of 1853, for the purpose of having the question of their liability determined by the Court.

The petitioners, being an incorporated body, and having an annual income of considerable amount, are *prima facie* chargeable under the 11th section of that statute, because the object is to levy a duty at the rate of 5 per cent upon the annual value, income, or profits of property belonging to bodies corporate or unincorporate, and the usual deductions have been made of all necessary outgoings, including receiver's remuneration, and all charges and expenses properly incurred in the management; so there is no dispute about the amount of revenue on which the charge is to be made, except in so far as regards one sum, I understand, of £320, the income or profits of which will fall to be deducted from the amount of the revenue upon which the charge has been made before finally adjusting the amount of the assessment.

The ground upon which the petitioners object to this assessment is not that their case does not fall within the operative and leading enactment of the 11th section, but because it is within one of the exemptions appended to that section.

¹ *Paterson v. Deacon, &c. of the Skinners' Corporation*, Feb. 10, 1803, M. App. I.

² *Finlay v. Newbigging and Others*, Jan. 15, 1793, M. 2008; *Wilson v. Scott*, Jan. 16, 1793, M. 2010; *Macauland v. Montgomery*, Jan. 16, 1793, M. 2010.

³ *Incorporation of Wrights, &c. of Leith*, June 4, 1856, 18 D. 981, 28 Scot. Jur. 417; *Muir, &c. v. Rodger, &c.*, Nov. 18, 1881, 9 R. 150; *Incorporation of Skinners of Glasgow*, Dec. 4, 1857, 20 D. 211, 30 Scot. Jur. 115; *Thomson v. Incorporation of Candlemakers*, March 16, 1855, 18 D. 765.

⁴ *Incorporation of Fleashers of Glasgow v. Scotland*, June 20, 1828, 3 Wilson and Shaw's Appa. 209.

⁵ *Society of Writers to the Signet v. Commissioners of Inland Revenue*, Nov. 3, 1886, 14 R. 34.

No. 137. In the third subsection, property is exempted, the income or profits of which shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts. The property is said to be exempted under that subsection, because it is legally appropriated and applied for a charitable purpose.

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The property which belongs to this incorporation has been created, and is kept up by contributions of members of the Incorporation. In short, the whole property of the Incorporation, I understand,—at least so far as the history of that property can be ascertained,—is the accumulations of entry-money paid by corporators to the Incorporation. Now, the first thing that the petitioners have got to establish is that this property so created is legally appropriated to charitable purposes; and these words “legally appropriated” seem to have a very clear and distinct meaning,—a meaning which has been given effect to in a previous case—(*Society of Writers to the Signet*, 14 R. 34). They mean that the property is so appropriated as to create a legal obligation upon the part of the administrators of the property to apply it in a particular manner. If the property is so legally appropriated, it follows of necessity that the administrators of the fund are under a legal obligation to apply the funds in their hands in a particular way; and so, in order to bring the case within the meaning of this exempting clause, the petitioners must make out that the funds in the hands of the corporation are so appropriated that the corporation is legally bound to apply them in a particular way. When there is a legal obligation, it follows again as a matter of necessity, that there must be somewhere a legal right to enforce the obligation. It may be that the legal right to enforce the obligation may belong to individuals, or it may be that the legal right belongs to a class; and I think it will be found, from the terms of the bye-laws of this Incorporation, that the legal right to enforce this obligation belongs to a class.

But in that I am anticipating, because the next question is, whether the purpose to which this fund is legally appropriated and must be applied is a charitable purpose. Now, charity—I mean the application of a charitable fund—generally means that the object of the charity has no right to demand anything from the party who administers the fund. But still further, it generally means that he has given nothing for it,—that the bestowal of the charity is entirely gratuitous on the part of the administrator of the fund. In the present case, the fund is legally appropriated, within the meaning of the subsection founded on, to the maintenance of decayed members of this Incorporation, and of their widows and children. Therefore the body—the corporators generally—have a right to demand that this fund shall be so applied, and shall not be applied to any other purpose whatever, and their right to require this depends upon the consideration they have given for the right; and that consideration is the payment of entry-money. Now, these different considerations seem to me to exclude the notion of charity altogether. The corporators and members of the body generally contribute, upon becoming members, to the funds and property of the incorporation, and these funds and that property are applied to one purpose, and one only, namely, to providing for decayed members and their widows and children, and so there is, so far as I can see, a complete obligation on the one hand, and a complete right on the other. There is an obligation on the part of the administrators of the fund to apply it in a particular way, and no other way, and there is a right on the part of the whole members of the corporation to insist that it shall be so

applied—and it does not seem to me to interfere with that view of the case, No. 137. that according to the bye-laws of the society an individual has no legal title, as May 26, 1887. it is called, to insist on the fund being so administered as to give him a permanent right. The bye-laws contain this provision among other things, and it is the most important of all:—"It is declared and enacted that pensions may be awarded to decayed members and the widows and children of deceased members in indigent circumstances, or an amount expended for their behoof, to such extent as the Deacon and Masters consider suitable; and this allowance shall be payable only during their pleasure, and no person shall have or acquire a legal title to share the funds of the incorporation as a pensioner or otherwise." There is a very large discretion undoubtedly left in the hands of the Deacon and Masters of the Incorporation. They have an entire control, in so far as regards each particular individual applying for the benefit of this fund. The amount to be given is in their discretion, and it is also in their discretion to say whether a particular individual shall not have the benefit of the fund at all, for reasons which of course must not be capricious or unreasonable, but for fair reasons. The discretion is a very large one, but, like the discretion vested in almost all administrators, it is not to be abused, and if it is abused, the administrators will be subject to the control of this Court, but notwithstanding that large discretion, it is here made abundantly clear what is the destination of the annual income of the property.

It is to be awarded in the shape of pensions to decayed members and the widows and children of deceased members in indigent circumstances. There is no other lawful application of the money. There is no other purpose for which this corporation now exists, and therefore it appears to me that notwithstanding the wide discretion vested in the Deacon and Masters as regards each individual case, this is nothing else in its real character, in its present circumstances, since it ceased to have any privileges of exclusive trading, than a provident society, and therefore it cannot answer the description of the exempting clause of the statute as being a corporation whose funds are legally appropriated to charitable purposes. I think the decayed members and their widows are not receiving charity when they get the benefit of this fund, but, on the contrary, are getting the benefit of it in consequence of the payment by either the members themselves who are now receiving aid, or by the husbands and fathers of the widows and children who are receiving aid. It differs from most provident societies of the same description in respect of that peculiarly large discretion which is vested in the Deacon and Masters; but I can see no other distinction, and that distinction is not sufficient to take it out of the category of a provident society, or to make the pensions and allowances payable under it charitable in any proper sense of the term.

I am therefore for confirming the assessment.

LORD MURE.—I am of the same opinion. It appears to me that your Lordship has very distinctly explained the position of this society as regards the creation and application of its funds. The fund in question was created by the contribution of the members of the association, paid in in terms of the regulations applicable to these matters; and it is distributed by the managers of the Incorporation in terms of the bye-laws among decayed members or the widows and children of deceased members, but the extent to which relief is to be given is to be entirely in the discretion of the managers. Strictly speaking,

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therefore, it is a benefit conferred upon the poorer families of the Incorporation in return for the money which they and the other members of the Incorporation have contributed towards the creation of the fund. In these circumstances, I agree with your Lordship in thinking that it is not a charitable purpose in the sense in which that word is used in cases of this description. Reference was made to the case of the *Fleashers' Incorporation of Glasgow*, 3 Wils. and Sh. App. 209, but there the rules were different, and the case has no direct bearing here, because by those rules a fixed sum of money was provided for each widow when she became poor. There was, moreover, no discretion as to the amount to be paid, but an absolute right given to the widow, if she was poor, to have a certain fixed annuity paid out of the funds; and her title to sue was sustained on that ground. There was no question raised in that case similar to that which is here in dispute; and I do not think we are in the least degree trammelled by it.

LORD SHAND.—I am of the same opinion, and your Lordship has so clearly and exhaustively stated the ground upon which my opinion rests, that I should be guilty of repetition if I added a word to what your Lordship has said.

LORD ADAM.—I am entirely of the same opinion.

THE COURT gave effect to the appeal so far as regards the £320, and *quoad ultra* refused it.

MAITLAND & LYON, W.S.—DAVID CROLE, Solicitor of Inland Revenue—Agents.

No. 138. JAMES S. SMILES (Surveyor of Taxes), Appellant.—*Sol.-Gen. Robertson—A. J. Young.*

May 31, 1887.
Surveyor of
Taxes v.
Northern
Investment
Co. of New
Zealand,
Limited.

NORTHERN INVESTMENT COMPANY OF NEW ZEALAND, LIMITED, Respondents
—D.-F. Mackintosh—C. S. Dickson.

Revenue—Property and Income-Tax Act, 1842 (5 and 6 Vict. c. 35), sec. 100, schedule D, Fourth case—Interest received from foreign investments—Powers of General Commissioners of Income-Tax.—A company carrying on the business of borrowing money in this country and investing it abroad may, in the option of the Surveyor of Taxes, be assessed for income-tax under schedule D either upon profits under the first case or upon the interest received from abroad under the fourth case of that schedule.

Scottish Mortgage and Land Investment Company of New Zealand, Limited v. The Commissioners of Inland Revenue, Nov. 19, 1886, supra, p. 98, followed and explained.

1st DIVISION.
Exchequer
Cause.
M.

THE NORTHERN INVESTMENT COMPANY OF NEW ZEALAND, LIMITED, incorporated under the Companies Acts, and having its head office in Edinburgh, was formed in 1880, principally for the purpose of borrowing money in this country on debentures at a low rate of interest, and lending it out in New Zealand, together with the paid up capital, at a higher rate of interest on the security of land there.

The Company carried on its business from the date of its formation, and in each year including the year 1885-86 returned its profits and gains, and was assessed and paid duty thereon in terms of the first case of schedule D of the Act 5 and 6 Vict. cap. 35, section 100.*

* The first case of schedule D is,—“Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act.”

“Rule First.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of

The Company, as already stated, was assessed for the year 1885-86, in terms of the first case of the schedule, but on 4th August 1886 the Surveyor of Taxes demanded a surcharge of £236, 3s. 4d., being the difference between the sum for which the Company was assessed under the first case, and the amount of the profits or gains from colonial securities computed in terms of the fourth case of the schedule.*

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The Company appealed to the Commissioners on Income-tax, who, on 7th April 1887 came to be of opinion that the profits of the business carried on by the Company were chargeable with income-tax under the rules applicable to the first case of schedule D aforesaid, sustained the appeal of the Company, and discharged the surcharge by the Surveyor.

The Surveyor of Taxes obtained a case for the decision of the Court of Exchequer, under the provisions of the Taxes Management Act, 1880.

The case set forth the manner in which the surcharge claimed was arrived at, but as the Court was of opinion that the case of the *Scottish Mortgage and Land Investment Company of New Mexico v. The Commissioners of Inland Revenue*¹ was directly in point, and that the Company might legally be assessed under the fourth case, on the ground that their revenue was to be regarded as interest on foreign investments received in this country, it need not be here set forth.

The question of law stated was—"Whether the Company is liable to be assessed to income-tax in respect of the interest received from its investments in foreign or colonial securities according to the rule contained in the fourth case of schedule D, section 100, 5 and 6 Victoria, cap. 35? or Whether the Company is chargeable for its whole profits or gains under the rules applicable to the first case, schedule D of the said Act?"

Argued for the appellant;—The case of the *New Mexican Company* was precisely applicable here, and the questions submitted to the Court raised no other point. On the point raised by the respondents he argued;—The surcharge was quite properly demanded within four months of the year to which the last assessment under case 1 had been made. Such a surcharge was specially provided for under section 52, subsec. 2, of the Taxes Management Act, 1880 (43 and 44 Vict. c. 19), which gave the Commissioners power where any property or profits had been "omitted from such first assessments" to "make an assessment" "in such sum as according to their judgment ought to be charged on such person, subject to objection by the surveyor and to appeal." The judgment of the General Commissioners was only final where (sec. 57, subsec. 9 of the same Act) no order of "the High Court" upon a case required, "as provided by this Act," had been made.

Argued for the respondents;—The present case was distinguishable

three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment; and shall be assessed, charged, and paid without other deduction than is hereinafter allowed."

* Schedule D and fourth case is as follows,—“The duty to be charged in respect of interest arising from securities in the British Plantations, in America, or in any other of Her Majesty's dominions out of the United Kingdom, and foreign securities, except such annuities, dividends, and shares as are directed to be charged under schedule C of this Act.”

“Rule.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in the United Kingdom in the current year, without any deduction or abatement.”

¹ Nov. 19, 1886, *ante*, p. 98.

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from the *New Mexican Company's* case in this, that there an assessment was being laid on for the first time, while here the Company had been assessed since 1880 under the first case of the schedule. In the *New Mexican Company's* case they maintained that the Lord President had stated that it was in the option of the Commissioners (which they interpreted as meaning the General Commissioners, and not the Board sitting in London), if a company might legally be assessed under either of two cases, to state which of the two should be chosen. Here they had decided that the course which would in the long run bring in the most money to the revenue was to assess the company under the first case of schedule D.

LORD PRESIDENT.—This is a very clear case, and I should not have thought it necessary to make any observations on it were it not that I think that my judgment in the *Scottish Mortgage and Land Investment Company of New Mexico* case (*ante*, p. 98), has been a little misunderstood. The passage in my opinion which was cited to us is as follows:—"The question is whether it (income-tax) may be lawfully charged under the fourth case, schedule D. One can understand that in particular circumstances the duty may be chargeable under the one or the other. The income, in respect of which the duty is to be charged, may fall under more than one description in the statute, and in that case it would, of course, be in the option of the Commissioners of Inland Revenue to take the case that was most favourable to themselves." Now, no more was meant in that passage than that it is in the option of the Surveyor of Taxes to take the case most favourable to the Crown, for the Commissioners of whom I there speak are the Board of Commissioners sitting in London; the Board which is charged with the collection of the revenue, and not the General Commissioners against whose decision this appeal is taken. These General Commissioners are charged with quasi-judicial functions, and have to determine whether any assessment is well laid on when it is objected to by the party assessed, and accordingly the statute says that whatever may be the determination of the Commissioners, whether it is favourable to the one party or to the other, an appeal lies. The Commissioners have no discretion, they have simply to determine the question in dispute between the parties. That is their only function. What they had to determine here was whether this company, which derives a large revenue from foreign and colonial investments, and which receives that revenue in this country, is liable to assessment under the fourth case of schedule D. On that point I cannot distinguish the case from that to which I have already alluded, and I think we must therefore follow the rule there laid down.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT reversed the determination of the Commissioners, and confirmed the assessment.

SOLICITOR OF INLAND REVENUE—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

No. 139.

May 31, 1887.
Cuthbertson
v. Gibson.

WILLIAM JOHN CUTHBERTSON, Petitioner (Respondent).—*Watt*.
ROBERT GIBSON, Compeerer (Appellant).—*Galloway*.

Judicial factor—Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 16.—The appointment of a judicial factor under the 16th section of the Bankruptcy Act, 1856, is not a matter of course, and ought to be made only where immediate measures for the preservation of the estate are necessary.

Bankruptcy—Sheriff—Procedure—Sheriff Court Act, 1876 (39 and 40 Vict. cap. 70), sec. 6.—Question, whether petitions in the Sheriff Court for sequestra-

tion under the Bankruptcy Act, 1856, must be in the form prescribed by the No. 139.
6th section of the Sheriff Court Act, 1876.

Opinion (per Lord Young) that they need not.

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DAVID GIBSON, farmer, Barns, Dumfriesshire, died on 5th March 1887, and on 14th March following William John Cuthbertson, publisher in Annan, alleging that he was a creditor of Gibson to the extent of £253, 11s. 9d., being the amount with interest of two bills said to be long past due, presented a petition in the Sheriff Court at Dumfries for the sequestration of the estates of the deceased and for the appointment of a judicial factor thereon under the 16th section of the Bankruptcy Act, 1856.*

2D DIVISION.
Sheriff of
Dumfriesshire.
1.

The petition was in the form in use prior to the passing of the Sheriff Court Act, 1876, and did not contain a condescendence and note of pleas in law, as required in petitions under that Act.†

The averment in the petition upon which the application for a factor was based was in the following terms:—"That the said David Gibson was tenant at the time of his death of the farm of Barns, and the same was and still is stocked with horses, cattle, sheep, and other bestial, and it is therefore desirable that immediate measures should be taken for the preservation of the estate."

On 15th March the Sheriff-substitute (Hope) granted warrant to cite the parties called as respondents to appear on certain days in September following, in terms of the statute, to shew cause why sequestration should not be granted, and ordered intimation in the *Edinburgh Gazette*. In the same interlocutor he appointed a factor as craved.

Robert Gibson, a son of the deceased, appealed against this interlocutor, on the grounds, as stated by him at the hearing, (1) that the petition was incompetent, in respect it was not in the form prescribed by the Sheriff Court Act of 1876†; and (2) that at all events the appointment of the factor ought not to have been made *de plano*, as there was no sufficient averment of the necessity of making such an appointment.

Gibson further stated (at the hearing) that he had been decerned his father's executor on the 12th March, that he had found caution as such, that his father's estates were not insolvent, and that the Sheriff-substitute had made the appointment of the factor as a matter of course, and without inquiry into the necessity for it.

Cuthbertson admitted that the Sheriff-substitute had appointed the factor as a matter of course, but, while he did not dispute that a decreedative appointing the appellant executor had been pronounced, he denied that caution had been found, and further stated that the deceased's estates were insolvent.‡

* The Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 16, enacts:—"It shall be competent for the Court to which a petition for sequestration is presented, whether sequestration can forthwith be awarded or not, on special application by a creditor, either in such petition or by a separate petition, with or without citation to other parties interested, as the said Court may deem necessary, or without such special application if the Court think proper, to take immediate measures for the preservation of the estate, either by the appointment of a judicial factor, who shall find such caution as may be deemed necessary, with the powers necessary for such preservation, including the power to recover the debts, or by such other proceedings as may be requisite; and such interim appointments or proceedings shall be carried into immediate effect; but if the same have been made or ordered by the Sheriff, they may be recalled by the Court of Session, on appeal taken, in manner hereinafter directed."

† 39 and 40 Vict. cap. 70, sec. 6.

‡ *Appellant's Authorities*.—On first point:—Crozier v. Macfarlane & Co., June 15, 1878, 15 S. L. R. 630; M'Dermott v. Ramsay, Dec. 9, 1876, 4 R. 217;

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LORD JUSTICE-CLERK.—I am of opinion that this appeal should be sustained. I think that a creditor who is desirous of having a factor appointed on his debtor's estate, under the 16th section of the Bankruptcy Act of 1856, must state special reasons in his petition for having his request granted. No doubt this application is for the sequestration of a deceased debtor's estate, which assumes that there is no one in the management of it, and that is a most suitable matter for the Sheriff's consideration, but I think that in making this appointment of a judicial factor without any statement by the petitioner to shew the propriety of such an appointment, and without, as we are told, giving the matter any special consideration, the Sheriff-substitute has gone wrong. I say nothing about the competency of the form in which this petition is drawn. It appears that it is in the form which was in use before the passing of the Sheriff Court Act of 1876, and as to whether such a form may now be continued in use looking to the terms of that Act, I express no opinion. But I am quite clear that this appointment of a judicial factor, without a specification of the reasons which made it necessary, and without an opportunity being given to the other side of appearing and opposing the application, ought to be recalled, and the petition remitted to the Sheriff.

LORD YOUNG.—That is my opinion also. I agree in thinking that the case may be disposed of on the ground which your Lordship has proposed, and I do not know whether we can competently consider the other question which was argued to us—to which indeed the greater part of Mr Watt's argument was addressed—the question, namely, whether the procedure in an application for sequestration in the Sheriff Court is now of necessity to be regulated by the provisions of the Sheriff Court Act of 1876. The inclination of my opinion is that it is not. The case in the other Division which was quoted to us was a case of *cessio*. That is a totally different thing, which is specially provided for by the Act of 1876. An application for sequestration is not specially provided for by the Act of 1876, but it is specially provided for by the Bankruptcy Act of 1856, which in its 29th and 30th sections prescribes the procedure that is to be followed. If the application for the sequestration of a deceased debtor's estates is made with the concurrence of his successor, or if the successor shall renounce the succession, the Sheriff is required by the statute at once to issue a deliverance awarding sequestration of the estates, and if there is no such consent or renunciation, the Sheriff is in that case to hear the parties in an informal way. Now, all that seems to me to be totally inconsistent with the procedure under the Act of 1876, which requires a record to be made up, and the case to be sent to the roll, and the parties to renounce probation, or the Sheriff to allow a proof, and so on. But as I said before, it is not necessary, and I doubt if it is even competent, for us to determine that question at the present stage. The Sheriff-substitute has ordered service on the parties in the usual way, and that was quite a right thing for him to do. Even if there is ground for objecting to the formality of the petition, that may be left to the parties to state when they appear, and ought not to be taken by the Sheriff of his own motion, or considered by us now. It would be a very strong and obvious objection

National Bank of Scotland v. Williamson, April 8, 1886, 23 S. L. R. 612. On second point :—M'Creadie v. Douglas, Nov. 4, 1882, 10 R. 108.

Respondent's Authority.—On first point :—Robinson v. Wittenberg, Dec. 15, 1860, 23 D. 181, 33 Scot. Jur. 84.

to the form of a petition which would entitle the Sheriff to say,—“This petition is utterly wrong. I cannot write upon it.” But in the same interlocutor as that in which he ordered service the Sheriff-substitute made the appointment of a judicial factor to take possession of the estate at once. Now, that is not a competent appointment except under clause 16 of the Bankruptcy Act, which provides that “It shall be competent for the Court to which a petition for sequestration is presented, whether sequestration can forthwith be awarded or not, on special application by a creditor, either in such petition or by a separate petition, with or without citation to other parties interested, as the said Court may deem necessary, or without such special application if the Court think proper, to take immediate measures for the preservation of the estate, either by the appointment of a judicial factor, who shall find such caution as may be deemed necessary, with the powers necessary for such preservation, including the power to recover the debts, or by such other proceedings as may be requisite.” The statute here contemplates an exceptional case, in which immediate measures for the preservation of the estate are necessary, but we are told that the Sheriff-substitute in this case granted the appointment of the factor without any special reason having been stated to him, and simply as a matter of course. I am of opinion that the granting of such an appointment is not a matter of course—that on the contrary it ought only to be granted where special and immediate measures are necessary for the preservation of the estate. We are told that an executor has been appointed here, and that he is in possession of the estates of the deceased, and we are told on the one side that this executor has found caution, and on the other side this is denied. How the fact may be I cannot tell. Whether this executor is not such a person as ought to be left in possession of these estates, whether he has found caution or not, or whether the fact that he has not found caution, if it be the fact, constitutes such a special case as will warrant the appointment of a factor, I cannot say. If this petitioner or any other creditor thinks so, then he can present his application to the Sheriff, who will grant it, not as a matter of course, but only after considering whether the special and exceptional circumstances of the case justify the appointment. Therefore I agree with your Lordship in thinking that this deliverance should stand in so far as it orders intimation and service, but that we should recall the appointment of the factor.

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LORD CRAIGHILL.—I agree entirely in all that your Lordship and Lord Young have said. With regard to the question of the form of the petition it is not necessary to say anything, because an answer to that question is not necessary to the decision of the case. With regard to the second question, it appears to me that we have no alternative but to recall the appointment of the judicial factor, inasmuch as it is plain that an irregularity was committed by the Sheriff-substitute in making the appointment. The Sheriff-substitute seems to have thought that the making of such an appointment was a mere matter of course, whereas the Act of Parliament makes it plain that special cause must be shewn. Now, not only is there no averment that the estate is without anyone to administer it—and there could not well have been such an averment when there was in fact an executor—there is nothing in the petition alleged against the administration which exists. In short, no reason whatever is stated for interfering with the executor's management; on the contrary, the fact that the property consists of the lease of a farm, and of the stock and crops on the farm, seems to me a

No. 139. strong reason against making such an appointment, for were the judicial factor to enter upon his duties he would have to take over the farm and to reap the crops and sell stock, and in this way entirely reverse the management of the farm before it could be determined whether sequestration was ultimately to be awarded or not. I therefore entirely agree in the course proposed by your Lordships.

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LORD RUTHERFURD CLARK.—I concur in thinking that a judicial factor ought not to be appointed at once and without some special reason being stated. I rather think that the practice of appointing without special reason and without notice is too common in the Sheriff Courts, and I am glad to have this opportunity of expressing my disapprobation of it. But the appointment has been made—perhaps irregularly,—and it is now defended on the ground that there is no legal administration of the estates of the deceased. If that be so, then I think the only course must be to confirm the appointment which the Sheriff-substitute has made. But it is said that before the application for a factor was presented a decree-dative appointing an executor was pronounced. It would have relieved my mind to have known whether this executor is prepared to find caution and to take up office—for of course the decree-dative is idle if he is not. If he has found or is going to find caution, and to enter upon office, I should have no hesitation in recalling the appointment of the factor, but if he has not found caution, and does not intend to do so, then I see no alternative but that the administration of the factor should continue. I should like much therefore to know this fact, whether the executor has found caution, or if he has not, whether he undertakes to do so within a certain short time, otherwise I should prefer that the appointment of the factor should stand, even if the Sheriff-substitute may have been somewhat premature in making it.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Sheriff appealed against in so far as regards the appointment of a judicial factor, reserving to the respondent to make application for such appointment in terms of the Bankruptcy Act: Find the appellant entitled to expenses Remit to the Sheriff to proceed in the cause as accords, and decern."

W. G. L. WINCHESTER, W.S.—JOHN PAIRMAN, S.S.C.—Agents.

No. 140. J. S. NAPIER AND OTHERS (Inglis' Trustees), Pursuers and Nominal Raisers.

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Inglis' Trustees v. Inglis. JOHN INGLIS Junior, Claimant (Reclaimant).—*Sol.-Gen. Robertson—Balfour—Pearson—C. S. Dickson.*

MRS MARGARET INGLIS OR BREEN AND HUSBAND, Real Raisers and Claimants (Respondents).—*D.-F. Mackintosh—Asher—C. J. Guthrie.*

Succession—Election—Essential error.—A daughter, who had intimated to her father's trustees her election to take legitim in place of her testamentary provisions in the belief that her right to the whole legitim fund was admitted by the trustees, of whom her brother was one, subsequently, when her brother declared his intention to dispute her right to more than half of the legitim fund, withdrew her election and claimed her testamentary provisions. *Held* that she was not barred from doing so.

Opinion (per Lord Shand) that even if the error had been one of law, and whether induced by another or not, the daughter would have been entitled to withdraw her election.

Succession—Election—Withdrawal.—*Question*, whether an election well No. 140.
made and intimated can be withdrawn.

MR ANTHONY INGLIS, engineer and shipbuilder, Glasgow, of the firm of Inglis' Trustees v. Inglis. May 31, 1887.
Messrs A. & J. Inglis, died on 10th January 1884. His wife had predeceased him. Two children survived him, an only son, Mr John Inglis junior, and a daughter, Mrs Margaret Inglis or Breen. Mrs Breen, at the date of the proceedings to be narrated, was married, but had no family. 1st DIVISION.
Lord Trayner.
B.

Mr Inglis left a trust-disposition and settlement, dated 8th August 1883, in which he conveyed his whole means and estate, heritable and moveable, to the following persons, as his trustees and executors, viz., Messrs J. S. Napier, John Ferguson, William Alexander, William Nowery, and his son and daughter. These trustees all accepted office.

Mr Inglis left a large amount of means, both heritable and moveable. The amount of the latter, as given up for confirmation, was £151,935, 15s. 10d. Of this sum £89,000 consisted of the deceased's share in the business of Messrs A. & J. Inglis. The net rental of the heritable property at the time of his death amounted to about £5000 per annum.

The trust-deed set forth the usual trust purposes, and after directing payment of certain legacies (including a legacy of £20,000 to Mrs Breen, and of £10,000 to Mr John Inglis junior), provided that the residue should be divided into two equal parts, one to be conveyed to his son, and the other to be held and applied for his daughter's liferent alimentary use alienably, and for her children in fee. Failing children, the daughter's share was to be paid and made over to the son, a power being reserved to the daughter in that event to test upon £10,000 of the sum liferented by her. These provisions were to be in full of legitim, and in the event of either son or daughter claiming legitim, he or she was to forfeit all rights under the settlement, and the forfeited provisions were to fall to the other beneficiaries.

Some months having elapsed after Mr Inglis' death before the amount of the estate was ascertained, Mrs Breen was not in a position at once to say whether she would elect to take her legal rights or her provisions under the will, but at a meeting of the trustees held on 9th September 1884 they instructed their agent, Mr Robertson, to give Mr Kidston, Mrs Breen's agent, "all information in their power to enable him to advise Mrs Breen as to her election, . . . and Mrs Breen is requested to declare her election with as little delay as possible."

At a meeting of the trustees on 14th January 1885 (at which Mrs Breen was not present), the following resolution, as afterwards minuted, was adopted:—"The trustees, having considered that upwards of a year has elapsed since Mr Inglis' death, and that the fullest information has been afforded by them to Mrs Breen regarding the extent of the personal estate, resolve that an intimation should be sent to her, to the effect that, in the event of her not declaring her election by 31st inst., the trustees will at once proceed to deal with and administer the estate in terms of the trust-disposition and settlement." A letter embodying the resolution was sent to Mrs Breen's agent on the same day.

On 28th January 1885 Mr Kidston wrote to Mr Robertson:—"I am instructed by Mrs Breen to inform you that she has now decided to claim her legal rights in place of the provisions under the settlement. I shall be glad to receive a statement for adjustment of the sum due Mrs Breen.—Yours truly." This letter was acknowledged by the trustees' agent on 29th January. Both these letters were submitted to the trustees at a meeting held on 3d February following (at which Mrs Breen was not present), and the trustees then instructed their agent "to prepare with all possible dispatch a statement of the personal estate, shewing the cost

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of administration, &c., and this for the purpose of ascertaining the amount of the legitim fund."

On 5th February 1885 Mr Robertson, as the trustees' agent, intimated to Mr Kidston that he believed that in electing to take at common law instead of under the trust-disposition and settlement, Mrs Breen had been going on the assumption that she was entitled to the whole of the legitim fund, and that he thought it proper to mention that Mr John Inglis junior had been advised that he was entitled to participate in that fund, and that without being liable to collate the heritage. On the same day Mr Kidston wrote this answer to Mr Robertson:—"I have to-day your letters of yesterday and this date. With reference to the latter, you expressed an opinion to Mrs Breen, in which I concurred, that she would be entitled to the whole of the legitim fund, and her intention to make her election was based upon the assumption that that would be the case. I am also informed by Mrs Breen that in September last, at a meeting of trustees, when both she and Mr Inglis were present, her legal rights were explained to her to be a claim to one-half of the moveable estate as legitim. Had Mr Inglis given earlier intimation of his claim to participate in the legitim without collating, I would not have written in the terms of my letter to you of 28th ulto. The trustees will therefore be good enough to hold Mrs Breen's election as still in abeyance."

The next meeting of trustees, at which Mrs Breen was present, was held on 11th March. The minute of that meeting bore that "Mr Robertson stated that the present meeting had been convened for the purpose of considering what course ought to be adopted by the trustees with reference to the legitim fund, the whole of which is now claimed by Mrs Breen; and he added that on the assumption of Mrs Breen and Mr John Inglis junior not coming to any agreement by a special case or otherwise regarding that fund, the trustees have no alternative but to raise a process of multiplepoinding before the Court of Session, thus leaving the Court, and the Court alone, to determine the respective rights of parties."

Ultimately Mrs Breen and her husband, as real raisers, brought a process of multiplepoinding in name of the trustees for the purpose of deciding the questions between her brother and herself, in which she and her brother were called as defenders.

In this action Mrs Breen claimed her provisions under the settlement, and alternatively, in the event of its being held that she had conclusively elected to take her legitim, the one-half of the free moveable estate left by her father at his death, or an equal share of both the moveable and heritable estate, in the event of her brother claiming a share in the moveables.

Mrs Breen stated that, when the letter of 28th January 1885 was written by Mr Kidston, she had not been furnished with the information she required as to the relative values of her rights at common law and under her father's settlement, without which an election could not be made by her; further, that the letter was written in reliance on the information given her by the trustees in her brother's presence that she was entitled under her legal rights to the one-half of the free moveable estate, and in the belief that no objection could be raised thereto by her brother, or anyone else. Further, she stated that Mr Breen, as her curator, did not authorise the writing of the letter, and that in writing it Mr Kidston was not acting for him.

Mrs Breen pleaded, *inter alia*;—2. The claimant is not barred from making this claim by the said letter of 28th January 1885, in respect that (1) the said letter was written without the claimant having obtained, or having been able to obtain, the information as to the relative value of her claims at common law and her rights under her father's settlement, to which she was entitled, and which was absolutely necessary in order

to enable her validly to elect; (2) the said letter was written under No. 140. essential error, and was timeously withdrawn; (3) it was not authorised by the claimant's husband as her curator. Alternatively, and in the event specified in her alternative claim,—3. She is entitled to one-half of the free moveable estate left by her father as her legitim; or otherwise, in the event of her brother claiming to share in the legitim, he is bound to collate the heritage, in which case she is entitled as her legitim to an equal half of both the heritable and moveable estate.

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Mr John Inglis junior claimed under the settlement the whole fund *in medio*, under deduction of the amount of legitim falling to Mrs Breen as that should be ascertained; and alternatively, his testamentary provisions, in the event of it being found that Mrs Breen had not elected to claim legitim.

He averred that, by Mr and Mrs Breen's contract of marriage, Mr Breen had renounced his *jus mariti* and right of administration; that full information was before Mrs Breen when her agent wrote the letter of 28th January, and that she had conclusively elected to claim legitim.

Mr John Inglis junior pleaded, *inter alia*;—(2) The averments of the claimants, Mrs Breen and husband, are not relevant or sufficient to support the claim for Mrs Breen. (3) The material averments for Mrs Breen and husband being unfounded in fact, their claim cannot be sustained. (4) The sum claimed in the second alternative head of Mrs Breen's claim being at least double what she is entitled to as legitim, the said alternative head ought not to be sustained.

After a proof, the import of which is given in the opinions of the Judges, the Lord Ordinary (Trayner) on 15th December 1886 pronounced this interlocutor:—"Finds that the claimant Mrs Breen has made no election between her legal rights as one of the children of the late Anthony Inglis and the provisions made in her favour by the settlement of her said father: Finds that she is now entitled to insist in the alternative claim made by her on the fund *in medio*: Finds the claimant John Inglis junior liable in the expenses," &c.*

* "OPINION.— . . . From a comparatively early date in the history of the trust the question was under consideration whether Mrs Breen would accept the provisions under the settlement or claim her legal rights. With a view to her determining upon this question, information of various kinds regarding the deceased's estate was from time to time required by her from the trustees, and (as some question was raised about this I think it right to add) was furnished to her as fully as the trustees were able to do. No election by Mrs Breen having been made or intimated, the trustees, at a meeting held by them on 14th January 1885, at which Mr John Inglis junior was present and Mrs Breen was not, resolved that an intimation should be sent to Mrs Breen to the effect 'that in the event of her not declaring her election by 31st inst., the trustees will at once proceed to deal with and administer the estate in terms of the trust-disposition and settlement.' That resolution having been communicated to Mrs Breen, she had a meeting with her agent, Mr Kidston, on 28th January 1885, to which, as regards what took place at it, I will afterwards advert. In the meantime it is enough to say that Mr Kidston, on the authority as he understood of Mrs Breen, wrote the letter of 28th January 1885 to Mr Robertson, the agent for the trustees, stating that Mrs Breen had 'now decided to claim her legal rights in place of the provisions under the settlement.' The receipt of that letter was acknowledged on 29th January by Mr Robertson, and both letters were read to the trustees at their meeting on 3d February, and are engrossed in their minute of meeting of that day. It is upon that letter of 28th January 1885 that Mr John Inglis junior now bases his objection to the alternative claim of Mrs Breen.

"It was maintained for Mrs Breen that the letter written by Mr Kidston was

No. 140. **May 31, 1887.** *Inglis' Trustees v. Inglis.* Mr John Inglis junior reclaimed* ;—I. The position which he maintained was that there had been a mistake on Mrs Breen's part in the legal de-

not binding because it was not holograph or tested. In fact, the letter was written by Mr Kidston's clerk and signed by him. I think there is nothing in this objection. I am not aware that writing is essential to a final and conclusive election in such a case as the present, or, indeed, in any case. On the contrary, there are cases where election has been inferred from facts and circumstances, and from actings and conduct of the person having power to elect. If the election had been intimated verbally by Mrs Breen to a meeting of trustees, or verbally to the agent who acted for and represented them, that would have been sufficient. To have such an election declared in writing is convenient and proper, because it saves questions as to the terms in which the election is declared, and affords ready proof of the election having been made. But the law does not require writing as a solemnity in making an election, nor proof in writing that it has been made.

"It was further maintained for Mrs Breen that even if the letter was not open to the objection just stated, still Mrs Breen was entitled timeously to withdraw it, so long as nothing had been done on the faith of it—so long as things were entire; and that Mrs Breen had withdrawn the letter of 28th January by another of date 5th February, in which Mr Kidston intimated that Mrs Breen's election should be held 'as still in abeyance.'

"If an election was well made and intimated on 28th January, I am of opinion that it was beyond the power of Mrs Breen to withdraw it. The general rule of law is stated by Lord Blackburn in the case of *Scarf v. Jardine* (L. R., 7 App. Cases, 360):—'When once there has been an election to do one of two things you cannot retract it and do the other thing; the election once made is finally made.' And obviously it must be so. For if the person who has the right of election, and validly exercises it, is entitled to withdraw from the election and do something else, it is not then a right of election which he exercises—he makes two elections; and there is no reason why the second election should not give place to a third, and so on. Nor do I see any just distinction (as was argued on behalf of Mrs Breen) between the case of an election having regard to rights in a succession and an election with regard to rights arising under a contract. The rule of law is the same where a right of election arises, independent of the circumstances out of which it has arisen. It was said that Mrs Breen might withdraw or depart from her election because nothing was done on the faith of it; that things were entire, and nobody injured by her withdrawal. If it be sound law that an election once made is final, then the question whether things are entire or not makes no difference, the election having been made it must remain. But in this case it can scarcely be said that things remained the same after the

* At the hearing in the Inner-House the following statement was produced, shewing approximately "(1) Mrs Breen's provisions under will; (2) her legitim if one-half of moveable estate; and (3) her legitim if one-fourth of moveable estate.

"I. Provisions under will,—

1. Legacy,	.	.	.	£20,000	
2. Viewpark Villa,	.	.	.	2,000	
				<hr/>	£22,000
3. Power to test on	.	.	.	£10,000	
4. Liferent of half of residue—					
Heritable property, say	.	.	.		£1,240
Moveable property, say 3½ per cent on					
say	.	.	.	£56,000	1,960
					<hr/>
				Yearly,	£3,200

"II. Legitim if one-half of moveable estate, say . . . £70,000

"III. Legitim if one-fourth of moveable estate, say . . . £35,000"

duction from the facts as put before her by the trustees, but that this did not entitle her to a remedy. No. 140.

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election and before its withdrawal. For, if Mr Inglis junior's other contentions in this case are sound (on which at present I offer no opinion), there were rights which at once emerged in his favour of the value of between £30,000 and £35,000. It might appear at first sight as if some countenance was given to Mrs Breen's contention by what was said by Lord Young in the case of *M'Fadyen*, 10 R. 285. But that was a very special case, and the precise point here raised does not seem to have been argued.

"The point, therefore, remaining to be disposed of is whether, on 28th January 1885, Mrs Breen validly exercised her right of election in such a way and under such circumstances as to bar her from now challenging it or setting it aside. To make an election valid and binding it is necessary that the person making the election shall have before him clearly the two alternatives between which he is to choose. He must also have before him all the information necessary to enable him intelligently to make his choice. In short, he must have before him clearly what the two things really are between which he is to elect. Now, to see whether these conditions were fulfilled in the present case, it is necessary to advert to some facts of which notice has not yet been taken. It appears that on several occasions in the year 1884, Mr Robertson, the agent of the trustees, had told Mrs Breen that if she resolved to take her legal rights rather than her conventional rights, she would be entitled to the whole legitim fund—the half of the personal estate—which he estimated at between £70,000 and £72,000, adding that, all things considered, if he were in her place, he would 'take the provisions at common law rather than the provisions under the settlement.' This opinion as to the extent and value of Mrs Breen's rights at common law was one, I think, which Mrs Breen was entitled to accept at least as information on the subject to which it referred. So far as regarded its legal aspect it was the opinion of a person eminently qualified to give it, and as regards the value of the provisions in money it was an opinion or statement from the best authority. On that information, therefore, the state of Mrs Breen's knowledge was this, that if she elected to take her legal provisions she would get £70,000 or £72,000. A similar statement was made by Mr Robertson at some of the meetings of trustees before 28th January 1885, and was repeated at the meeting of 3d February, when Mrs Breen's letter of election was read. At all these meetings of trustees Mr John Inglis junior was present, 'and did not utter a word upon the subject.' I accept that as the fact on Mr Robertson's statement. Mr John Inglis junior, no doubt, says that he did say something on the subject, but I am satisfied he never said anything by way of objection or dissent from Mr Robertson's views—(1) because Mr Robertson could not have forgot it, if such a thing had taken place; and (2) because the other trustees, so far as they have been examined, were at the time and are now distinctly under the impression that Mr Robertson's view was accepted by the meeting. The whole trustees had the idea conveyed to them (and whatever Mr Inglis may have said he did not disturb the trustees' belief and lead them to any doubt) that Mrs Breen's legal rights entitled her to the one-half of the moveable succession—that is, the whole legitim fund.

"Mr Robertson's view was repeated by his partner Mr Low, at a meeting of trustees held on 9th September 1884. The proceedings at that meeting deserve particular attention. Mr John Inglis junior was applying to the trustees for a payment to account of his provisions under the settlement of his father, and a calculation was made at the meeting—Mr Inglis and Mrs Breen being both present—of the amount of the estate and the claims upon it, to enable the trustees to determine what sum they were in safety to pay Mr Inglis. One of the claims mentioned at that meeting was the possible claim of Mrs Breen for legitim, and this was put down at £70,000 the estimated value of one-half of the moveable estate. No objection or dissent from this was stated by Mr Inglis, and it was decided to make him a payment to account on the basis of the calculation then made. That Mrs Breen's claim for her legal rights, as a possible

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The duty of trustees in a matter of this kind was to supply the beneficiary with full information both as to the facts and the law, and

claim against the estate, was distinctly and prominently before that meeting cannot be doubted. It is referred to in the minute of that meeting, which concludes in these words, 'Mrs Breen is requested to declare her election with as little delay as possible.'

"On the evidence, so far, I think it is established that not only was Mrs Breen informed by Mr Robertson, the agent for the trustees, but also heard it stated over and over again at meetings of trustees, without objection or dissent from her brother, that her right at common law was to the whole legitim fund, estimated at £70,000 or £72,000. It is also ascertained that in April 1884 Mr John Inglis junior had been advised by his law-agent that this view so reported was erroneous; that he meant to contest his sister's right to the whole legitim fund; and that he concealed both the advice he had received and his intention to act upon it until after his sister had made her election—which he with the other trustees was pressing her to make. I come now to the meeting which Mrs Breen had with her own agent on 28th January 1885, after receiving the notice from the trustees already alluded to, to the effect that her election must be declared by the 31st of that month. At this meeting Mr Kidston submitted a draft letter which he proposed to send to Mr Robertson. Mrs Breen made some difficulty about the terms of the letter, but ultimately, to quote her own words, 'I said I had not got sufficient information, but if Mr Kidston thought it would settle matters and put an end to all further trouble, I was quite willing to accept the half of the personal estate, as I had been advised. I asked him to state that.' 'I am quite positive that I asked Mr Kidston if he thought that by accepting the half of the personal estate it would end the matter. He thought so, and that was my reason for agreeing.' It appears plain, therefore, that the election which Mrs Breen was making was between the one half of the moveable succession and the provisions under the settlement. I am not surprised that Mr Kidston should have communicated Mrs Breen's choice in the language of the letter in question; for up to that time he, in common with Mr Robertson and every other person concerned (except Mr Inglis junior), regarded the half of the moveable estate and Mrs Breen's legal rights as equivalent expressions. They had in a manner been diverted from a consideration of the question whether Mrs Breen's legal rights could in any case be less than one-half of the moveable succession, by the general acquiescence in the repeated statement of Mr Robertson that one-half of the moveable succession was the amount of her right. It was certainly the *prima facie* view of her right; and if Mr Inglis junior had desired to give his sister fair play and get from her a declaration of her election formed under a consideration of the subject in all its aspects, he should not have concealed the advice he had received nor the question he meant to raise. Apart from this, however, I think it cannot be doubted that if the expression in Mr Kidston's letter 'legal rights' means something different from 'the half of the personal estate,' then that letter was not authorised. It was the half of the personal estate and nothing else which Mrs Breen authorised him to accept for her; it was that she elected in place of her 'provisions under the settlement.'

"It was maintained on behalf of Mr Inglis junior that the question on which Mrs Breen decided was her legal rights on the one hand and her settlement provisions on the other, and that error in law on her part as to the extent of her legal rights did not affect the election she had made. I am not prepared to adopt that view as stated. If a legal question affected the pecuniary value of her rights, Mrs Breen could not elect between the opposing claims until she had had that legal question, with its possible result one way or other, explained to her. For, after all, it was between two sums of money or money's worth that she was choosing, and not between two abstract legal rights. But, in my opinion, the argument maintained has no place in the present case. The mistake, if there was one on the part of Mrs Breen, was in fact. But I think there was no mistake even in fact. Mrs Breen was, according to my view, electing

they had done this. The trustees knew that Mrs Breen was being advised by a competent person. Mrs Breen shewed she had full confidence in Mr Kidston even after she knew that doubts had been thrown on his opinion by others. No. 140.
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II. The letter of 28th January 1885, in which Mr Kidston intimated Mrs Breen's election, was clear and unequivocal. It was said that the letter, being neither holograph of Mrs Breen nor tested, was not a probative instrument. But a probative writ was not necessary in order to a valid election. And it was clearly established that Mr Kidston was fully authorised to intimate the election.

III. It was said that Mr Breen not having authorised the letter of 28th January, as his wife's curator, it was not binding. But under Mr and Mrs Breen's marriage-contract Mr Breen had renounced his *jus mariti* and right of administration. This included his curatorial rights, and accordingly it was not necessary that he should have been a party to the letter.¹

IV. Mrs Breen's mistake was an error in law. As put by the other side, it was said that she had been under a misapprehension as to the sum she would get if she elected to take her legitim. That was a general proposition in law, seeing that the amount of the available estate had been ascertained, and the only remaining question was what were her legal rights upon that basis of fact. The maxim "*ignorantia juris neminem excusat*" applied, *jus* there being used in the sense of denoting the general or ordinary law of the country, and not private right. That

between £70,000 or £72,000—the half of the moveable estate—and her rights under the settlement.

"I come therefore to this conclusion: If Mr Kidston's letter is to be held as expressing Mrs Breen's election of her legal rights as something different from the one-half of the moveable estate, then it was not authorised: it was not Mrs Breen's election. If, further, the letter is regarded as Mrs Breen's election, it was an election made under essential error—an error induced among other things by the conduct of Mr Inglis junior, and therefore not binding.

"It need scarcely be said that if Mrs Breen on 28th January elected to take her legal rights rather than the settlement provisions, before the amount of the legitim fund was at least approximately known, or in the knowledge that the amount of the legitim fund falling to her, if she so elected, might only be one-half of what she expected or was advised would be hers, if she elected to take her legal rights in the knowledge that her view of what those amounted to in money value was to be contested by her brother, her election made in such circumstances would have been binding. She then, in the knowledge of all the facts affecting or which might affect her choice, took the risk and responsibility of making it. But the case I am dealing with is the very opposite of this. Indeed, it appears to me that Mrs Breen, better informed now than she was on 28th January, is not yet in a position to make her election. Whether she is to get £35,000 or £70,000 if she elects to take her legal rights, is a consideration which, I should suppose, would very materially affect her choice. But which of these sums represents the value of her legal rights is not yet ascertained. And although it is comparatively a small matter, it is yet in itself sufficiently important for her to know whether the moveable succession of her father, and consequently the legitim fund, is to be increased or not by the addition of a share of the profits made on contracts current at his death.

"On the whole matter I shall find that Mrs Breen is entitled to insist in her alternative claim, not having validly elected between her legal and conventional rights."

¹ Bryce's Trustee, March 2, 1878, 5 R. 722; M'Dougall v. City of Glasgow Bank, June 20, 1879, 6 R. 1089; Biggart v. City of Glasgow Bank, Jan. 15, 1879, 6 R. 470; Keggie v. Christie, May 25, 1815, F. C.

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was] a distinction which had been repeatedly drawn,¹ and it met the argument on the other side, and the Scottish cases which had been cited in support of it. In these cases the error which was at the foundation of each depended upon a question of private right. Even in *Johnston v. Johnston*,² where the error was in mistaking what was moveable for heritable estate, the mistake was not necessarily one of law, for, it depended to a large extent on fact. It came to this, that Mrs Breen's mistake was in assuming that the opinion she got was infallible.

V. As to Mr John Inglis junior, he had concealed nothing which he was bound to disclose. He knew no facts which were not known to Mrs Breen. He had simply got another opinion as to the law, which enabled him to realise the fact that lawyers differed. He had no right to advise or to interfere in any way, and if he had offered advice it might not have been taken. Besides, the matter of Mrs Breen's interest in the legitim had only been mentioned at two of the meetings of trustees at which Mr Inglis had been present—once by Mr Robertson, and again on 9th September by Mr Low, both meetings being in 1884. Above all, both Mr Inglis and the trustees knew she was being separately advised.

VI. The election made by the letter of 28th January could not be withdrawn. It was contended, upon the other side, that the case of *Scarf v. Jardine*³ was not in point, because there had been a transaction following upon the election. But the transaction, if there were such, was nothing more than evidence of the election. Mrs Breen's election was entirely unambiguous.

VII. Apart from the question of election, the testator had imposed a condition in his settlement which implied that the mere statement of a claim for legitim inferred forfeiture of the conventional provisions.⁴

The respondent argued;—There was no serious controversy as to the facts. The question of Mrs Breen's right to the whole of the legitim fund had come up at several meetings of the trustees and no one had ever disputed that position although Mr Inglis was present at these meetings.

I. There was no election in the proper sense here at all. The letter of 28th January merely implied an offer to take £70,000, and if that was paid, to depart from any further claim. An election could not be final, and beyond recall, if nothing had followed upon it.⁵ Here it was timeously withdrawn by the letter of 5th February.

II. Although it might not be the case that a probative deed was required in order to make a valid election, still a mere communication without anything following upon it might not be enough. There was no authority for the Lord Ordinary's view, that a letter written as this was by an agent who was not proved to have been authorised to write it was final. The letter was no better than parole evidence.⁶ The nature of the alleged contract was a discharge of rights which arose under a probative instrument, and such a discharge must be by probative deed, or by an

¹ *Cooper v. Phibbs*, May 1867, L. R., 2 Eng. and Ir. App. 149 (Lord Westbury, p. 170); *Earl Beauchamp v. Winn*, 1873, L. R., 6 App. Ca. 223 (Lord Chelmsford, p. 234); *Kippen v. Kippen's Trustees*, July 10, 1874, 1 R. 1171 (Lord Justice-Clerk Moncreiff, p. 1179); *Johnstone v. Paterson*, Nov. 29, 1825, 4 S. 234; *Baird's Trustees v. Baird & Co.* July 10, 1877, 4 R. 1005.

² March 11, 1857, 19 D. 706.

³ L. R., 7 App. Ca. 345.

⁴ *Jarman on Wills*, ii. 58; *Williams on Executors*, 1280.

⁵ *Scarf v. Jardine*, 1882, L. R., 7 App. Ca. 345; *Blacks v. Girdwood*, Nov. 25, 1885, 13 R. 243.

⁶ *M'Fadyen v. M'Fadyen's Trustees*, Dec. 2, 1882, 10 R. 285; *Donaldson v. Tainah's Trustees*, June 11, 1886, 13 R. 967.

informal writ followed by such acts as would bar *locus penitentie*. Here No. 140. there was clearly a *locus penitentie*, when the letter of 28th January was recalled on 5th February.¹

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III. A great deal had been said upon the other side upon the distinctions to be drawn between errors in law and errors in fact. But it was not admitted that there was any error in law. Mr Robertson's view that Mrs Breen was entitled to the whole of the legitim fund might turn out to be correct. The real mistake made by Mrs Breen was in assuming that there was no dispute as to her being entitled to the whole legitim fund.

IV. But, assuming that there had been an error in law, no homologation had followed, such as would bar *locus penitentie*. In order to homologate a person must be in full knowledge of the circumstances of the case. The present case was similar to cases of discharges *sine causa* or for an inadequate consideration.² It was quite unnecessary to appeal to the English cases, which were cases involving transaction and contract, and so were on a different footing.

V. But, even if it should be held that the letter of 28th January imported a contract, it was incomplete. To make it complete, Mr Breen ought to have been a party to it. It was said that because his right of administration was excluded under the marriage-contract, this involved a similar exclusion of his curatorial power. But there was no case which could be cited where that had been held, except the old case of *Keggie*.³ In some cases where a husband's rights were renounced in the marriage-contract, a curator *ad litem* had afterwards been appointed to act for the wife.⁴ The law seemed to be that, whenever an extraordinary act of administration was required on the part of the wife, the curatorial power was invoked. The making an election was certainly an extraordinary act. The previous law on that matter was not affected by the Married Women's Property Act, 1881.⁵

VI. As to the clause of forfeiture contained in the settlement, the contention of the other side was an invocation of the law of approbate and reprobate. One could always get the better of that by abandoning the claim and restoring things to their previous condition.⁶

At advising,—

LORD PRESIDENT.—The fund *in medio* in this multiplepinding consists of the estate of the late Mr Anthony Inglis. The testator died in January 1884, and he left two children, Mr John Inglis jun., the reclamer, and Mrs Breen. The estate consisted of a very considerable amount both of heritage and moveables, the moveable estate alone, according to the inventory, reaching £150,000. The

¹ Lord Panmure v. Crockat, Nov. 22, 1854, 17 D. 85.

² Mercer v. Anstruther's Trustees, March 6, 1871, 9 Macph. 618, 43 Scot. Jur. 285 (Lord President, p. 628), affd. April 25, 1872, 10 Macph. (H. L.) 39; Dickson v. Halbert, Feb. 17, 1854, 16 D. 586, 26 Scot. Jur. 266; Johnston v. Johnston, March 11, 1857, 19 D. 706, 29 Scot. Jur. 320, affd. 3 Macq. 619; Purdon v. Rowat's Trustees, Dec. 19, 1856, 19 D. 206, 29 Scot. Jur. 99; Lord Kintore v. Countess Dowager of Kintore, June 28, 1884, 11 R. 1013, affd. June 29, 1886, 13 R. (H. L.) 93; Bell's Princ. sec. 11; Benjamin on Sale, 375; Hope v. Dickson, Dec. 17, 1833, 12 S. 222.

³ *Keggie v. Christie*, May 25, 1815, F.C.

⁴ Hay Primrose, Petitioner, Feb. 7, 1850, 12 D. 916, 22 Scot. Jur. 240; Fraser on Husband and Wife, i. 815.

⁵ Millar, &c. v. Galbraith's Trustees, March 16, 1886, 13 R. 764.

⁶ Lord Panmure v. Crockat, Nov. 22, 1854, 17 D. 85 (Lord President Colonsay, p. 92), and Feb. 29, 1856, 18 D. 703.

No. 140. daughter, Mrs Breen, being married, had to consider, before taking any decided steps, whether she would accept the provisions made in her favour by her father's settlement, or whether she would claim her legal rights; and, of course, in so large a succession as this, that was a matter of great importance to her and her husband. She and her brother were among the trustees, and there were several others, viz., Mr Napier, Mr Ferguson, Mr Alexander, and Mr Noway, all of whom seem in some degree to have been connected with Mr Anthony Inglis.

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The election which Mrs Breen had to make between her testamentary provisions and her legal rights was made a subject of talk at many of the meetings of the trustees, and also apparently of private conversations during the year which elapsed between the death of the testator and the election which it is alleged was made in January 1885. A meeting of trustees was held on 14th January 1885, at which they resolved that intimation should be sent to Mrs Breen to the effect that, in the event of her not declaring her election by 31st instant, they would proceed to administer the estate in terms of the trust-disposition and settlement. This was not the first time Mrs Breen had been asked to make her election, but she and her agent were hesitating as to what the election should be, and it was not until this peremptory intimation was sent that she at last instructed Mr Kidston, her agent, to write and inform the trustees, as he did by letter of 28th January 1885, that she had now decided to claim her legal rights in place of the provisions under the trust-disposition and settlement. The long delay which occurred in coming to this conclusion obviously arose from the doubt in the mind of Mrs Breen and her agent which was the more profitable choice to make, whether she would be better with her testamentary provisions or with her legitim; and the state of the funds being, as I have said, that there was moveable estate to the amount of at least £150,000, it is pretty plain that the question which they were considering and hesitating about was one under which the two sums—the sum to be got by claiming her legal rights, and the sum or benefit to be got by taking the testamentary provisions—were pretty nearly equal in value. There must have been considerable ground for hesitation, or this delay would not have taken place in the face of the repeated suggestions that some decision should be come to.

Now, the view Mrs Breen and her agent took of the matter was this:—They assumed she was entitled in name of legitim to one-half of the entire moveable succession, which, of course, would amount to £70,000 or thereby; and, on the other hand, she would have got from the settlement an income of £3200 per annum by way of liferent, and also a capital sum of £22,000. Looking at the case in that view, there was undoubtedly ground for hesitation. The testamentary provisions would certainly give Mrs Breen a larger income than she would possibly have by betaking herself to her legal rights; but, on the other hand, if she claimed her legitim, then she got her provision in the form of a capital sum, and that was a subject for grave consideration. It is said now by her brother, Mr Inglis, that she was not entitled to one-half of the moveable succession in the name of legitim, but only to one-fourth. Now, one-fourth of the moveable succession would be £35,000 or £36,000, and it might very fairly be asked whether, in deciding between an annual income of £3200, in addition to a capital sum of £22,000, or, on the other hand, £35,000 or £36,000, there was any room for hesitation at all. No sane person would make any room for

deliberation upon such a subject, or would prefer to take the £35,000 instead of the testamentary provisions. It would not require a year, or a month, or a week to decide between these two things, and therefore, *prima facie*, it seems exceedingly improbable, and it turns out in the end not to be the fact, that Mrs Breen or her advisers ever for one moment imagined they were making an election between £35,000 or £36,000 and the testamentary provisions. That is the first point in this case which seems to me to be entirely free from doubt.

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The next question is, if this was a misapprehension under which Mrs Breen was labouring, how was the misapprehension brought about? Of course we are not here to decide whether she would be entitled to one-half of the moveable succession or to one-fourth; we are here to decide whether she has made an election by which she is bound, and nothing else. That is the subject of the Lord Ordinary's interlocutor, and I think the Lord Ordinary has quite properly decided this question before going any further, because if it is decided in the way the Lord Ordinary has done, it puts an end to all further litigation. It is quite plain that this misapprehension, if it was one, was brought about by the conduct of the trustees and of Mr John Inglis jun. As to the evidence, I shall come to that by-and-bye, but undoubtedly Mrs Breen was acting under the belief when she made the election that she was choosing between £70,000 and the testamentary provisions.

It has been contended that whatever may have been Mrs Breen's state of mind, or her mistake about the law of the case, she has finally elected, by the letter of 28th January, and that she cannot possibly withdraw that letter, or deliberate further as to the choice she has so made. I think it is of some consequence to observe in what form this election was made. It was not made by the form of a written instrument, because this letter was not such in any sense. It was a mere letter written in the ordinary course of business in the handwriting of Mr Kidston's clerk, and subscribed by Mr Kidston. In my estimation it was nothing more than a piece of evidence of a parole election, because, in order to make it binding on Mrs Breen, it must be proved, in the first instance, that Mr Kidston signed it, and it must be proved in the second place that he was authorised to sign it. That being so, it has none of the characteristics of a written instrument, and it is nothing more than a circumstance which, along with other parole evidence, establishes that such an election was made.

But then it is said that the misapprehension under which Mrs Breen laboured, if it was a misapprehension, was an error of law, and not an error of fact. I do not think there was any error of law at all, but I think there was an error of fact. I am not going to give any opinion upon the question whether Mrs Breen was entitled to one-half or one-fourth of the moveable estate as her legitim; all I say is, that there was no error in law. I mean that she never took into consideration the question of law at all, nor was she advised about the question of law by her law-agent. And in order to make out there was an error of law, it would be necessary first to establish that she was only entitled to one-fourth of the moveable succession. That has not yet been established, and until it is established there can be no error of law in the case, but there was a very clear error in fact. This error consisted in that she believed, and was led to believe, that neither the trustees nor her brother disputed or doubted that, if she took her legitim, she was entitled to £70,000. That was a very plain error,

No. 140. and it was an error in fact under which she laboured when she made the election by the letter of 28th January.

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Let us see what Mrs Breen and her agent say upon this matter. She says,—“On 27th January 1885 I went up to Glasgow to meet Mr Kidston, in consequence of a resolution of the trustees of 15th January calling upon me to make my election. I called at Mr Kidston's office on 28th January. He read over the draft of a letter which he had prepared, and which he proposed to send to Mr Robertson. In consequence of what took place between Mr Kidston and me, he altered the draft in the manner shewn by the red ink markings. I still disliked it, and in consequence I arranged to have another meeting with him at the St Enoch's Hotel that afternoon. He called there. My husband was in the room during part of the time. Mr Kidston again read the letter. I said I did not like it. I did not feel comfortable about it. I was not satisfied. I felt as if I was being forced into saying something I did not want to say. I said I had not got sufficient information, but if Mr Kidston thought it would settle matters and put an end to all further trouble, I was quite willing to accept the half of the personal estate as I had been advised. I asked him to state that. Mr Kidston made some pencil alterations upon the draft, and took it away to his office.” And further on,—“I am quite positive that I asked Mr Kidston if he thought that, by accepting the half of the personal estate, it would end the matter. He thought so, and that was my reason for agreeing. (Q.) If you had thought that by writing that letter you were embarking in a litigation or dispute with your brother, would you have allowed it to go? (A.) No. My brother had never spoken to me at all on the subject of my right to the half of the personal estate. He was present at meetings of the trustees when the subject came up. He must have heard Mr Robertson explaining his views upon that matter to the trustees. Mr Robertson throughout explained that if I took my legitim I would get the half of the personal estate. Until after the letter of 28th January was sent my brother never hinted at any intention on his part to dispute that, neither at the meetings nor to me personally.” Mr Kidston again gives evidence to the same effect as regards the condition of his own and Mrs Breen's mind upon the matter. Mr Kidston says,—“On 16th January 1884 I waited upon Mr Robertson, who explained to me that he wished me to become their agent” [i.e., the agent of claimants Mr and Mrs Breen]. “He told me that a valuable succession had opened to Mrs Breen by the death of her father, and he thought it advisable a separate agent should be employed on her behalf. He mentioned she would be entitled to the provisions under the settlement or to her legal rights, and that it would be necessary to be very careful to see that everything was properly explained and made clear to her. I had meetings with him next day and the day afterwards, and on one or other of these days he stated that the amount of her legal rights would be a very large sum—that it would come up to between £70,000 and £80,000, so far as he could then judge, that being the half of the personal estate. He distinctly conveyed to me his opinion that she was entitled to the half of the personal estate. That was my own opinion also—that is, failing collation with her brother. That was the view on which throughout these proceedings I acted, and on which I advised Mrs Breen. I never hinted to her any doubt as to her right to half the personal estate, failing collation.” And further on,—“I have no doubt that in authorising me to send that letter it was in Mrs Breen's mind that she was entitled to the half of the personal estate. It never entered my

mind or hers, so far as I knew, that there would be any difficulty or dispute about the matter." And lastly, at the conclusion of his examination by the Court he says,—“In the election which I advised Mrs Breen to make, and which she did make, I was proceeding upon the view that she was to get the half of the whole personalty, whatever it was.”

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That evidence proves satisfactorily to my mind that Mrs Breen and her adviser were under the distinct impression, induced by the information they had received from Mr Robertson, the law-agent of the trustees, and from the trustees themselves, that the election which she had to make was between half of the moveable estate and the testamentary provisions, and that no dispute would ever be raised on that question.

Now, turning from that evidence to Mr Robertson, who certainly gives very distinct and impartial testimony in the case, I think he very distinctly shews that this was his view also, and also the view of all the other parties interested. It appears that Mr Robertson had three meetings with Mrs Breen on the subject, and in regard to these he says,—“On all the three occasions I told Mrs Breen that, according to my opinion, she was entitled to the whole legitim fund, which I estimated at between £70,000 and £72,000—I mean the half of the personal estate. I told her that, all things considered, were I in her shoes, I would take the provisions at common law rather than the provisions under the settlement, but I did not advise her to take them. It would certainly not have been her interest to take her provision at common law unless she had been entitled to the whole amount. The question of Mrs Breen's legal rights was mentioned by me certainly at two meetings of the trustees. One of these would be early in 1884, and probably there were two occasions in the course of 1884, and on 3d February 1885 I repeated what I had said at former meetings on that subject. At the 1884 meeting or meetings, if there were two, I brought up the matter casually, and mentioned in an off-hand way, ‘This will be a good thing for Mrs Breen; she will get the whole of the legitim fund, which I estimate at about £70,000 or £72,000.’ At that meeting all the trustees were present, including John Inglis and Mrs Breen. I mentioned that subject on only two occasions in 1884, but I mentioned it again at the meeting of 3d February 1885. At the time I made that statement at the meeting of trustees no exception was taken to it by anyone. John Inglis did not utter a word upon the subject. On 28th January 1885 Mr Kidston addressed a letter to me intimating the election. There was a meeting of trustees on 3d February, at which John Inglis was present. I submitted Mr Kidston's letter of 28th January to that meeting. Something was said as to the question of Mrs Breen's legitim. . . . My impression is that the statement regarding that was not volunteered by me, but was given by way of answer to a question thrown out either by Mr Napier, who acted as a kind of leading trustee, or by Mr Ferguson, another of the trustees. It came out very much in this way,—‘What will this lead to?’ And I said, ‘She will get a very considerable sum; she will get the whole of the legitim fund.’ Nothing more was said about it. John Inglis was present, and took no exception to my statement. My natural inference was that as he was not expressing dissent he was to be assumed as assenting. (Q.) Was it your understanding at the time that everybody was agreed upon that? (A.) I did not understand anything to be agreed about that. (Q.) But did you understand there was any difference of opinion as to the amount of the legitim? (A.) I did not understand there was any difference.”

No. 140. In a subsequent passage of his evidence he says,—“So far as I know, none of the trustees except John Inglis had the impression before 3d February that there was to be any question as to the amount of Mrs Breen’s legitim.” There is another witness, Mr Low, who at one of the meetings represented Mr Roberton, who was necessarily absent. His evidence is to the same effect,—“In the absence of Mr Roberton I attended one meeting of the trustees of the late Anthony Inglis in the year 1884, viz, on 9th September. That meeting was called to consider as to a payment by A. & J. Inglis towards the sum due by them to the trustees, and it was agreed to make a payment of £80,000 to account. Then a question was raised by Mr John Inglis junior, I think, as to whether or not he should have a payment to account of the sums due to him under his father’s settlement. The trustees, after some conversation, agreed to make a payment to him, and they were anxious to make him as full payment as they could, keeping themselves safe. That question depended a good deal upon the sum to which Mrs Breen was entitled as legitim. The matter of legitim had never been considered by me before; but I explained to them that the half of the moveable estate was the legitim fund, after deducting expenses. It was then mentioned in the meeting—I forget by whom—that Mrs Breen was entitled to the whole of the legitim fund; whereupon, in making up the calculation for Mr John Inglis, I deducted a sum of £70,000 as her share of the legitim, in fact the whole legitim fund, before making any division, as I said that if there was to be a question raised about it, and it was to be decided against Mr John Inglis, they would have to pay the whole £70,000, and they could not make him any payment out of that sum.” The end was that a sum was paid to Mr Inglis *ad interim*, leaving enough in hand to pay Mrs Breen her legitim if she claimed it. This was done without any remonstrance from John Inglis junior, or anyone else.

Further, the evidence of the trustees is to the same effect, although very naturally their recollection as to what actually passed at the meetings, or the particular time at which certain things were said, is not so accurate as that of the two legal gentlemen to whose evidence I have already referred. Mr Alexander, for instance, says,—“I have been present at almost all the meetings of the trustees which have been held. Amongst others, I was present on 9th September 1884 when Mr Low appeared for Mr Roberton. At that meeting Mr Low said something about £70,000 to £72,000 being what Mrs Breen would be entitled to under her legal rights—that that was the half of the personalty. I made a note at the time upon the circular calling the meeting as to the amount which was stated as the probable amount of the legitim. I produce that jotting. The free moveable estate is there noted as £141,892, of which Mrs Breen was entitled to from £71,000 to £72,000. On the other side there is this written, ‘If Mrs Breen takes her legitim—£70,000 a half.’ That note was made at the same time, and it refers to the same sum.” Then he is asked as to the meeting of 3d February, “At that time what was your understanding as to the amount of Mrs Breen’s claim for legitim? (A.) I always understood it was the same amount—£70,000 odds, being the half of the personal estate. The whole of the trustees understood that at all the meetings. It was talked of at several of the meetings, although I cannot name the precise dates. It was after the meeting of 3d February—how long after I cannot say—that I first heard Mr John Inglis was making an objection to his sister being paid out on that footing.” Mr Nowery says,—“I attended all the meetings of trustees except one. I was present at a

meeting in February 1885 at which the amount of Mrs Breen's legitim was No. 140.
 spoken of. Probably it had been spoken of in my presence at a previous meeting. I knew Mrs Breen was entitled to claim her legitim if she chose. I heard that expressed at a meeting of the trustees by Mr Robertson. He also explained what was meant by her legitim—that she would be entitled to half of the personal estate. I believe that was said in presence of both Mrs Breen and Mr John Inglis. I think Mr Inglis took exception to that statement. I am not certain as to the date of that. I think the statement to which I have alluded was made at a meeting comparatively early in the trust. (Q.) At that first meeting was any exception taken to it by Mr Inglis? (A.) My impression is that he took exception all along. I think he did say something indicating objection at a meeting. (Q.) When did he first in your presence, at a meeting of trustees, make any statement of that nature? (A.) I think it was after Mrs Breen's election was declared in February 1885. (Q.) Is it your belief that prior to that date he never indicated that her legitim would not be the half of the whole personal estate? (A.) If a discussion took place I think he did. I cannot positively say he stated that before the election; he may, but I cannot say positively. I cannot recall any occasion on which he did so prior to her election." Now, this statement by Mr Nowery is really the only piece of evidence that seems at first sight to throw some doubt on the statements of the other witnesses, but it turns out, in fact, to be just a loose want of recollection on the part of Mr Nowery as to the precise date at which this statement by Mr Inglis was made. I think the conclusion to which Mr Nowery comes on thinking over the matter and recalling the events which he had witnessed is this, that prior to the time when Mrs Breen made her election no statement of the kind and no objection of any kind was made by Mr Inglis to the universally accepted position that the choice Mrs Breen was to make was between the entire legitim fund and her testamentary provisions.

In the meantime Mr Inglis was in a very different state of knowledge and understanding from everybody else. He had consulted an agent of his own, and had received advice from him so far back as April 1884, and the advice he had received was that if his sister elected to take her legitim she would be entitled only to one-half of the legitim-fund, or one-fourth of the moveable estate. But that advice he kept to himself, and never mentioned it to anybody concerned—not to Mrs Breen, his sister, nor to her husband, nor to Mr Robertson, who was acting for the trustees, nor to any of the trustees. He kept it locked in his own breast until his sister had made her election, and immediately upon that event he disclosed it. In his own evidence Mr Inglis states quite distinctly that he did not mention it to anyone until the meeting of 3d February 1885, after his sister had made her election. He says,—“I did not tell him,” i.e., Mr Robertson, “of the advice I had got from Mr France until 3d February 1885, and then at the private meeting I had with him after the meeting of trustees. I had not mentioned it to any of the trustees. I think the meeting at which Mr Robertson stated in Mrs Breen's presence that if she took legitim she would be entitled to half of the whole moveable estate was early in 1884. I did not at any meeting state the contrary advice which I had got, because I was not asked, and I did not see I had any business to volunteer information or advice to Mrs Breen.” But on the 3d February 1885, at the meeting at which Mrs Breen's election was announced, Mr Robertson tells us,—“Mr Inglis remained after the meeting, and sitting down he said,—‘I do

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not wish you to assume that I am a consenting party to the views you have been expressing at the meeting of the trustees.' I said, 'Hallo, what's up now?' and he said, 'I have been advised by Bannatyne & Kirkwood, or rather by Mr France, that Mrs Breen is not entitled to the whole of the legitim fund.' Until he made that communication I did not know that he had been consulting other agents. My firm had been throughout agents for the firm of A. & J. Inglis, and are so still. Something passed between John Inglis and me in January 1884 on the subject of his having a separate agent." Again, Mr Robertson says,—“When I got the intimation from John Inglis on 3d February 1885, which I have mentioned, I considered it imposed a duty upon me with regard to Mrs Breen. I thought that as she and her agent had been going upon the assumption got from me that she was entitled to the whole of the legitim fund, it was only fair and reasonable to give her agent the earliest possible intimation.” Accordingly, he wrote a letter to Mr Kidston, dated 5th February, in these terms:—“As I believe that in electing to take at common law instead of under the trust-disposition and settlement, Mrs Breen has been going on the assumption that she is entitled to the whole of the legitim fund, I think it proper to acquaint you that Messrs Bannatyne, Kirkwood, M'Jannet, & France have advised Mr John Inglis junior that he is entitled to participate in that fund, and this without his being liable to collate the heritaga.—Yours faithfully, JAMES ROBERTSON.” On the same day Mr Kidston answered,—“I have to-day your letters of yesterday and this date. With reference to the latter, you expressed an opinion to Mrs Breen in which I concurred—that she would be entitled to the whole of the legitim fund—and her intention to make the election was based upon the assumption that that would be the case. I am also informed by Mrs Breen that in September last, at a meeting of trustees, when both she and Mr Inglis were present, her legal rights were explained to her and Mr Inglis to be a claim to one-half of the moveable estate as legitim. Had Mr Inglis given earlier intimation of his claim to participate in the legitim without collating, I would not have written in the terms of my letter to you of the 28th ulto. The trustees will therefore be good enough to hold Mrs Breen's election as still in abeyance.—Yours faithfully, JOHN KIDSTON.” This communication which Mr Robertson made, and very properly made, to Mr Kidston as soon as he became aware of the position which Mr Inglis had taken up appears to have given great offence to Mr Inglis. He seems to give expression to this in some of his letters to Mr Robertson,—“Thinking over the matter, it occurred to me that as the question of division of legitim did not arise at a meeting of trustees, but in a subsequent conversation, Mr Kidston was not bound to have it communicated to him any more than I should ask their intentions. I would not have anything shabby done in my interest, but I shall keep them at arm's length if I can, and take every advantage I can with due regard to what is honourable.—Yours faithfully, JOHN INGLIS.” This was on the 9th February 1885, and very shortly after the time when his views were first disclosed. Again, on the 9th March he writes to Mr Robertson,—“It is evident that there is a desire to make out that Mrs B. is the victim of a scheme or plot, and that you and I are probably conspirators. Alexander's line of argument seems to point to something of that sort. . . . After all, we have no evidence that she made her election because she thought she would get all the legitim; she says so, but that is no reason for believing it.” And on the 13th April,—“As I leave for London to-night, I may be unable

to attend the next meeting of my father's trustees, but they will, of course, keep distinctly in view that Mrs Breen having elected to claim her legal rights in place of the settlement provisions in her favour must be dealt with by them upon that footing and no other." Mr Inglis, in his evidence, says,—“Being referred to my letter of 9th February to Mr Robertson, and to the paragraph beginning, ‘Thinking over the matter,’ &c., I meant, by ‘the question of division of legitim,’ the manner how legitim would be divided. (Q.) Did you mean the question whether Mrs Breen would be entitled to half of the whole estate under legitim, or only the fourth? (A.) The manner of division. (Q.) Did you mean the question whether Mrs Breen would be entitled to the half or to the fourth of the moveable estate as legitim? (A.) Well, I suppose so. I did not object to Mr Robertson informing Mrs Breen that there would be any question of that nature. (Q.) Looking at the paragraph referred to, did you not intend by that paragraph to find fault with him for having communicated to Mr Kidston that there was any question as to the proportion of the estate which would be Mrs Breen's legitim? (A.) I did not object to his communicating to Mr Kidston that I had a different opinion from him. I objected to Mrs Breen being told the grounds of that opinion. (Q.) If you were advised in April 1884 that Mrs Breen was entitled only to one-fourth, why did you not communicate that fact to the trustees or Mrs Breen before February 1885? (A.) Because I was not asked or called upon. I was a party to the minutes of the trustees calling upon her to elect. (Q.) Did you wish her to elect in ignorance of the fact that you had been advised that her legitim was only one-fourth instead of a half? (A.) She must have been in ignorance. (Q.) Did you wish her to elect in ignorance of that fact? (A.) In ignorance of the advice I had—Yes. I had no motive for withholding the advice I had received other than that I was not called upon to give it. If I had been asked for advice I would have offered it. I regarded the letter of 3d February as a final election. (Q.) Was it because you thought Mrs Breen had finally elected and was bound that you then for the first time communicated to Mr Robertson your position? (A.) I thought it was time to communicate, because otherwise payment would have been made. When I made that communication I thought she was bound. (Q.) Did you choose that time to make communication because you thought she was by that time bound? (A.) I thought that was the proper time to make it, because otherwise the trustees would probably have proceeded to give her the money.”

Taking Mr Inglis' evidence and his letters together, I think they prove this—and I do not want to state the case against him more strongly than is necessary for the purpose of deciding the question before the Court—that Mrs Breen and the trustees and Mr Robertson being all at one in their opinion that the amount of Mrs Breen's legitim would be one-half of the personal estate of the deceased, Mr Inglis took advice from a law-agent as to whether that would be so as early as April 1884. Subsequent to that time, and having received advice that she was entitled to only one-quarter of the whole estate instead of one-half, Mr Inglis attended meetings of the trustees at which the subject of Mrs Breen's legitim was discussed, when he found everyone assuming as a matter of course that one-half of the personal estate was to be Mrs Breen's legitim if she took her legal rights, and he never said a word against this; he kept to himself entirely the advice he had received, but as soon as he thought that his sister had finally committed herself to the choice of her legal rights in preference to the testamentary provisions, he then came out with his great law point, and announced

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Taking the evidence of Mr Inglis with the other evidence in the case, I think we have it very clearly proved that Mrs Breen had elected to take her legitim because she believed it to be half of the moveable estate, and that she was induced to that belief by the trustees and by Mr Inglis, her brother. We have it also proved that nobody ever raised any question or suggested the slightest doubt that that was so, and yet all the time Mr Inglis had in his pocket the advice of his law-agent that that was not so, and he kept up that advice until Mrs Breen was induced into an erroneous belief that there was to be no dispute about the matter, or rather that her taking her legitim was to end all dispute. He kept up that advice, and allowed her to go on in that belief to make her election, and the moment that was made he then insisted that she should be held to it, notwithstanding the plain error in the matter of fact upon which she made her election—that error being that she took her legitim to put an end to all dispute in the assumed belief derived from the trustees, the agent to the trustees, and Mr Inglis himself, that there would be no doubt or difficulty if she took that course.

I think that that election was made in such circumstances as fully to entitle Mrs Breen to withdraw and to claim as she has now done in this multiplepounding the provisions settled upon her in the trust-disposition and settlement. The ground of fact upon which she proceeded is proved to be no fact, that is to say, Mr Inglis has challenged that which everyone held to be settled, and so the belief under which Mrs Breen acted was an erroneous belief brought about very much by the conduct of Mr Inglis himself—certainly by no fault of herself, but, I think, to a very great extent by the fault of her opponent, her brother.

LORD MURE.—I am of the same opinion. I agree with your Lordship in thinking that what we have to dispose of is the question of fact whether Mrs Breen, when she wrote or caused to be written the letter of the 28th January, was under essential error as to what she was doing. She, no doubt, knew that she required to elect between her legal rights and the provisions her father had made in her favour, and it was intimated that she had resolved to claim her legal rights. But then it is, I think, very distinctly proved that when this was done she and her agent were both in the firm belief that she was to receive the one-half of her father's personal estate, which she knew was estimated to amount to at least £70,000. Now, this belief was founded upon information she had received from the agent of the trustees; and the whole of those trustees knew that such was her belief. It was upon this assumption then that the letter of 28th January was written, and it was under that same belief on the part of the trustees that the letter was received and directed to be acted upon by them at the meeting held on 3d February 1885. Mrs Breen believed she was to get a sum of about £70,000, and the trustees, as a body, and their agents, believed that she had elected to take and would receive that sum; and the only person who it now seems did not actually believe this to be her position was her brother, who still disputes her claim. But as soon as Mr Inglis' intention in this respect was communicated to Mrs Breen's agent he at once intimated that Mrs Breen's election must be held to be still in abeyance. In these circumstances I have come to the conclusion that, as the alleged election was made under an entirely erroneous impression on the part of Mrs Breen as to the precise pecuniary posi-

tion in which she might be placed if she elected to take her legitim, she was entitled to retract that election. I agree, therefore, in the result at which your Lordship has arrived.

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LORD SHAND.—I think this case is very clear and easy of decision, so much so that I have difficulty in believing that Mr Inglis could have supposed that any Court of law would give effect to his contention, or that he can ever have been advised he could possibly succeed in cutting down his sister's right to a mere fourth of his father's moveable estate. It is perfectly clear upon the narrative of the facts, as given by your Lordship in the chair, that Mrs Breen made her choice acting on the belief that all parties, including her brother, were agreed that she was entitled to one-half of the moveable estate—that is, to about £70,000, and it was not until she had acted on that belief so far as to allow her agent to send the letter of 28th January, intimating her election to the trustees, that she discovered that her brother had secretly entertained the intention to take advantage of her if he could, and to have her right restricted to one-fourth only of the moveable estate—i.e., to £35,000 in place of £70,000.

If the Court were to hold that Mrs Breen had conclusively elected to take her legal rights, a serious question is raised as to the amount to which she would thereby be entitled. Mrs Breen maintains that she would have a right to one-half of the moveables. Mr Inglis maintains that she would only be entitled to one-fourth; and he, at all events, now puts his case in this way, that Mrs Breen took her risk that her claim might be cut down to £35,000. When we look at the figures—a rough estimate of which has been prepared for us by the parties—it seems impossible that Mr Inglis could for a moment have supposed that Mrs Breen would claim her legitim if either the amount was to be cut down to £35,000, or she were to take the risk of a serious question which might lead to that result. By taking her provisions under the will, she would be entitled to a sum of £32,000, as to £10,000 of which her right to a liferent use was excluded (for as to that sum her power is only to test in regard to it), and in addition she would have had a liferent of half the residue of the estate, i.e., about £3200 a year. It is clear she would never have entertained the idea of electing her legal rights, taking only £35,000 in lieu of these provisions. The very statement of the figures is enough to shew that Mrs Breen must have acted on the belief that she would receive one-half of the moveable estate, or about £70,000. I do not mean to resume to any effect the consideration of the evidence which your Lordship has gone over. It is clear that Mrs Breen acted upon the view that every one interested in the matter understood she was to receive a sum of £70,000. It was upon that view she proceeded, but it now appears that she was mistaken in so far as her brother was concerned; and having been in error regarding that matter of fact, I have no hesitation in holding that she is entitled to go back upon the choice she made.

It appears to me that the mistake was clearly one of fact, but if it had been a mistake in law I think the result would have been the same. Suppose that Mrs Breen, labouring under an error of law in thinking that she was entitled as legitim to a half of the estate, while in law her right was only to a fourth, intimated her election, and that from this cause, in place of £70,000 she was only entitled to £35,000, the same result would, I think, follow. That would not be a case of *condictio indebiti*, where money has passed, and where a mistake in law will not entitle the person who made the payment to recover the

No. 140. money, nor a case of a transaction where one person has been led by the action of another to do something to his disadvantage, against which he cannot be restored. I think it is both law and justice that, where a choice like Mrs Breen's is made under an error either in fact or law, there shall be redress, at least where, as here, matters are entire.

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Accordingly, I am of opinion that the interlocutor of the Lord Ordinary should be adhered to. And I do not think it would make any difference whether Mr Inglis had been a party to Mrs Breen's mistake or not. The fact of the mistake is sufficient to entitle her to come to the Court to ask to be restored against it. The authorities which have been quoted to us support this view. But if in addition Mr Inglis acted, as I think he did, so as to induce the erroneous belief in his sister's mind, all the more is she entitled to her remedy. I think it is a principle of the law that whatever may be the real intention of any person interested in a transaction, wherever an intention has been manifested, so as to induce another to act upon it, the person who has so induced another to act will be barred from afterwards denying that the intention he manifested was his real intention. This seems to me to be the result of the judgment in the case of *Freeman v. Cook* (2 Exch. 654), to which effect was given in the Scottish case of *Stewart's Trustees v. Hart* (3 R. 192). That doctrine has been made part of the law for the purpose of enforcing honest dealing between parties to pecuniary transactions, and has been enforced in many cases with the result of compelling parties to act honestly towards each other. If the doctrine were to be applied to the present case, and if Mrs Breen preferred to stand upon her legal rights, taking up the ground that she was induced to act as she did, by what was at the time Mr Inglis' intention manifested to her, she would, I think, be in a position to claim the £70,000 if she thought fit. If so, it seems to follow that she is also entitled to say to Mr Inglis, There has been misunderstanding, of which you have been the inducing cause, and as matters are still entire, I have right to be reinstated, and put in the same position as if the misunderstanding had not occurred.

On these grounds, I think the Lord Ordinary's interlocutor should be adhered to, and I have no difficulty in reaching that result. I only desire to add one remark in regard to the following passage in the Lord Ordinary's note, where his Lordship says—"If an election was well made and intimated on 28th January, I am of opinion that it was beyond the power of Mrs Breen to withdraw it." I desire to reserve my opinion on that matter. In the absence of any action or transaction following upon the alleged election, I am not prepared to agree with the Lord Ordinary's view. Indeed, my opinion at this moment is to a contrary effect.

LORD ADAM.—In my opinion nothing can be clearer than that upon the 28th January 1885, when Mrs Breen is said to have made her election, she was in the belief that she was entitled to one-half of the personal estate, and that no one of those who were interested in the matter disputed the correctness of that belief. It is said that she was labouring under an error in law in entertaining such a belief, because as matter of fact she was not entitled to one-half of the estate, but only to one-fourth. Whether there was, or is, this error in law or not, no one knows—at all events I do not know. But Mrs Breen's error was not one of law. It consisted in this, that she understood she was to get undisputed and unquestionable possession of one-half of the estate. That

is a pure error of fact, and of a fact which was essential and of the most vital importance, and I have no doubt that she is entitled to be restored against it. No. 140.

With reference to the opinion which has been expressed by the Lord Ordinary, ^{May 31, 1887.} Inglis' Trustees v. Inglis. and adverted to by Lord Shand, viz., that if an election was well made on 28th January, it was beyond Mrs Breen's power to withdraw it, I can only say that as I think the case is very clear on the ground I have stated, I have not thought it necessary to make up my mind upon that point. The inclination of my opinion is in the direction indicated by Lord Shand, and at present I am not prepared to concur in the Lord Ordinary's views in that respect.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—H. B. & F. J. DEWAR, W.S.—Agents.

HUGH BONNAR, Pursuer.—*A. J. Young—Nicoll.*
JOHN F. RODEN, Defender.—*J. C. Thomson—Wallace.*

No. 141.

June 1, 1887.

Bonnar v.
Roden.

Expenses—Reparation—Vindication of Character—Nominal damages.—In an action of damages for vindication of character, the jury found the pursuer entitled to one farthing of damages. Circumstances in which the Court found the pursuer entitled to expenses.

IN an action of damages at the instance of Hugh Bonnar, butter 1st DIVISION. merchant, Tullagan and Sligo, Ireland, against John F. Roden, medical student in the University of Edinburgh, the following issue was sent to the jury on 21st March 1887:—"Whether, on or about the 14th day of October 1886, the defender, John F. Roden, wrote or caused to be written and sent, or caused to be sent to the inspector of the Butter Market in Sligo, Ireland, the letter in the terms set forth in schedule annexed, and whether the said letter, or any part thereof, is of and concerning the pursuer, and falsely and calumniously represents the pursuer as having been guilty of fraud or dishonesty in the transactions therein referred to, or makes similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage?" B.

"Damages laid at £1000."

The letter referred to, which bore to be from F. Roden & Son, provision merchants, Edinburgh, and addressed to the Butter Inspector, Sligo Market, Sligo, was in the following terms:—"Dear Sir, —Will you be able to recollect if Mr Hugh Bonnar bought in your market on Tuesday August 17th last a large number of firkins qualified by you as firsts? There is a law-suit pending between him and us about twelve firkins—a part of the large consignment he bought that day—he sold us, which he described as being the finest Sligo first qualified by you. When we received the butter we found it was not equal to thirds, as it was oily and greasy; we returned the butter to him. You will oblige me very much by giving me what information you can on the subject, as it is my conviction that this butter never passed through your hands as firsts, and even perhaps never entered your market. It is, sir, a gross injustice to your market to have men coming here selling such an inferior butter as Irish firsts. It is such misrepresentation that has caused our Irish butter to lose its hold on this and our markets, and the sooner Irishmen, both at home and here, put their foot on it the better it will be for our Irish butter trade."

At the trial it was proved that the letter was written by the defender and sent to the inspector as averred. The inspector did not shew the

No. 141. letter to anyone, but sent it direct to the pursuer, who immediately raised the present action.
June 1, 1887. The jury returned a verdict for the pursuer, and assessed the damages at one farthing.
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The presiding Judge, the Lord President, certified, in terms of sec. 40 of the Court of Session Act, 1868, that the cause was one brought for the vindication of character, and that it was in his opinion fit to be tried in the Court of Session.

On 1st June the pursuer moved the First Division of the Court to apply the verdict, and asked for expenses. He maintained that in every action of damages on the ground of defamation of character, even though only nominal damages were awarded, the pursuer was entitled to expenses.¹

The defender maintained that the pursuer should not be found entitled to expenses, the damages awarded being merely nominal. There had been no publication here, and the pursuer's character had not suffered in the least. Further, the defender had had no chance of tendering an apology until the case was on the point of going to the jury, and then the terms on which the pursuer agreed to withdraw the action were very high. The general rule was that nominal damages did not carry expenses; at all events it was a matter in the discretion of the Court,² and the evidence did not shew that the pursuer had suffered any injury.

LORD PRESIDENT.—This is no doubt a case of nominal damages, but I certified under the statute that the case was one brought for the vindication of the pursuer's character, and I certified further that it was a fit case to be tried in the Court of Session. The issue is a serious one, and the jury affirmed it, and have therefore found that the defender falsely and calumniously represented the pursuer as having been guilty of fraud and dishonesty. Now, that is a very serious charge, and if the libel had been extensively published I can have no doubt that the jury would have awarded very different damages. But the peculiarity of the case is that the libel was uttered in a letter to the inspector of markets where the butter was bought, and that the inspector on receipt of the letter very discreetly sent it to the pursuer, no one else having seen it. Of course the pursuer said nothing about the libel; if he had, it would have disentitled him probably from getting any damages, and the fact is that no one saw it but the inspector, and that he did nothing towards the publication of it. That state of facts, I think, quite accounts for the smallness of the damages awarded, still I cannot help thinking that the action was quite justified, and that the pursuer was entitled to have a verdict to clear his character though the libel was never published. For these reasons I think the pursuer is entitled to his expenses.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT applied the verdict, and found the pursuer entitled to expenses.

GIBSON & PATERSON, W.S.—RHIND, LINDSAY, & WALLACE, W.S.—Agents.

¹ *Craig v. Jex Blake*, July 7, 1871, 9 Macph. 973, 43 Scot. Jur. 524; *Craig v. Taylor*, Dec. 20, 1866, 5 Macph. 203, 39 Scot. Jur. 96.

² *Duncan v. Balbirnie*, March 3, 1860, 22 D. 934, 32 Scot. Jur. 395; *Graham v. Napier*, Jan. 21, 1874, 1 R. 391.

JOHN WESTLAND AND SPOUSE, Pursuers (Respondents).—*Rhind—A. S. Paterson.*

No. 142.

GEORGE PIRIE, Defender (Reclaimer).—*Kennedy—W. Campbell.*

June 1, 1887.
Westlands v.
Pirie.

Parent and Child—Illegitimate child—Aliment—Mora—Offer by father to take child.—In 1863 a woman was delivered of an illegitimate child in her father's house. The putative father admitted the paternity, and until the child was four years old made contributions in name of aliment to its maternal grandfather, with whom it continued to live. He then made an offer to take the child to his own house, which both its mother and its maternal grandfather declined. Thereafter the father contributed little or nothing towards the child's support. It continued to live with its grandfather till its seventeenth year, when it went to its mother. She had previously contributed nothing directly to its support, although she was in the habit of residing with her father for considerable periods, when she was not in domestic service. The maternal grandfather died in 1883, without having made any demand on the father in respect of the child's aliment. In 1886 the mother raised an action for payment of a sum in name of inlying expenses and of aliment down to the child's thirteenth year. *Held (dub. Lord Rutherford Clark, rev. judgment of Lord M'Laren)* that in the circumstances the pursuer was not entitled to recover, and defender *assoluted*.

ON 9th June 1886 John Westland, carter, Edinburgh, and Elizabeth M'Arthur or Westland, his wife, raised an action against George Pirie, contractor, Aberdeen, concluding for payment of a sum in name of inlying expenses and aliment, till its thirteenth year, in respect of an illegitimate male child of which the female pursuer was delivered on 12th June 1863, and of which the defender, then a farm-servant, was alleged to be the father.

2D DIVISION.
Lord M'Laren.
I.

The defender admitted the paternity of the child, but averred;—(Stat. 1) "Shortly after the birth of the said child the female pursuer went again into service, leaving the child to be maintained by her father, the late James M'Arthur. The boy continued to reside with his grandfather until he reached the age of nineteen, when he went to live with the pursuers in Edinburgh." (Stat. 2) "During all this time the boy was entirely maintained by the said James M'Arthur, with the assistance of the defender. Immediately after the child was born the defender paid James M'Arthur £3 for inlying expenses and aliment, and during the next four years he from time to time paid him further sums for aliment.

. . . The defender married in 1866, and went to live in Aberdeen. At his wife's suggestion he wrote in 1867 to James M'Arthur offering to take his child to live with him, and to provide for it free of expense to its mother or grandfather. Up to this time the defender had contributed to the child's maintenance by payments to the said James M'Arthur, and to his satisfaction. James M'Arthur declined the defender's offer, as he did not wish to part with the boy. Though the defender considered that he had thus discharged any legal obligation incumbent on him, he nevertheless continued *ex gratia* to send money to James M'Arthur from time to time for the boy's aliment. The defender and James M'Arthur were throughout upon very friendly terms, and the latter never asked the defender for more money. It was well understood on both sides that M'Arthur was maintaining the boy gratuitously as one of his family, and that he had no claim against the defender in respect of such maintenance. *Separatim*, if he had any claim against the defender, he abandoned and discharged it before his death. Mr M'Arthur never made any claim against the defender." (Stat. 3) ". . . The defender was never asked for money either by the female pursuer or by her husband until February 1886. . . . Up to this time the defender had been in frequent communication with the pursuers—he visiting them when he

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happened to be in Edinburgh, and the boy spending his holidays with the defender in Aberdeen."

The defender pleaded;—(2) The said child not having been maintained by the female pursuer or her husband during the period when he was unable to support himself, the pursuers have no title to sue. (3) The action is barred by *mora*, taciturnity, and abandonment. (4) In respect of the offer to provide for the said child, and the other circumstances libelled on, the defender is entitled to absolvitor.

A proof was allowed. It was conceded at the hearing in the Inner-House that down to the date of the defender's offer to take the child (which took place when the child was about four years old), the defender had implemented his obligation of contributing to its support by paying sums of money to its maternal grandfather, with whom it lived till its seventeenth year. The evidence was inconclusive as to the defender having made any payments after the date of the offer. He deponed that he made contributions through his own father to the female pursuer's father. The total amount of his contributions in respect of the child he estimated at £100. The female pursuer contributed nothing directly to its support, and until this action made no demand upon the defender, but in 1880 the son himself wrote to his father asking for £2 to enable him to attend a class, which request the defender declined. She lived in her father's house, when not in service, alternately for several years with her sister. She deponed that it was necessary that either she or her sister should be at home, as their mother was in weak health. Her father died in August 1883. It did not appear that after he had declined the defender's offer to take the child, he had ever made any demand upon the defender on account of the child.

On 2d March 1887, the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the defender, as the father of the illegitimate child, is liable for his aliment, and finds that after making allowance for some payments made to account thereof, there remains a balance still due of £50, for which sum decerns against the defender, with interest thereon from the date of citation till paid: Finds the defender liable in expenses," &c.*

* "OPINION.—In this case I am inclined to give a good deal of weight to the statements made by the parties in their record,—the record being always before the Judge where the case is investigated by a proof without a jury. The defender admits the paternity of the child for whom aliment is claimed, and he says that, immediately after the child was born, he paid James M'Arthur, the pursuer's father, £3 for inlying expenses and aliment. During the next four years he from time to time paid him further sums for aliment. Then he explains that in 1867—that is, at the end of the four years—he wrote to James M'Arthur offering to take the child to live with him, and to provide for it free of expense to its mother or grandfather; and, passing over the next sentence, he says that, while he considered that he had thus discharged any legal obligation incumbent on him, nevertheless he continued *ex gratia* to send money to James M'Arthur from time to time for the boy's aliment. 'The defender and James M'Arthur were throughout on friendly terms, and the latter never asked the defender for more money.' Then the defender says it was well understood that M'Arthur was to maintain the boy gratuitously as one of his family, and that he had no claim against the defender in respect of such maintenance. I read these statements as averring that, during the first four years of the boy's life, the defender had fulfilled his legal obligation to maintain the child, but that thereafter he considered that had come to an end. Any sums he had given *ex gratia* I conclude must have been small, because he says it was well understood on both sides that M'Arthur was to maintain the boy gratuitously, and that

The defender reclaimed, and argued;—The female pursuer had contributed nothing to the support of her child. It had lived in her father's house, and had been supported partly by him, and partly by contributions from the defender. That these contributions were sufficient in the grand-father's eyes to discharge all claims he had against the defender was shewn by his having made no demand on the defender. Receipts were neither given nor expected in such cases. There was no claim therefore which the pursuer could insist in as representing her father. If she had any independent claim of her own, that was lost by her refusal of the defender's offer to take the child, and by her long silence. The offer was a good offer. No doubt, at its date the child was only four years old, but the only real limit of age in such a case was the fact that the child was still at its mother's breast.¹ Further, the circumstances here—that the child was living with its grandfather, and was not really in its mother's custody—took the case out of the seven years' rule, if there was such a rule. Then, while it was admitted that the triennial prescription did not apply²—although in so far as the mother claimed as representing her father it did³—the long delay in making the claim was a good answer.⁴ The case of *Moncreiff*⁵ was special, because there the Court proceeded on the fact a formal deed of discharge had been founded on in defence, but not proved. The parties were entitled to come to an arrangement, and the long silence imported an arrangement.

Argued for the pursuers;—The offer was a bad offer, as it was not such as the mother was bound to accept, the child not being seven years old. The child was in its mother's custody when in her father's house, and she

statement is quite inconsistent with the idea that the defender continued to aliment him on the footing of a legal obligation.

"Now, the statement on record is not inconsistent with the evidence which the defender has given in Court; because, while he speaks positively as to his contribution during the infancy of the child, his statements of what he did after the first three or four years are very vague. He cannot mention any sums, except payments, which he made by arrangement with his father and the pursuer's father; he sent what he thought right—what he could spare—through his father to the pursuer's father, which he understood went to the aliment of the boy. All that is extremely vague. If he had regularly, during the period of fourteen years, or whatever the period is, paid a fixed sum at periodical times, I should have given great weight to the argument that the mother's claim was satisfied; because, when a claim like this is made so many years after the event, if any precise statement is made about it being discharged, I should be inclined to receive such a statement with great favour, there being no explanation of the cause of delay in making the claim. But, taking the defender's evidence as amounting merely to evidence of casual payments, the amount of which he is unable to state, and the only corroboration being by his brother, whose evidence has reference to one payment during all that time, I have to set against it the positive evidence of the pursuer Mrs Westland and her sister and son, who all say that they know nothing of any such payments having been made by the defender. Their belief was that the boy was maintained by his maternal grandfather. Therefore, I cannot hold that the defender has either averred or proved such payments in discharge of his legal obligation as would entitle him to be absolved from this action . . ."

¹ *Weepers v. Kirk*—Session of Kennoway, June 20, 1844, 6 D. 1166, 16 Scot. Jur. 507.

² *Thomson v. Westwood*, Feb. 26, 1842, 4 D. 833, 14 Scot. Jur. 286.

³ *Ligertwood v. Brown*, June 21, 1872, 10 Macph. 832, 44 Scot. Jur. 472.

⁴ *Arbuthnot v. Symon*, May 15, 1834, 12 S. 590, 6 Scot. Jur. 337.

⁵ *Moncreiff v. Waugh*, Jan. 11, 1859, 21 D. 216, 31 Scot. Jur. 124.

No. 142. had contributed to its support by her services there. The triennial prescription did not apply,¹ and mere delay was no bar.²

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LORD JUSTICE-CLERK.—This is a case of some peculiarity. The Lord Ordinary has decided in favour of the pursuers, that their claim, on account of the aliment of a child born twenty-four years ago, should be allowed. The facts as they have come out are simply these: The child was born in the house of his maternal grandfather, who brought him up, and with whom he remained till he was seventeen years of age. There were in the grandfather's house from time to time two of his daughters, one of whom is the present pursuer, the mother of the child. They worked in their father's house when not otherwise engaged in service, as they frequently were; and although the evidence is not very distinct on the matter, they were apparently at home alternately for a period of six or seven years. The demand now made against the defender by the mother and her husband is for aliment from the child's birth till he reached the age of thirteen. The defender does not deny the paternity of the child, but he says that the boy was brought up by his maternal grandfather, and that he, the defender, bore a certain proportion of the expense for some years after the child's birth, that, when the child was between four and five years old, he made an offer to take him and bring him up himself, that this offer was rejected, and that from that time until the present claim was put forward no demand whatever was made upon him for the aliment of the boy.

This is not a claim which is entitled to much favour, because the facts have been left very obscure, from the circumstance that the pursuers have chosen to make no claim until after the death of the grandfather, who expended the money and alimented the boy. It is said that the mother, by her service in her father's house, contributed to the aliment of her child. I do not think it is clear on what footing she was in her father's house, and I doubt whether she was there regarded as a servant entitled to wages. We have no distinct evidence on that matter, but we have evidence that after the defender had for three or four years made payments towards the child's aliment, he offered to take it and provide for it, that that offer was rejected, and that, after that, no farther claim was made upon the defender. Now, if the mother had been living in a house of her own, and supporting herself by her own industry, there might have been some ground for saying that such an offer was not sufficient to bar all future claims by the mother against the father for the aliment of their child; but looking to the fact that she was living in her father's house, I think that the defender's offer to take the child was, in the circumstances, a valid offer, and that it does not come within the category of the rule that a young child should not be taken from its mother's care by an offer of this kind on the part of the father. I think that this is in the circumstances a stale demand, and that the defender's offer is sufficient to liberate him. I therefore propose to your Lordships to recall the Lord Ordinary's interlocutor, and assolvie the defender.

LORD YOUNG.—I am of the same opinion, and if the case had stood on this ground only—that the father of the child had paid aliment for it for four or five years from its birth, and had then offered to take it and provide for it entirely

¹ Thomson v. Westwood, Feb. 26, 1842, 4 D. 833, 14 Scot. Jur. 286.

² Corrie v. Adair, Feb. 24, 1860, 22 D. 897, 32 Scot. Jur. 377; Grant v. Yuill, Feb. 29, 1872, 10 Macph. 511, 44 Scot. Jur. 276; Shearer v. Robertson, Nov. 29, 1877, 5 R. 263.

himself, instead of leaving it in the care of its maternal grandfather, with whom it had been living, I should have arrived at the same conclusion. But there is more in the case than that. The child was born in its maternal grandfather's house, and was brought up there till it reached the age of seventeen. It was admitted at the bar that the case was to be taken on the footing that for the first four years sums were paid by the father to the grandfather towards the aliment of the child. The defender was then a farm servant. I don't know whether he could write, or whether the grandfather could write,—probably the grandfather was the less likely of the two to be able to do so, as he was of an older generation; but when a farm servant pays £1 or 10s., or even larger sums in name of aliment for his bastard child, I do not think he habitually takes receipts for such payments, and docketts and files them for forty years, in case actions may afterwards be raised against him for payment of the aliment he has already paid. Therefore, unless there is some other way of proving payment within the forty years, innumerable actions of this description might be brought, and would be unanswerable. The defender says he paid sums in name of aliment which he estimates at £100 in all—probably he paid less than that by a good deal, but that he paid sufficient to satisfy the grandfather with whom the child was brought up I conclude—and I think it is the proper judicial conclusion—from the fact that the grandfather lived for twenty years afterwards without making any further demand, and that this action was not brought until he had lain in his grave for several years. The pursuer in her evidence says:—"I had written to the defender before leaving my father's house, and he wrote me a letter in 1865, when the child was two years old, saying that he would take him. In my letter to the defender I asked money from him. I never answered his letter offering to take the child"; and then on the next page of the proof she adds:—"I instructed Mr Barclay to write him for aliment in February 1886. That was the first claim I made on the defender since I wrote him in 1865." So that she is absolutely silent for a period of twenty-one years, she indicates no claim against the defender, but now she brings this action when, as she informs us in her evidence, "it is three years past in August since my father died, and my mother died shortly before that." In these circumstances I think the ground of action here is not proved; the evidence does not satisfy me that during these twenty-one years there was any debt due either to the child's grandfather or grandmother, who brought up the child, but who died without having made any claim, or to its mother, who does not appear to have contributed anything towards its support. On the whole matter therefore I am prepared to find that the averments of the pursuers are not established, and to assolve the defender.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK.—I have found this case to be attended with difficulty. The child, I think, was throughout, in the ordinary sense of the word, maintained by its mother. No doubt it lived in its grandfather's house, but that is not an uncommon occurrence in cases of this kind. Its mother placed it there; that was the way in which she fulfilled her obligation of maintaining her child. Now, the defender has not contributed anything—or much—to the support of his child since it was four years old, and his first defence to this action is that he offered to take the child and maintain it himself. If I thought that that was a legal offer I should consider it an end of the case, and I think it would have been a legal offer if at its date the child had been seven years

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old, but I have the greatest possible doubt whether the father of an illegitimate child can relieve himself of the obligation to contribute to its future support by an offer to take it into his own house when it is a year old, or two years old, or of any age short of seven. I think that is the principle to be deduced from the cases which were cited to us. I am not disposed, therefore, to regard the defender's offer, taken by itself, as sufficient to relieve him from liability. It is said that the child was not constantly living with its mother, and it is quite true that she was not constantly in the same house as her child, because she herself was not always living in her father's house, where the child was. At the same time, I think the child was throughout in the custody of its mother, and I question whether the father is entitled to take so young a child out of the custody of its mother, or if she refuses to give it up, then to consider himself free of all liability for future aliment. But while that is so, I admit that I have some difficulty, arising from the conduct of the parties, because it does appear that the pursuer preferred to keep her child and give up her claim to aliment. I think that there is some evidence, at least, of that. Accordingly, I am disposed to think that the only safe ground on which to put the judgment your Lordships propose is that the parties came to an arrangement by which the pursuer abandoned her claim to future aliment, not being willing to accept the offer which the defender had made. I confess I have great hesitation, but as your Lordships are all agreed I do not differ.

THE COURT recalled the Lord Ordinary's interlocutor, and assoilzied the defender from the conclusions of the summons.

ABRAHAM NIVISON, Solicitor—J. D. MACAULAY, S.S.C.—Agents.

No. 143.

June 2, 1887.
Ross v. Gray.

AMELIA ROSS, Pursuer (Appellant).—*A. S. Paterson.*

ALEXANDER GRAY, Defender (Respondent).—*Macfarlane.*

Process—Appeal—Dispensation from printing in hoc statu—Boxing of prints—A. S., 10th March 1870, sec. 3, subsec. 2.—The provisions of sec. 3, subsec. 2 of the A. S., 10th March 1870, relating to the lodging of manuscript copies or prints in appeals from the Sheriff Court, do not apply to cases where an interlocutor has been pronounced dispensing with printing *in hoc statu*; and should the Court subsequently refuse to dispense with printing, a day will then be fixed for the boxing of the necessary prints.

An appellant seven days after the appeal was lodged obtained an interlocutor from the Lord Ordinary on the Bills dispensing with printing *in hoc statu*. Subsequently the Court refused to dispense with printing. Fourteen days thereafter the necessary prints in the cause were boxed to the Court. The respondent moved that the appellant should be held to have abandoned the appeal in respect the prints had not been timeously lodged, the effect of the interlocutor of the Lord Ordinary on the Bills having been merely to interrupt the currency of the fourteen days allowed by the Act of Sederunt for boxing the prints. The Court *refused* the motion, and sent the cause to the roll.

1ST DIVISION.
Sheriff of
Aberdeen-
shire.

M.

IN an action of filiation and aliment at the instance of Amelia Ross, Old Deer, against Alexander Gray, Cruden, the Sheriff-substitute (Brown), and on appeal the Sheriff (Guthrie Smith), assoilzied the defender.

The pursuer appealed to the Court of Session. The appeal was received by the Clerk of Court on 25th April.

Seven days thereafter (May 2d), the Lord Ordinary on the Bills (Fraser), dispensed with printing "*in hoc statu*."

On May 17th the First Division refused to dispense with printing, and on May 31st the print of the record and proof was boxed.

The appellant having moved that the appeal should be sent to the roll, the respondent moved that the appellant should be held to have abandoned

her appeal, on the ground that the print had not been timeously lodged in terms of the A. S., 10th March 1870, sec. 3, subsec. 2.* He argued that the effect of the interlocutor of the Lord Ordinary on the Bills was simply to stop the currency of the fourteen days allowed to the appellant wherein to box the statutory prints. Seven days of the fourteen days had run before that interlocutor was pronounced, and only seven days remained to run after the interlocutor finally refusing to dispense with printing was pronounced by the First Division on 17th May. If that were so, the prints boxed on May 31st were too late.

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Argued for the appellant;—The A. S. of 10th March 1870 did not apply to cases where printing was dispensed with simply *in hoc statu*. Such an order was nowhere mentioned. A fresh period of fourteen days ought to begin to run from the date of the interlocutor refusing to dispense with printing.

LORD PRESIDENT.—It appears to me that the 2d subsection of the 3d section of the A. S., 10th March 1870, does not apply to cases where printing has been dispensed with *in hoc statu*. On 2d May the Lord Ordinary on the Bills dispensed with printing *in hoc statu* in this case, and on 17th May a dispensation from printing was absolutely refused by us. It appears that on that day we ought, consistently with our practice, to have appointed a day for prints to be lodged. We did not do that, but we shall take care to do so in future. This is a demand for a penalty under the subsection, and as the subsection does not apply, I think we must refuse the motion of the respondent and send the case to the roll.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT sent the case to the roll.

J. D. MACAULAY, S.S.C.—ALEX. MORISON, S.S.C.—Agents.

* The A. S., 10th March 1870, sec. 3, subsec. 2, provides,—“The appellant shall during vacation, within fourteen days after the process has been received by the Clerk of Court, deposit with the said clerk a print of the note of appeal, record, interlocutors, and proof if any, unless within eight days after the process has been received by the clerk he shall have obtained from the Lord Ordinary officiating on the Bills an interlocutor dispensing with printing in whole or in part, for which purpose the assistant clerk shall, if required, lay the process before the Lord Ordinary on the Bills; and in such case the appellant shall deposit with the clerk, as aforesaid, a print of those papers, the printing whereof has not been dispensed with, and if printing has been in whole dispensed with shall lodge with the said clerk a manuscript copy of the note of appeal; and the appellant shall upon the box-day or sederunt-day next following the deposit of such print with the clerk, box copies of the same to the Court, or if printing has been in whole dispensed with, shall furnish to the clerk of the Lord President of the Division a manuscript copy of the note of appeal: and if the appellant shall fail within the said period of fourteen days to deposit with the Clerk of Court, as aforesaid, a print of the papers required, or to lodge with him a manuscript copy of the note of appeal as the case may be, or to box or furnish the same, as aforesaid, on the box-day or sederunt-day next thereafter, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein except upon being reponed as hereinafter provided.”

No. 144. JAMES REID AND OTHERS, Pursuers (Respondents).—*C. S. Dickson—Watt.*

June 2, 1887. Reid v. Reid's Trustees. JAMES ASHBURN LIGHTBOURNE AND OTHERS (Reid's Trustees), Defendants (Reclaimers).—*Darling—G. W. Burnet.*

1ST DIVISION. *Process—Revisal of pleadings—Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 25.*—In an action of reduction at the instance of James Reid and others against J. A. Lightbourne and others, his trustees, for reduction of certain deeds, the defences lodged were in the form of answers to the condescendence, and a separate statement of facts disclosing a defence of homologation and adoption. On the case appearing in the Adjustment-roll, the defenders asked for an order on the pursuers to answer their statement. The Lord Ordinary (M'Laren) thereupon ordered a revisal of the condescendence and defences, in terms of sec. 25 of the Court of Session Act, 1868.* The pursuers in their revised condescendence did not specifically answer the averments on which that defence rested. When the case came before the Inner-House on a question of relevancy, the Court opened up the record and ordained the pursuers to lodge specific answers to the defenders' revised statement of facts in fourteen days; the Lord President observing that an order for revisal under the 25th section of the Act of 1868 meant precisely the same as a similar order did before the passing of that Act.

ROBERT EMSLIE, S.S.C.—J. & A. HASTIE, S.S.C.—Agents.

No. 145. JAMES C. GRAHAME AND OTHERS (Dickson's Marriage-contract Trustees), Pursuers and Real Raisers.

June 3, 1887. Somerville's Trustees v. Dickson's Trustees. JAMES LAW AND OTHERS (Lieutenant-Colonel Somerville's Trustees), Claimants (Reclaimers).—*Asher—H. Johnston.*
WILLIAM FINLAY AND OTHERS (Mrs Eleanor J. Dickson's Trustees), Claimants (Respondents).—*Pearson—Low.*

Succession—Legitim—Approbate and Reprobate—Provisions in marriage-contract not declared to be in satisfaction of legitim.—H. S., in his daughter's antenuptial marriage-contract, bound himself, within one month of the marriage, to convey £8000 in Government Stock to trustees, to hold in trust for the spouses and the longest liver of them in liferent alienably, the fee to belong to the children of the marriage, whom failing, to such persons as H. S. might appoint, whom failing, to his heirs and successors whomsoever, "but under this provision that, notwithstanding the above destination, it shall be in the power of the said" daughter, "in the event of her having no children, or if they shall all predecease her without leaving issue, to dispose, by will or testamentary deed executed by her, of any part of the said trust-funds, not exceeding £4000 sterling." There was no clause by which the daughter accepted these provisions as in full of her legal rights over her father's estate. The father, H. S., executed a trust-settlement by which, in the event of his daughter and her husband dying without issue, the whole property liferented by the spouses was to be divided amongst certain legatees. After the father's death the daughter, in an action of multiplepoinding, claimed her legitim. The Court in that action found that she was not barred by her acceptance of the provisions

* Sec. 25 of the Court of Session Act, 1868, enacts,—“Neither party shall be entitled as matter of right to ask for a revisal of his pleadings; but it shall be competent for the Lord Ordinary to allow or to order a revisal of the pleadings, upon just cause shewn.”

in the marriage-contract from claiming legitim. The daughter thereafter, there being no issue of the marriage, exercised the power to test on the £4000, and also to claim as legitim half of the remaining £4000. In a question between the daughter's testamentary trustees and those of H. S., her father, *held* that the daughter was not barred from testing on the £4000, either (1) by having claimed legitim generally, or (2) by having claimed as legitim half of the remaining £4000.

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By antenuptial marriage-contract, dated 26th December 1854, and registered in January 1855, entered into between William Dickson, accountant in Edinburgh, on the one part, and Miss Eleanor Jane Somerville and her father, Colonel Henry Erskine Somerville, on the other part, Colonel Somerville bound and obliged himself, within one month of the marriage between his daughter and Mr Dickson, "to transfer and make over the sum of £8000 of the stock of the Three Per Cent Consolidated Annuities" to certain trustees, who were to hold the same in trust for behoof of the spouses, and the longest liver of them, "in liferent for their liferent uses alienarly, and as an alimentary fund, and the fee of the said trust-fund shall belong to the said children of this marriage, or of any subsequent marriage into which the said Eleanor Jane Somerville may enter, or their issue, subject to the powers of division and appointment before and after specified; whom failing, to such person or persons as the said Lieutenant-Colonel Henry Erskine Somerville may appoint; and failing any appointment by him, to his nearest heirs and successors whomsoever, and shall remain vested in the trustees agreeably to the directions contained in this contract; and the said fund shall not be attachable for the debts of the said William Dickson or Eleanor Jane Somerville, nor affectable by the diligence of their or either of their creditors, and the orders, receipts, and discharges of the said parties respectively, as above provided, shall alone be sufficient discharges to the trustees; but under this provision, that notwithstanding the above destination it shall be in the power of the said Eleanor Jane Somerville, in the event of her having no children, or if they all shall predecease her without leaving issue, to dispose by will or testamentary deed executed by her of any part of the said trust-funds not exceeding £4000 sterling."

1st Division.
Lord Kinnear.
B.

There was no clause in the deed stating that Mrs Dickson accepted the provision as in full of her legal claims on her father's estate.

The sum of £8000 of Three Per Cent Stock was duly transferred to the trustees, who drew the dividends thereof and paid and accounted therefor to Mr and Mrs Dickson during their respective lives.

Colonel Somerville died on 7th March 1863. After his death there was discovered in his repositories a postnuptial contract between himself and his wife, by which his whole estate was at her death (which had occurred) conveyed to the children of the marriage, of whom Mrs Dickson was the only one who survived. Colonel Somerville also left a trust-disposition and settlement under which he, in the event of his daughter and her husband dying without issue, directed the residue of his property, including the whole of the property which they were liferenting, to be divided amongst certain legatees.

Mr and Mrs Dickson thereupon claimed right under the postnuptial contract to the whole estate left by Colonel Somerville, and in order to settle the question an action of multiplepounding was raised by Colonel Somerville's trustees, in which appearance was entered for Mr and Mrs Dickson, who lodged a claim, wherein Mrs Dickson, as the sole surviving issue of the marriage between Colonel Somerville and his wife, claimed to be ranked and preferred (1) to the whole fund *in medio*, in terms of the provisions of the said postnuptial contract of marriage between her said parents; or

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(2) to one-half of the fund *in medio*, in so far as the same consisted of the free moveable estate of Colonel Somerville, as legitim. After considerable litigation, in the course of which one stage of the case was appealed to the House of Lords (5 Macph. (H. L.) 69), the Lord Ordinary (Barcaple) pronounced this interlocutor on 19th November 1867:—"Having heard counsel for the parties on the claim of Mrs Dickson and her husband for legitim, and on the fourth plea in law for the claimants Alexander Russel and others, and third plea in law for the claimants John Anthony Grahame and others, and having resumed consideration of the closed record and whole process, Finds that there are no grounds on which it can be held that the provisions made by Colonel Somerville for Mrs Dickson in the antenuptial contract of marriage between her and Mr Dickson were in full of her claim of legitim: Finds that she is not barred by the acceptance of these provisions from claiming legitim: Finds that these provisions do not fall to be imputed to account of or in extinction of her claim for legitim: Finds that Mrs Dickson was entitled to one-half of the free moveable estate of Colonel Somerville at the date of his death as legitim," &c.*

On 14th January 1868 Lord Barcaple allowed Mrs Dickson and her husband to lodge an additional condescendence and claim, in which, *inter alia*, the following claim was made:—"In virtue of her legitim, to which she has been found entitled by interlocutor of the Lord Ordinary, dated 19th November 1867, which has become final, the claimant Mrs Dickson claims to be ranked and preferred (2) to one-half of such part (if any) of the said sum of £8000 stock held by the claimant's marriage-contract trustees as may hereafter fall into the residue of Colonel Somerville's estate." This claim was opposed by Colonel Somerville's trustees, on the ground that the right claimed was contingent, and could not be ascertained, and on 16th June 1868 Lord Barcaple pronounced an interlocutor, whereby, *inter alia*, he "finds it is not expedient or proper *in hoc statu* to dispose in this process of the contingent claim stated by Mrs Dickson in said additional condescendence and claim to one-half of such part, if any, of the sum of £8000 stock held by the claimant's marriage-contract trustees as may hereafter fall into the residue of Colonel Somerville's estate; but reserves her right to insist in said claim whenever circumstances make it proper or necessary for her so to do."

Mr William Dickson died on 31st May 1881, and Mrs Dickson died on 16th May 1886, without issue. By her trust-disposition and settlement she disposed to William Finlay and others, as trustees for certain purposes, her whole property, including the sum of £4000 upon which she was entitled to test in virtue of the clause in her marriage-contract quoted *supra*, and such part of the sum of £8000 of Three Per Cent Stock as she was entitled to from her father's estate in name of legitim.

On 28th September 1886 Mrs Dickson's marriage-contract trustees raised an action of multiplepoinding, and called Colonel Somerville's trustees and Mrs Dickson's testamentary trustees as defenders.

The fund *in medio* consisted of the £8000 of Three Per Cent Government Stock, or the price thereof when realised, and the dividend received or that might fall due thereon before it was sold.

Mrs Dickson's testamentary trustees claimed to be ranked and preferred, *inter alia*,—" (2) To the sum of £4000 sterling, part of the said £8000 stock, which the said Mrs Eleanor Jane Somerville or Dickson was entitled to dispose of in virtue of the provision in her said contract of

* "NOTE.—The present case as regards the question of legitim falls under the principle recognised in this Court and the House of Lords in the case of *Brand-albane v. Chandos*, 14 S. 309, and 2 S. and M'L. 377."

marriage, with interest thereof, or the dividend corresponding thereto, from the said 16th day of May 1886 till paid; and (3) To one-half of such part of the said sum of £8000 stock held by the said Mrs Eleanor Jane Somerville or Dickson's marriage-contract trustees as has fallen, or may fall, into the residue of Colonel Somerville's estate."

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They pleaded;—(2) Mrs Dickson having been entitled, in terms of her marriage-contract, to dispose by testamentary deed of £4000 of the said £8000 stock, and having disposed thereof by her trust-disposition and settlement, the claimants are entitled thereto, with interest. (3) Mrs Dickson being entitled to legitim, and the balance of the said sum of £8000 stock being part of the free moveable estate of her father, one-half thereof vested in her as legitim, and now belongs to the claimants. (4) It is *res judicata*, and, *separatim*, the result of a sound construction of Mrs Dickson's marriage-contract, that the acceptance by her of her marriage-contract provisions, including the power of disposal, did not exclude her right to legitim. (5) Mrs Dickson being entitled to legitim, and also to exercise the power of testamentary disposal under her marriage-contract, the claimants are entitled to be ranked and preferred in terms of the third branch of their claim.

Colonel Somerville's trustees claimed to be ranked and preferred to one-half "of the said sum of £8000 stock of the Three Per Cent Consolidated Government Annuities, or the price thereof when realised, and one-half the dividends thereon accrued since the date of Mrs Dickson's death, viz., 16th May 1886," &c.

They pleaded, *inter alia*;—(2) *Separatim*, On a sound construction of her marriage-contract, and her father's trust-disposition and settlement and codicils, Mrs Dickson was barred from both claiming her legitim and also exercising her power of appointment or testamentary disposal under her marriage-contract; and she having elected to take her legitim, her trustees are entitled to one-half of the fund *in medio* as legitim, but to no part thereof under her pretended exercise of her power of testamentary disposal; (3) In any event, one-half of the remaining half of the fund *in medio*, which was not subject to Mrs Dickson's power of testamentary disposal, falls into dead's part of Colonel Somerville's estate, to which the claimants, as his testamentary trustees, are entitled.

On 25th January 1887 the Lord Ordinary (Kinnear) pronounced this interlocutor:—"Repels the first [departed from] and second pleas in law for the claimants Colonel Somerville's trustees: Sustains the pleas in law for the claimants Mrs Dickson's trustees, and the third plea in law for the claimants Colonel Somerville's trustees: Ranks and prefers the claimants Mrs Dickson's trustees . . . ; and (2) to the sum of £4000 sterling of the proceeds of the said £8000 stock; and ranks and prefers the claimants Mrs Dickson's trustees, and the claimants the said Colonel Somerville's trustees, each to one-half of the balance of the fund *in medio* and dividends accrued thereon, under deduction of the expenses of the real raisers and of the expenses aftermentioned, and decerns," &c.*

* "OPINION.—The only question in controversy between the parties is that which is raised by the third branch of the claim for Mrs Dickson's trustees, where they claim, on account of legitim, one-half of such portion of the sum of £8000 held by Mrs Dickson's marriage-contract trustees, as may have fallen into the residue of Colonel Somerville's estate.

"By the marriage-contract in question, Mrs Dickson's father, Colonel Somerville, put £8000 into the hands of trustees for behoof of the spouses in liferent, for their and the survivor's liferent use allenary, and of the children of the marriage in fee, with a declaration that, failing children, the fee should belong

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Colonel Somerville's trustees reclaimed, and argued;—They did not deny that Mrs Dickson was entitled to legitim out of the £8000 consols,

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to such person or persons as Colonel Somerville might appoint; and failing any appointment by him, to his nearest heirs and successors whomsoever. But it was further provided, that notwithstanding this destination of the fee, Mrs Dickson, in the event of her leaving no children, should have power to dispose by will of any part of the trust-funds not exceeding £4000. Mrs Dickson, who survived her husband, died without issue; and she has left a trust-disposition and settlement, by which, *inter alia*, she has disposed of the sum of £4000, on which she was entitled to test, and also of whatever part of the said sum of £8000 she may be entitled to in name of legitim, as the only child of Colonel Somerville who survived him.

“Colonel Somerville's trustees maintained that she is barred, by the principle of approbate and reprobate, from exercising the power of testamentary disposal conferred upon her by the marriage-contract and at the same time claiming legitim against that deed; and that, as she has in fact exercised her power of disposal as to the sum of £4000, her trustees' claim to legitim out of the other must be repelled. They do not dispute, however, that, notwithstanding the provisions in her favour contained in her marriage-contract, Mrs Dickson became entitled to legitim at her father's death; and, indeed, this has been already determined by a final judgment pronounced by Lord Barcapple in 1867. The only question, therefore, is whether any part of the £8000 falls into the legitim fund; or, whether Mrs Dickson, although she is not barred by the marriage-contract from claiming legitim generally, may not be barred from claiming any part of the fund settled by that deed otherwise than upon the rights given by the deed itself, and in strict accordance with its provisions.

“It appears to me that there is nothing in the marriage-contract, taken by itself, to raise a plea of approbate and reprobate, or to compel Mrs Dickson to elect between inconsistent rights. Her father settles money that is absolutely his own, and to which she had no right whatever independently of his gift. The question of election, therefore, could not arise until she came to claim legitim upon his death. When that claim was brought forward, she might have been put to an election, if it could have been maintained successfully that her marriage-contract provisions were intended to be in lieu or in satisfaction of legitim. But the contrary has been decided by a judgment that is admitted to be unimpeachable. I think it follows that any part of the funds in the hands of the marriage-contract trustees which may have fallen into the residue of Colonel Somerville's estate must suffer a division, like the rest of the free moveable estate, between dead's part and legitim; and Mrs Dickson must be entitled to her share, because it is decided that she was entitled to legitim. The judgment sustaining her right to legitim means that she was entitled to one-half of the entire moveable estate left by Colonel Somerville, after providing for his debts; and it is now certain, in consequence of her death without issue, that the £4000 held by the marriage-contract trustees was in fact a part of Colonel Somerville's moveable estate at his death.

“It is said that the right to test with regard to one-half of the £8000 was given to Mrs Dickson on condition of her abstaining from making any claim to the remaining half. But this is a misconception of the legal effect of the marriage-contract. It is in no proper sense of the term a condition of the benefits given to Mrs Dickson, that she shall not disturb the other provisions of the contract. There was no legal right in her which could enable her to disturb them. But the provision applicable, in the event which has happened, to the £4000 in question is, in effect, that it shall fall into the general estate of Colonel Somerville. In other words, it is not disposed of by the marriage-contract, but by Colonel Somerville's testamentary settlement; and it is this disposition by testament, and this alone, which Mrs Dickson's right of legitim enables her to challenge. She can claim no part of the £4000 without claiming against the testamentary settlement, and therefore forfeiting the liferent bequeathed to her by that deed. But she makes no claim against the marriage-contract. The argument that the claim

but they maintained that as she had elected to take legitim she was excluded from taking something else, viz., the power to test. The power to test was not a contract provision nor a testamentary bequest, but a gift. The contract stopped with the proper matrimonial purposes, and what followed in contemplation of the failure of the matrimonial purposes was not pactional but a free gift from Colonel Somerville to his daughter. The gift, however, was conditional. There was the implied condition, which was the basis of the equitable doctrine of election, viz., that one who takes under a deed of gift, whether testamentary or otherwise, shall allow the donor's whole intention to have effect.¹ Now, Colonel Somerville's intention was that while his daughter should have power to test upon the £4000 his appointees should receive the rest. His general settlement was a valid and effectual appointment. His daughter might claim against his general settlement and take legitim. By so doing she might disappoint his appointees, but having done so she was not entitled to claim also her power of testamentary disposal. She was bound to allow that part of the fund over which she had this power of disposal to go as compensation. Even if the power to test was held to be part of the contract provisions, it was subject to the same implied condition. The plea of *res judicata* did not apply, as the question never had been *sub judice*, and was indeed specially reserved.

Argued for Mrs Dickson's trustees;—The power to test was given absolutely to Mrs Dickson in the contract, and there was there no such stipulation as that contended for on the other side, viz., that she should either take her legitim and give up her power of testing, or test on the £4000 and forego her right to legitim. If such a condition were to be adjected it must be done explicitly. Lord Barcaple, *ex facie* of his interlocutor, considered the claim of legitim. Mrs Dickson must be entitled to her whole legitim, viz., what had been already paid to her, and her share of the general estate, or to none, and he had found her entitled to her legal rights. If that were so, the case was *res judicata* in a case between the same parties as were here present. The provision was not testamentary, but a provision of the contract on which the marriage depended. It was a valuable right, and gave her a fund of credit during her life.² Such a gift in an onerous deed was not revocable by the donor. There was no question of approbate or reprobate in the matter. Mrs Dickson took the one provision as the wife of Mr Dickson, and the other as the daughter of her father. Neither did the doctrine of election have any place here, as that could only arise when a testator disposed of property with which he was not entitled to deal.

LORD PRESIDENT.—The division of the moveable estate of the late Colonel Somerville was the subject of a previous multiplepinding, and in that case his only child, Mrs Dickson, claimed her legitim, and was found entitled to do so by the interlocutor of Lord Barcaple on 19th November 1867. In that inter-

now made by her trustees, in accordance with her will, involves a claim against the marriage-contract, appears to me to proceed upon two false assumptions—first, that the £4000 which has fallen into residue is disposed of by the marriage-contract, instead of by the testament; and, secondly, that the marriage-contract expresses or implies an intention that the benefits given to Mrs Dickson shall be taken in lieu of legitim."

¹ *Kers v. Wauchope*, 1819, 1 Bligh 1—see Lord Eldon's opinion at p. 21.

² *Hyslop v. Maxwell's Trustees*, Feb. 11, 1834, 12 S. 413, Lord Corehouse's opinion, p. 416.

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locutor the Lord Ordinary "having heard counsel for the parties on the claim of Mrs Dickson and her husband for legitim, and on the fourth plea in law for the claimants Alexander Russel and others, and third plea in law for the claimants John Anthony Grahame and others, and having resumed consideration of the closed record and whole process, finds that there are no grounds on which it can be held that the provisions made by Colonel Somerville for Mrs Dickson in the antenuptial contract of marriage between her and Mr Dickson were in full of her claim of legitim: Finds that she is not barred by the acceptance of these provisions from claiming legitim: Finds that these provisions do not fall to be imputed to account of or in extinction of her claim for legitim: Finds that Mrs Dickson was entitled to one-half of the free moveable estate of Colonel Somerville at the date of his death as legitim." Now, that really gives effect to the principles of law laid down in the *Breadalbane* case, and I think these principles are very well applied in that interlocutor. A considerable sum was paid to Mrs Dickson in consequence of that judgment, which was not submitted to review, but there remains of Colonel Somerville's estate a sum of £8000, which forms the fund *in medio* in the present action. Now, that £8000 was settled on Mrs Dickson in her marriage-contract, to which her father was a party.

The contention of the trustees of Colonel Somerville with regard to that fund is embodied in their second plea in law, which is as follows:—" (2) *Separatim*, On a sound construction of her marriage-contract, and her father's trust-disposition and settlement and codicils, Mrs Dickson was barred from both claiming her legitim and also exercising her power of appointment or testamentary disposal under her marriage-contract; and she having elected to take her legitim, her trustees are entitled to one-half of the fund *in medio* as legitim, but to no part thereof under her pretended exercise of her power of testamentary disposal." The reference in that plea to Colonel Somerville's trust-disposition and settlement and relative codicils I do not quite understand. I cannot see how they are of any avail in determining what is the extent of the legitim, or how far it is consistent with what Mrs Dickson has done.

The real question is, whether, according to a sound construction of Mrs Dickson's marriage-contract, she is entitled at once to claim her legitim as regards that sum of £8000, and to exercise her power of disposal of £4000 of that sum.

The opposite contention is well embodied in the second and third pleas for her trustees.

The whole question then, in my opinion, depends on the construction and effect of the marriage-contract. The deed is simple enough. It contains provisions on the part of the husband in favour of the wife and possible children, and on the wife's part her father undertakes at one month's date from the marriage to transfer £8000 of consols to trustees, who are to secure the liferent thereof to the spouses and the longest liver of them, and to give the fee to the children of the marriage, if any. Now, those are the whole trust purposes, with the exception of a clause to which I shall immediately draw attention—the trust purposes are exhausted when the liferent has been paid to the spouses and the fee given to the children, or if the spouses die without leaving issue then the contract is at an end.

But there follows what is represented as being a testamentary provision by Colonel Somerville. It is contended on the one side that this clause is a

testamentary provision, and on the other that it is a part of the contract, and must be dealt with as such. I think it is neither. It is a simple declaration of what will be the effect of the spouses dying without leaving issue, and that effect would have been operated by law, even though the provision had not been in the deed at all. For it simply amounts to this, that when the spouses were dead, without issue, the £8000 settled by the contract shall revert to him from whom it came, and shall pass according to the directions of his will, or if he does not leave one then it shall go to his executors. Now, is that a testamentary provision? It benefits no one, and it does not interfere with the operation of the common law. What is the use of it? I cannot see, for it simply directs that that shall be done which the law would have done without any direction.

But if the clause is not testamentary still less is it of the nature of contract, for it merely declares what would certainly take place if the marriage-contract purposes did not require to be fulfilled, or to be fulfilled only in part. Should, however, anyone inquire what use there was in putting this clause into the contract at all, I think a perfectly clear and satisfactory answer can be given. It was put there simply for the purpose of introducing the power of disposal given to Mrs Dickson. The clause amounts just to this,—Failing children of the marriage of course this £8000 will revert to the grantor or go to his next of kin, but “under this provision” those words mean that what follows interferes with the ordinary course of the law, *i.e.* that to a certain extent the £8000 shall not revert to Colonel Somerville or go to his next of kin. Accordingly, it is clearly declared what shall happen. “Notwithstanding the above destination, it shall be in the power of the said Eleanor Jane Somerville, in the event of her having no children, or if they all shall predecease her without leaving issue, to dispose by will or testamentary deed executed by her of any part of the said trust-funds not exceeding £4000 sterling.” It seems to me that the whole clause simply means this, that the parties foresaw that in the event of there being no children the result would be that the whole estate would revert, and that therefore they made this stipulation as part of the contract that in that event Mrs Dickson should have power to test on £4000. I think that that is one article of the contract between Mr and Mrs Dickson and Colonel Somerville, and it is impossible to say that it is not a “provision” (the word in Lord Barcaple’s interlocutor) “of the marriage-contract.” It seems to have been thought that because only a power of disposal is given that that is not a valuable provision, but, as Mr Low shewed in the course of his argument, a power of that kind is a matter of pecuniary value, it is capable of being valued in pounds, shillings, and pence, or of being sold for value, and, therefore, to say that it is not a “provision” is a contradiction in terms.

Now, if Mrs Dickson were entitled to exercise this power which was secured to her, how that is to interfere with her claim of legitim with regard to the other portion of the estate it is difficult to see. The two things are quite separate. It has been settled that the marriage-contract does not in any of its provisions interfere with Mrs Dickson’s claim to legitim; and that none of its provisions are to be imputed to legitim. The one £4000 therefore falls into the general estate, and is subject to legitim to the extent of one-half; the other £4000, on which she had power to test, does not belong to Mrs Dickson quite in the same sense as her legitim, but as she has executed her power of disposal it goes to her trustees. On these grounds I am clear that the judgment of the Lord Ordinary is

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No. 145. right, and that the two propositions stated by her trustees are well founded, viz :
 June 8, 1887. —“(2) Mrs Dickson having been entitled, in terms of her marriage-contract, to
 Somerville's dispose by testamentary deed of £4000 of the said £8000 stock, and having
 Trustees v. disposed thereof by her trust-disposition and settlement, the claimants are
 Dickson's entitled thereto, with interest. (3) Mrs Dickson being entitled to legitim, and
 Trustees. the balance of the said sum of £8000 stock being part of the free moveable
 estate of her father, one-half thereof vested in her as legitim, and now belongs
 to the claimants.”

LORD MURR.—I think it is now quite settled that where there is a provision of the description here in question in a marriage-contract, it does not form a bar to the child claiming legitim, unless it is expressly stipulated in the marriage-contract that the provisions there made shall be in lieu of all legal rights. There is no such clause in this contract, so that on the authority of the *Breadalbane* case Mrs Dickson is not barred from claiming legitim; and I agree in all that your Lordship has said as to the construction of the deed, and as to the provision in question not being of a testamentary character.

If I had had any doubt in coming to that conclusion, I should have been disposed to hold that Lord Barcaple, in his interlocutor of 19th November 1867, dealt with the whole question here raised. That decision was, I think, pronounced in a case between substantially the same parties as those who are here competing, and it is there distinctly laid down that there are no grounds on which it can be held that the provisions made by Colonel Somerville for Mrs Dickson in her marriage-contract were to be in full of her claim of legitim, and that she was not barred by the acceptance of those provisions from claiming legitim. At the date of that interlocutor there had been no actual exercise of the power given to Mrs Dickson; but she had been drawing the liferent provisions for years, and it was pleaded that that circumstance barred her from claiming legitim. That contention was, however, negatived by Lord Barcaple, and I think that the word “provisions” used by him included the power of testing reserved to Mrs Dickson in the contract. The words of the deed so describe it, for the clause begins with the words, “but under this provision.” I therefore think that the question is *res judicata* as between the parties in this case.

LORD SHAND.—The view maintained by the reclamer is that Mrs Dickson having claimed her legitim she has no longer power to execute any testamentary deed affecting the £4000 specially mentioned in her marriage-contract. It is not disputed that she had right to take legitim, but the question raised is whether by taking legitim she is barred from testing with regard to the sum of £4000. Now, there is nowhere in the contract any exclusion of legitim. The two rights are both open to her on the face of the deed. The clause confers a right on her—the power of testing on £4000—which is just as much a provision to her as any other provision in the deed. It was a valuable power, and in an onerous deed of this kind it appears to me to have been irrevocable, and in no sense testamentary only.

Was there any condition, implied or expressed, that if Mrs Dickson tested on this £4000, she should forfeit her right to legitim? I can see nothing of the kind in the deed. All that Colonel Somerville provided was that in the event of her not dealing with that sum, and if there were no children of the marriage,

it should fall back into his estate. I am therefore clearly for adhering to the No. 145. judgment of the Lord Ordinary.

It would have made no difference in my opinion if the provision of the £8000 had been a direct legacy in favour of a person named, which was put by way of illustration by Mr Asher. I think Mrs Dickson, in that case, would still have been entitled to do what she has done, because the exercise of the power has not been made conditional on her not claiming legitim.

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On the question of *res judicata*, it rather appears to me that the point was not determined by Lord Barcaple. All that he decided was that there was nothing to prevent Mrs Dickson from claiming legitim. A different question has been raised here, viz. :—whether having claimed legitim, she had power, nevertheless, to exercise the right of testing to the extent claimed.

LORD ADAM.—It is clear that this right of testing which was conferred on Mrs Dickson was a valuable right, and was a matter of stipulation between the parties to the marriage-contract. I am of opinion that that power was not in any view a testamentary provision. If that is so, the parties are of opinion, and I think rightly, that the effect was to remove this £4000 from the legitim fund, and, therefore, there was left only £4000 available for that fund. It is not disputed that Mrs Dickson had a right to claim legitim, and, therefore, she had a right to £2000 of this undisposed of fund. Having that right, I think she had certainly right to test on £4000 of her father's estate. The two rights are quite distinct, and having them both why should she not exercise them both—under the contract her right to test on £4000, and under the operation of law to claim the £2000? I think there is no question of approbate and reprobate in the case.

In reference to the question of *res judicata*, though in one sense this question did not arise before Lord Barcaple, yet the moment you find an opinion that this was a provision of the marriage-contract, then you must hold that the question was dealt with by him. It is in that way that the plea of *res judicata* in my opinion applies, for in that interlocutor Lord Barcaple simply restates the law laid down in the *Breadalbane* case, that when a sum is given by a father in his child's marriage-contract, and there is no specific statement that that sum is to be accepted in full of all legal claims, then there is nothing to prevent the child from both taking the provision and claiming legitim. On these grounds, I think we should adhere to the Lord Ordinary's judgment.

THE COURT adhered.

JOHN T. MOWERAY, W.S.—HENDERSON & CLARK, W.S.—Agents.

No. 146.

MRS JEAN VOST OR MACPHERSON, Petitioner.—*Murray.*
 SEPTIMUS LEISHMAN, Respondent.—*M'Kechnie—Mac Watt.*

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Parent and Child—Custody of illegitimate child.—The mother of an illegitimate child agreed to hand over the child, then eight months old, to the custody of the father for maintenance and education. Nine months thereafter she presented a petition to the Court praying for the custody of the child. The father opposed the petition on the ground that she had bound herself by the agreement to allow him to have the custody of the child. *Held* that the mother was not bound by the agreement, but was entitled to the order craved.

Opinions that the mother of an illegitimate child cannot by agreement deprive herself of the right to its custody.

1st DIVISION.
 B.

ON 13th May 1887 Mrs Jean Vost or Macpherson, wife of Finlay Macpherson, Edinburgh, presented a petition praying the Court to find that she was entitled to the custody of her illegitimate child, Septimus Rollo Leishman Vost, and to ordain Septimus Leishman, the father of the child, and Mrs Lawrie, Alloa, with whom it was living, to deliver the child to her.

She averred "that on 13th November 1885 the petitioner, Jean Rollo Vost or Macpherson, who was then unmarried, gave birth to an illegitimate male child, of which Septimus Leishman, residing in Dollar, son of the late James Leishman, C.E., Dollar, was the father. The said child was named Septimus Rollo Leishman Vost. The said Septimus Leishman admitted the paternity, and on being called upon to pay aliment for said child, he, on or about 3d August 1886, offered to take, and did take, the custody and charge thereof in lieu of payment. The petitioner is now desirous of resuming the custody and control of her said child, and has called upon the said Septimus Leishman, through his agents, Messrs Wallace & Kier, writers, Alloa, to deliver up the child to her, but this is refused. The child is at present living with a Mrs Lawrie at the lodge of Greenfield House, Alloa, who, acting under the orders of the said Wallace & Kier, declines to give up the child to the petitioner. Mr Leishman never visits the child, and has no home to take it to. He is at present in Australia or elsewhere furth of Scotland, and his address is unknown to the petitioner. The petitioner believes and avers that her said child is seriously suffering in health from the want of due attention and nourishment, and that its life will be endangered if it is not delivered up to her without delay."

Mr Leishman, who was absent from Scotland, lodged answers, in which he stated,—“The said respondent was not anxious that the said child should be taken care of by the petitioner; and when application was made to him for aliment, his agents wrote to the petitioner's agents proposing to relieve her of the custody of the child; and after some negotiations an agreement was come to between the petitioner and the said respondent, whereby the petitioner agreed to hand over, and she did hand over, at the request of the said respondent, the said child to Mrs Lawrie, presently residing at Greenfield Lodge, Alloa.* Mrs Lawrie is the widow of a Mr Lawrie, sometime draper in Alloa. She is a most

* On 10th July 1886 Mr Leishman's agents wrote to Miss Vost's agents:—“We have submitted to Mr Leishman your letter to us relative to the amount of aliment to be paid by him for Miss Vost's child, and have now received his instructions on the subject. Mr Leishman is prepared to relieve Miss Vost of all expenses for the child's maintenance and education, &c., provided she consents to Mr Leishman having the custody of the child; and should she agree to that, Mr Leishman will not only take care that it be placed in charge of some

respectable person, has one child of her own, and resides in a healthy locality near Alloa. The said child was handed over, in pursuance of that agreement, by the petitioner to Mrs Lawrie, who had gone to Edinburgh to receive it. Mrs Lawrie has had the care of the child since, and its aliment is provided solely by the respondent, Mr Leishman. The petitioner has never visited her child since Mrs Lawrie received the custody of it. The said child was in a weakly state of health, and it does not appear to have been well attended to when in the custody of the petitioner.* . . . Some time subsequent to the delivery of the child to Mrs Lawrie the petitioner was married to Mr Finlay Macpherson, who is the son of a Free Church clergyman, but who has no profession or calling himself. He has no means, and he does not earn any, but lives with the petitioner, presumably upon the damages recovered by her from the respondent, Mr Leishman. The petitioner is the mother of another illegitimate child."

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Argued for the petitioner;—The law as regarded the right of a mother to have the custody of her illegitimate infant was quite settled. She had an absolute right while the child was of tender years.¹ She admitted that there might be circumstances which would entitle the Court to break through the general rule, but there would have to be very special averments as to the unfitness of the mother to take care of the charge. Here the averments were of the most general kind, except that the petitioner was mother of another illegitimate child. That child had, however, been born before the child whose custody she now sought, and she had now married its father. The agreement which it was alleged she had entered into as to giving up the custody was, in the first place, only temporary, and, in the second place, was out of her power to make. Her right to

competent person, but will also arrange for Miss Vost seeing it at short and stated intervals, in order that she may be satisfied that it is properly attended to. Should, however, Miss Vost insist upon retaining the custody of the child herself, which we admit she is entitled to claim at present, Mr Leishman is not disposed to pay for its aliment more than the sum which is usually awarded for that purpose, and we think that the aliment stated by you is considerably in excess of the amount usually fixed by the Court, which runs from £6 to £10 per annum."

On 12th July Miss Vost's agents answered as follows:—"Dear Sirs,—We are in receipt of your letter of the 10th instant. Miss Vost is willing to hand over the child to Mr Leishman for maintenance and education; and so soon as a satisfactory place of residence has been procured by Mr Leishman for it, she will be prepared to give the child to anyone whom he may send for it to 108 George Street here. You had better give us a day's notice before the child is sent for; and you will understand that this arrangement is made upon the assumption that Miss Vost is to have access to the child at short stated intervals, in order that she may be satisfied that it is properly attended to. We are instructed to press for the inlying expenses and aliment due to this date, amounting to the sum mentioned in our former letter. The rate of aliment mentioned by you is altogether too low, and we hope that you will see your way to advise Mr Leishman to pay the sum we name, and so terminate this unpleasant matter."

* The medical certificates went to shew that the child was delicate, but that every care was being taken of him at Mrs Lawrie's.

¹ Erskine, i. 6, 56—see Lord Ivory's note for summary of older cases; Goadby v. McCandys, July 7, 1815, Fac. Coll.; Corrie v. Adair, Feb. 24, 1860, 22 D. 897, 32 Scot. Jur. 377; Shearer v. Robertson, Nov. 29, 1877, 5 R. 263; Baie v. Steven, Dec. 5, 1863, 2 Macph. 208, Lord Justice-Clerk, p. 222, 36 Scot. Jur. 103; Weepers v. Kirk-Session of Kennoway, June 20, 1844, 6 D. 1166, 16 Scot. Jur. 507; Kidston v. Smith, Dec. 16, 1773, 5 Br. Supp. 390.

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the custody of her child was a natural right, and she could not contract herself out of it. The law put the mother's right to the illegitimate child on precisely the same ground as the right of a father to his legitimate child. Both relations rested on natural right, and both involved a duty of which the parent could not discharge him or herself. The case of *Goadby* resembled the present in being a case where the Court ordered that a child should be given back to the custody of the mother.

Argued for the respondent;—The general law, as stated by the petitioner, was conceded; but the peculiarity here was the agreement into which the mother had entered. There had been no change of circumstances since the date of the agreement, and it could not be doubted that it was more for the interest of the child to live with its father. He had property to the extent of £12,000, and he had left the *universitas* of his estate to the child in the event of his dying before he reached England. There was no case in Scotland where an illegitimate child had been taken out of the custody of the father and given to the mother when he had obtained it without fraud or fear. In *Goadby's* case the father was dead, and the question was between the mother and the father's relatives. In England Lord Kenyon had indicated an opinion that where the father had once got the child without using fraud or force, he would be allowed to keep it.¹

LORD PRESIDENT.—It appears to me that the arrangement made between the parties as to the custody of this child was very judicious in the circumstances, and I cannot help regretting that the petitioner should desire to put an end to it. But all that we have to decide is whether she has a right to do so. The right of a mother to the custody of her illegitimate infant is no doubt absolute, and in all ordinary circumstances it must be enforced. The putative father has no right over it at all. The peculiarity of this case is that an arrangement was entered into under which the child was to be boarded out at a respectable house, and the father was to provide the funds for that being done. Now, I do not think that that arrangement is binding on the petitioner as a permanent agreement; whether it is binding on the putative father is another question, which it is not necessary to settle. It is not binding on the mother, because it is an interference with a legal right which she has consented to, but without providing that the arrangement should be permanent. Even had there been an express stipulation that the arrangement should be permanent I should have entertained very great doubt whether the mother could be held to have effectually bound herself. As things are, I have no doubt that we should grant the prayer of the petition.

LORD MURE.—The mother's right over her illegitimate child is absolute, and the putative father has no right over it at all, at all events in the ordinary case. The only question here is whether the arrangement set forth is to be held to preclude the mother from reassuming the custody of her child. I agree that that arrangement was a judicious one in the interests of the child, but I cannot come to any other conclusion than that the mother has a right to come here and say she is entitled to break through the agreement, and to claim the custody.

LORD SHAND.—On the facts before us I am clear that there is no ground for the statement of the petitioner that the child "is seriously suffering in health from the want of due attention and nourishment, and that its life will be

¹ Rex v. Moseley, 1804, 5 East. 224.

endangered if it is not delivered up to her without delay." If that statement is rash and unwarranted,—and I think it is clear the child is well cared for,—it would be well that it should be left where it is. That, however, is not what we have to decide. The argument of the petitioner is based on legal right, arising from the natural relation of mother and child, which gives her the right to the custody of her child, and notwithstanding that she agreed that the putative father should have the child, I think she is entitled to break her agreement, and demand that it should be handed over to her custody.

I would only qualify what I have said by adding that, no doubt, even the putative father of an illegitimate child would be entitled to claim and probably to get the custody of the child if he could shew that the child would certainly suffer by being left with the mother, for the paramount consideration is the benefit of the child itself; but no such averment is here made, and therefore I think we have no alternative but to grant the prayer of the petition.

LORD ADAM.—It is not disputed that the right of the mother of an illegitimate child to have the custody of it is absolute, nor that in the present case, if the child had been actually in her custody, there is nothing in the mother's character which would have entitled anyone to interfere to take it away. The case then comes to be whether the mother is barred from claiming the child by the agreement founded on. I do not know how the case would have been had the mother absolutely bound herself in all future time not to claim the custody; probably such a contract would not have been binding, but we have not that case here. The arrangement here alleged is merely temporary, and I think she can set it aside whenever she chooses.

THE COURT found the petitioner entitled to the custody of her illegitimate child, and continued the cause for arrangements to be made with regard to its being handed over to her.

MACANDREW, WRIGHT, ELLIS, & BLYTH, W.S.—WILLIAM B. GLEN, S.S.C.—Agents.

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Macpherson v.
Leishman.

HANNAH BRADY AND OTHERS, Pursuers (Appellants).—*Rhind—*
A. S. D. Thomson.

No. 147.

JOHN PARKER, Defender (Respondent).—*Darling—G. W. Burnet.*

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Parker.

Reparation—Liability for safety of premises to persons entering manufacturer's store.—A man, on a winter evening, entered the store of an oil manufacturer (who had an office in another part of the town for business purposes), desiring to buy old barrels for firewood. Being directed by one of the employees to go upstairs to a clerk, he went up, and was informed by the clerk that (as was the fact) the manufacturer never sold old barrels. On his way back he was killed by falling into the well of a hoist in the store. This hoist was situated in the course which a person unacquainted with the locality (as the man in question was) would naturally take in leaving the clerk's office, unless the well was either fenced or lighted, which it was not at the time, though there were the means of doing both. In an action by the representatives of the deceased against the proprietor of the store, *held* that the deceased entered the premises for a legitimate purpose, that his death was attributable to the negligence of the defender in failing to light and fence the well of the hoist, and that therefore the defender was liable in damages to the pursuers.

THE works and store of John Parker, oil-merchant and soap manufacturer, Glasgow, were situated between Stirling Street and Port Dundas Road there, and had entrances from both these thoroughfares. The main entrance was that from Port Dundas Road, which was the address in the directory; that from Stirling Street was a cart entrance, with a

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large wooden gate, having a small wicket-door for foot-passengers in the centre. The Stirling Street entrance was the direct access to the store portion of the premises, which had two doors, near each of which was a hoist for raising goods from the cellars. The platforms of these hoists were worked by hydraulic pressure, and the wells had a depth of ten or twelve feet. When the platform was flush with the passage it completely covered the well, and as an additional precaution against persons falling into the well, there were pillars at the corners of the well, with chains connecting them. There was also a lamp close to each of the hoists. The commercial branches of Mr Parker's business were carried on in another part of the city, but at the stores there was a clerk to check the delivery orders, who had an office in the stores upstairs. A person passing between this office and the Stirling Street entrance might naturally take a course by which he would fall into one of the hoists (if it was unprotected), as it was situated very near the door leading to the office stair, and on the Stirling Street side of that door. A person going to the Port Dundas entrance would naturally pass in the other direction into the manufacturing portion of the premises, and thus avoid both the hoists.

About five o'clock on the evening of 3d December 1885 Francis Brady, an ironfounder, entered the premises by the Stirling Street wicket-gate, which had immediately before been opened by Anderson, one of Parker's carters, in order that he might go inside and open the large door to admit his cart. Brady in entering remarked to Anderson (who made no objection to his going in), that it was dark. After Brady had passed the hoist near the clerk's office he met another of Parker's employees named Norrie, whom he asked whether they had any old barrels for sale as firewood. Norrie referred him to the clerk, and accordingly Brady went upstairs to the clerk, by whom he was informed that they never sold barrels—as was the fact. On coming down Brady at first went in the direction of the Port Dundas Road entrance, but suddenly turned round and went towards the Stirling Street entrance, by which he had come in. In passing the hoist he fell in, and was so severely injured that he died shortly afterwards. At the time of the accident the platform of the hoist was at the bottom of the well, the chains were off the pillars, and the lamp was not lighted.

Brady's widow and children brought an action in the Sheriff Court of Lanarkshire against Parker for damages on account of the accident, alleging that it occurred through Parker's fault in not having the hoist "sufficiently protected against possible danger to those coming out and in to his works."

In defence Parker pleaded;—(2) The defender not being responsible for the safety of the said deceased, he having entered the defenders' works of his own accord, and solely for his own interests, ought to be assolizied. (3) The defender having used all due precaution for the protection of those legitimately in his works, ought to be assolizied, with expenses. (5) In any event, the deceased having, by his own negligence, materially contributed towards the accident libelled, the pursuers are barred from insisting in this action.

A proof was allowed. The foregoing narrative expresses the material results of the evidence. The only matter of fact of importance in controversy at the hearing in the Court of Session was as to the right of persons to enter the defender's stores and manufactory—particularly by the Stirling Street entrance. On that point Ferguson, the clerk at the stores, gave this evidence,—“My duties were to get orders from the office, make them up according to sample, and send them out to the various addresses. . . . Any sales that are carried through are effected at the office.

. . . The only cash transactions I have are petty transactions. . . .” No. 147.
 At Stirling Street “there is no sign inviting people to enter. Mr Parker’s name is not on it. It is a plain painted gate. (Q.) Do you discourage people from coming into the work as much as possible? (A.) If we saw anyone who looked as if he had no business there we would immediately put him out. Carters and other people come in that way with goods, and so on. There are a lot of things lying about that could be easily picked up if we admitted any person. It is not intended that strangers, or people wishing to buy or sell, should come there at all. When travellers come in to me I send them down to the counting-house.” The defender’s own evidence was to the same effect. On the other hand, Norrie, the man who told Brady to go up to the clerk, deponed,—“People often come in by this entrance [Stirling Street]. The reason I sent him up to the clerk was that I had nothing to do with what he was inquiring about. I saw the clerk at the top of the stair. (Q.) And you thought him the proper person to give him instructions? (A.) I could give him none.”

It did not appear that the hoist as it was when the accident took place was considered to be in a dangerous condition for the defender’s employees, but Norrie, Anderson the carter, and M’Cartin, the defender’s foreman, all deponed that it was a place into which a stranger unacquainted with the locality might readily fall.

On 29th July 1886 the Sheriff-substitute (Spens) pronounced an interlocutor in which (after findings in fact) he assolized the defender, founding mainly on the case of *Walker v. The Midland Railway Company*.*

On appeal the Sheriff (Berry), on 18th March 1887, adhered.

The pursuer appealed, and argued;—The deceased entered the defender’s premises on a legitimate errand, viz., to buy old barrels for firewood, and it did not make his errand less legitimate that he was mistaken in supposing that the defender sold barrels. That took the case out of *Walker v. The Midland Railway Company*,¹ on which the Sheriffs had proceeded, because there it was held that the deceased had no legitimate reason for being in the place in which he met his death. The principle of that case was identical with the present pursuer’s contention, for had the opinion of the Judges been that the deceased there had legitimate grounds for being where he was, the judgment would have been for the plaintiff. That principle was supported by other authorities.² (2) The deceased

* “NOTE.—. . . This case has from time to time been put off in order to have the official report of the case of *Walker v. The Midland Railway Company*. That case had just been reported in the newspapers a few days after the diet of proof before me. It appears that no report in the ordinary law reports has been given, the explanation being, I understand, that the case was regarded by the reporters as one of special circumstances. The case, however, is reported in the periodical issue known as *The Times Law Reports* (which report, it may be noted, is reported by a barrister-at-law), vol. ii. p. 450. It appears, from that report, that a gentleman in the St Pancras Hotel, in the middle of the night, intending to go to a w.-c., went into what was called a service-room in the hotel, where there was a sound of a drip of water, and fell down the cavity of a hoist in this room, whereby he was killed. It was held by a majority of the Judges in the House of Lords that there was no liability. I do not intend to go into details of this case, but I think the report referred to clearly shews that if there was no liability for the deceased Smith falling down a hoist in premises where he was paying for his living, *a fortiori*, there can be no liability in this case, where the deceased, at his own hand, went into premises which the defender did not open to the public.”

¹ See excerpt from the Sheriff-substitute’s note, *supra*.

² *Indermaur v. Dames*, Feb. 26, 1866, L. R., 1 C. P. 274, aff. Feb. 6, 1867, L. R., 2 C. P. 311; *White v. France*, June 7, 1877, L. R., 2 C. P. Div. 308.

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entered the defender's premises on the invitation of the defender. In the first place there was no notice of prohibition against his entering, such as the words "No admission" over the door. Then he entered without objection on the part of Anderson the defender's carter, and was directed by Norrie the defender's employee to go to the clerk, who also expressed no disapprobation. It must therefore be held that he had the authority of the defender to enter, and that implied that reasonable precautions would be taken for his safety;¹ such precautions here were wanting. (3) The hoist was in an unnecessarily dangerous condition. It was not in use, and the platform therefore ought not to have been at the bottom of the well and the chains off.² Further, the lamp should have been lit.³

Argued for the defender;—(1) This was not the case of a shop, which the public were invited to enter; it was a private place—a large manufactory and store, where no commercial transactions were carried on. The deceased therefore had no legitimate purpose in going to such a place to buy old barrels. The present case was *a fortiori* of *Walker v. The Midland Railway Company*,⁴ where the deceased was a guest in the hotel, and also of *Batchelor v. Fortescue*,⁵ where undoubtedly the deceased had a right to be in the works, but the *ratio* of the judgment was that he was not there on the owner's business. Similarly in *Indermaur v. Dames*,⁶ it was only because the injured person had gone into the works in pursuance of a contract with the householder that he was held entitled to recover. There was nothing of that sort here. The deceased was a mere volunteer or licensee, as it was expressed in England, who had entered private works by a private and back entrance in the dark for purposes of his own. If he chose so to enter, he entered at his own risk.⁷ As it was put in one case; if it was so dark that he could not see, he ought not to have proceeded along a passage which was strange to him—if there was light enough, he ought to have seen the danger.⁸ (2) There had been no invitation to the deceased to enter the premises—particularly by a private entrance which had not even the name of the proprietor on it. The only tangible ground for maintaining that there had been was the circumstance that Norrie had directed the deceased to go to the clerk. But it was to be observed that the deceased had already entered, and had indeed passed the source of danger, before he met Norrie, and further it could not be held that a chance conversation with an employee who was ignorant of the details of the business amounted to an invitation to enter binding on the defender. (3) The works were not in an unnecessarily dangerous condition. They were safe enough for the employees who knew the locality—and the defender's obligation to the deceased, if it existed at all, was no higher than towards his employees.

LORD JUSTICE-CLERK.—When I first read the judgments of the Sheriffs I

¹ *Smillies v. Boyd*, Dec. 2, 1886, 14 R. 150; *White v. France*, *supra*; *Sarch v. Blackburn*, Feb. 24, 1830, 4 Car. and Payne, 297.

² *Cairns v. Boyd*, June 5, 1879, 6 R. 1004.

³ *Southcote v. Stanley*, June 4, 1856, 1 H. and N. 247, *per* Baron Bramwell, p. 250.

⁴ See excerpt from the Sheriff-substitute's note, *supra*.

⁵ *Batchelor v. Fortescue*, June 22, 1883, L. R., 11 Q. B. Div. 474.

⁶ *Indermaur v. Dames*, Feb. 26, 1866, L. R., 1 C. P. 274, *aff.* Feb. 6, 1867, L. R., 2 C. P. 311.

⁷ *Gantret v. Egerton*, Feb. 11, 1867, L. R., 2 C. P. 371; *Balfour v. Baird*, Dec. 5, 1857, 20 D. 238, 30 Scot. Jur. 124; *Addison on Torts*, 6th ed. 314.

⁸ *Wilkinson v. Fairrie*, Nov. 25, 1862, 32 Law Jour. Excheq. 73.

formed the impression that they proceeded on somewhat narrow grounds, and now, after having heard the case very fully and ably argued, I find that my original impression is confirmed.

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The facts of the case are of the simplest nature. The defender, a soap manufacturer, has a store with two entrances—one from Port-Dundas Road and the other from Stirling Street. The Port-Dundas entrance is the usual entrance, that from Stirling Street has a wicket gate, but it is substantially a cart entrance. On the 3d December 1886, the deceased, whose representatives are the pursuers here, went into the defender's premises at about five o'clock in the evening—that is to say, when it was almost dark—and he went in by the cart entrance, through which he obtained access without meeting with any obstacle. After entering he saw one of the defender's employees, to whom he mentioned that his errand was to see whether they had any empty barrels for sale as firewood, and he was referred to the clerk upstairs. He accordingly went upstairs; on coming down he appears at first to have intended to leave by the Port-Dundas gate, but he changed his mind, turned round, and went towards the gateway by which he had come in. While doing so he fell into a hatchway, which had been left open without any protection to prevent people from meeting with such a disaster.

This action is brought by the representatives of the deceased, in order to recover damages, on the ground that the hatchway, which was in the passage from the Stirling Street entrance to the house, was left open without anything to protect it, or to prevent such an accident as here occurred, although there is a platform which if it had been raised would have made a cover for the hatchway flush with the rest of the floor, and although there are also chains which if placed in position on the pillars at each corner of the hatchway, would have made it safe against accidents like this. It is said on the part of the defender that he was under no obligation to see to the safety of persons in the position of the deceased, in the first place, because the deceased had not entered by the usual entrance, and in the second place, because he had come about his own affairs, and not about anything with which the defender had any concern. I do not think that these two arguments make any difference on this question if the defender is liable otherwise. If the deceased had been the most ordinary customer in the world, and if he had gone in by the other entrance, I think the result would have been just the same. But I am not prepared to say that this man in visiting the store as he did for purposes of his own was not exactly in the position of an ordinary customer. He came to see whether the defender had a particular article of merchandise for sale. It turned out that the defender had none of the article—at least none for sale—but the deceased believed that he might have. I think too that if these doors were kept open for the purposes of the ordinary traffic in which the proprietor was engaged, all the customers of the defender had a right to come in by the one door as much as by the other. Therefore, on this branch of the case, I am of opinion that if there was an obligation on the part of the defender towards any of his customers, it existed towards the deceased. But, in the second place, I am of opinion that there was such an obligation undertaken by the defender in this place of public merchandise. It is a private house, no doubt, in one sense, but is open, as all shops are open, to those of the public who have any dealings with the proprietor, or who wish to have dealings with him, and accordingly I am of opinion that the proprietor is bound to have his through way safe for customers or intending cus-

No. 147: tomers to come and go upon, and as in the case of the deceased he neglected to do so, I think he is liable in damages.

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LORD YOUNG.—I am of the same opinion. The premises here have two entrances, and I think on the evidence that both are open to the public. In the line of persons coming in or leaving by one of these entrances—that leading to Stirling Street—is a store with two doors. At each door is a hoist leading to a cellar beneath, and the platform upon which the goods are raised or lowered serves also as a cover for the vacant space. When this accident happened to the pursuer's husband, the platform of the hoist nearest the Stirling Street entrance was at the bottom, not at the top, of the vacant space, which consequently was uncovered, and as it was quite dark that was manifestly dangerous. It is true that there is a lamp immediately above the hoist, but as it was not lighted at the time it might as well not have been there. There are also four pillars, one at each corner of the hoist, with chains to connect them, but as the chains were off, they too, with the pillars, might as well not have been there. The place therefore when the accident occurred was open, unlit, and unprotected, and it is a place, as several of the witnesses inform us, into which a person unacquainted with the locality might readily fall when it is in that open, unlit, and unprotected condition.

Now, the first question which I put to myself in this state of matters is, Was it a right or a wrong state of matters, irrespective of any question of liability to any particular individual? Was it right or wrong to leave such a source of danger in a passage along which people were coming and going "with goods and so on," as one of the witnesses puts it? I have no hesitation in saying that it was quite wrong. No reason or excuse can be suggested as a palliation for leaving this source of danger, which might be worth as much as a man's life—was worth as much, as this case shews. Then what is the defence? The pursuer's husband went in to see if he could get any old barrels for firewood. They had none to sell—it seems they did not sell any—and it is said that the pursuer's husband must therefore be taken as having no right to enter the defender's premises. Now, he certainly had no right which he could vindicate against the proprietor, who had a perfect right to exclude him if he pleased. But in entering this open door for the purpose which he had in view, was he doing what was right or wrong? I have no hesitation in saying that his conduct was not wrong. I think that there was nothing wrong in his entering these premises, or in his making the civil inquiry which he made about the firewood. I have therefore no difficulty in concurring with your Lordship in thinking that we should recall the 'Sheriffs' interlocutors.

LORD CRAIGHILL.—I concur in the result at which your Lordships have arrived. The defender maintained that the deceased was improperly in the premises on the evening in question, that if he had any right to enter at all he came in by the wrong door, and that in any case the defender was under no obligation to provide for his safety after he had entered. I do not think it necessary to determine any of those preliminary questions. Brady, the deceased, entered upon a perfectly lawful errand. Norrie, one of the defender's servants, sees him, but does not challenge him—does not tell him that he has no right to be there, or that he has come in by the wrong door, and that he must leave. On the contrary, when the deceased asked him whether he could buy any old barrels for firewood, Norrie told him to go upstairs to the clerk. Surely that

was an authority to do that which he was told to do, and implied that he might do it in safety. He got upstairs in safety, and was on his way back when he met with this accident. I think that there was here what amounted to an invitation to enter, and consequently that the defender was under an obligation to have things in a reasonably safe condition for the person so invited to enter, both on entering and coming back, and that as things were not in such a reasonably safe condition, the defender must be held liable in damages for the injury sustained by the deceased.

LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Find in fact (1) that on the occasion libelled the deceased Francis Brady entered the premises of the defender for a legitimate purpose, and when leaving the same fell into the well of the hatch or hoist mentioned in the record, and thereby sustained injuries which caused his death; (2) that the said well was not lighted nor fenced; and (3) that the death of the said Francis Brady is attributable to the fault and negligence of the defenders in failing to light and fence the well: Find in law that the defenders are liable in damages to the pursuers, the widow and children of the deceased, accordingly: Therefore sustain the appeal; recall the judgments of the Sheriff and Sheriff-substitute appealed against; assess the damages at £250, payable to the persons in the proportions following, viz.:—To the pursuer Hannah Sweeney Brady, widow of the deceased, £200; to each of Sarah Ann Brady and Thomas Brady, his children, £16, 3s. 4d.; and to the said Hannah Sweeney or Brady, as tutrix to Hannah Brady, also child of the deceased, £16, 3s. 4d.: Ordain the defenders to make payment of the said sums to the pursuers respectively: Find the pursuers entitled to expenses in the inferior Court and in this Court: Remit," &c.

WILLIAM OFFICER, S.S.C.—GEORGE ANDREW, S.S.C.—Agents.

WILLIAM REID, Pursuer (Respondent).—*J. C. Thomson—Watt.*
REID BROTHERS, Defenders (Appellants).—*Murray—Mc Lennan.*

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June 8, 1887.

Innominate contract—Proof—Parole—Guarantee by commission agent of a minimum price.—Question, whether, in an action of accounting between a principal and a commission agent, it was competent to prove by parole that the agent, in order to retain his principal's custom, had agreed in a particular transaction to pay a minimum sum as the price of the goods to be sold, whether that sum should be realised on sale or not.

Opinions per Lord Justice-Clerk and Lord Young that it was not; *per* Lord Craighill and Lord Rutherford Clark *contra*.

IN June 1886 William Reid, herring merchant, Stettin, who was in the habit of advancing cash against consignments of herrings made to him by fishcurers in Scotland, brought an action in the Sheriff Court at Wick against Reid Brothers, fishcurers, Keiss, for payment of £147, 12s. 4d., being the alleged balance due by them to him on an advance of £400 after deducting the prices realised by the herrings against which the advance had been made.

In defence, Reid Brothers averred:—“(1) In the month of September 1885 the defenders consigned a cargo of herrings from Shetland, *per* ship or vessel, ‘Wild Wave’ . . . the pursuer agreeing to make an advance of £400 to account of the consignment. . . . (2) In the

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month of October 1885 the pursuer's son, William Reid, Stettin, as holding himself to have been a partner of and as representing the pursuer, came to Wick, and the defenders having at that time only received £200 of the foresaid £400 agreed on, he, the pursuer's son, was annoyed at the delay, and non-implementation of the said arrangement, as condescended on in article 1 of the defenders' statement, and assured the defenders that the balance of the amount would be obtained forthwith. (3) When the pursuer's son was in Wick in the said month of October he knew that the defenders had a cargo of herrings shipped on board the vessel 'Swift' ready for dispatch, and in consequence of the disappointment as to the £400, the defenders were to send the cargo to another merchant. The pursuer's son, however, gave the verbal assurance that the balance of the £400 would be forthwith received, and he further agreed to give at least a free price of 26s. per barrel of crown branded full herrings, and 12s. per barrel of spents, mixed or small branded herrings, forming the 'Swift's' cargo. Upon these terms the defenders agreed to consign the 'Swift's' cargo to the pursuer, the pursuer in the meantime making a payment to account of 20s. on full herrings, and 10s. on spents, mixed or small herrings, per barrel." The defenders then set forth an account in which, giving effect to the alleged agreement as to the minimum prices of herrings, a balance of £119, 10s. 9d. was brought out as due to the defenders.

The defenders pleaded;—(2) The pursuer having agreed to pay the defenders for the herrings sent *per* the 'Swift' at the minimum clear price stated on record by the defenders in article 3 of their statement, the defenders are entitled to payment thereof as arranged and agreed on.

A proof was allowed.

On 17th February 1887 the Sheriff-substitute (Harper) assoilized the defenders.

On appeal the Sheriff (Thoms), on 23d March, recalled that interdictor, and gave decree as concluded for.

The defenders appealed.

The arguments at the hearing were mainly directed to the question whether the agreement set forth by the defenders in article 3 of their statement could competently be proved by parole evidence.¹

LORD JUSTICE-CLERK.—The agreement alleged here is one of a somewhat eccentric and unusual kind. It appears that the defenders, who are fish-curers at Wick, consigned a certain quantity of herring to the pursuer, who is a fish-dealer at Stettin, to be sold by him on commission, and the agreement which the defenders allege is that the pursuer undertook that the fish should bring at least 26s. and 12s. per cran, according to their quality—that they should bring these sums whatever their market price might be. In short, the agreement, if it was entered into, amounted to this, that the pursuer was to give the defenders a bonus in return for the consignment of their fish, as he was indifferent about making a profit on this particular transaction, provided he could preserve the trade connection which the defenders were able to give him. That is an object which we can easily conceive might be of so much importance as to justify such an arrangement. It is said that such a bargain may be proved by parole evidence, and that it has been proved by the parole evidence which we have here.

¹ *Authorities.*—Mercantile Law Amendment Act, 1856 (19 and 20 Vict. cap. 60), sec. 6; *Edmonston v. Edmonston*, June 7, 1861, 23 D. 995, 33 Scot. Jur. 514; *Forbes v. Caird*, July 20, 1877, 4 R. 1141; *Moscrip v. O'Hara*, Oct. 23, 1880, 8 R. 36; *Ex parte White*, Feb. 18, 1871, L. R., 6 Chanc. App. 397; *Erskine*, iv. 2, 20; *Bell's Princ.* secs. 248, 249, 286; *Dickson on Evidence*, sec. 599.

(His Lordship then proceeded to consider the evidence, and came to the conclusion that the parole evidence did not instruct the alleged agreement. His Lordship then continued.) But the question arises, and was argued to us, whether such an agreement can competently be proved by parole evidence. I have an impression that it cannot. I think it is a bargain with a condition which is repugnant to the nature of the original contract, like a contract of sale without a price. I think, therefore, that it falls within the rule of contracts of an unusual and anomalous character, which can only be proved by writ or oath.

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LORD YOUNG.—I am of the same opinion. The defender's case is founded upon this special bargain—which Mr Murray represented to us as entered into on this occasion only and in order to serve a particular purpose—a bargain, namely, by which the pursuer agreed to make good to his principals 26s. and 12s. per barrel for different qualities of herring, whatever he sold them at. Now, I am inclined to agree with your Lordship in thinking that such a bargain is an unusual and anomalous one, and one accordingly which our law will not sustain unless it is supported by the writ or oath of the party disputing it; but I should desire, if possible, to avoid deciding that question, and I am of opinion, even if we may competently regard the parole evidence here, that the agreement on which the defenders found has not been proved.

LORD CRAIGHILL.—I agree with your Lordship in the result, but if it were necessary in order to come to a decision in the case to give a final opinion on the competency of parole evidence here, I should be obliged to come to a different conclusion from your Lordships. The pursuer undertook to dispose of the defenders' herrings as their agent, and we have here a dispute regarding one of the terms of that contract. The proof therefore relates to the proof of these terms, and is incidental to the proof of the contract itself. You may call it an out-of-the-way contract or an extraordinary contract, but if you are entitled to inquire by parole evidence whether the contract itself existed or not—and it is not disputed that you are—then by parole evidence also may you find out whether any of the conditions which are represented to have formed part of the contract really did so. I do not give that as my final opinion. I only say if it had been necessary to express such an opinion, it would have been that just stated. I however agree with your Lordships in thinking that the parole evidence fails to shew that the bargain alleged by the defenders was that which the parties truly entered into. (His Lordship then considered the evidence.)

LORD RUTHERFURD CLARK.—If this question were to be decided entirely by the parole evidence, and on the footing that written evidence is not requisite, I should incline to the opinion that the defence has been established. There remains the further question whether the defenders are entitled to proceed on parole evidence only, or whether alleging an agreement like the present, they must prove it *scripto* or by the oath of their adversary. As I have no voice in the decision of the case I shall refrain from expressing an opinion on this interesting question, contenting myself with saying that my impression rather is in favour of admitting parole evidence.

THE COURT pronounced the following interlocutor:—"Find in fact (1) that the account-current between the pursuer and defenders libelled exhibits a balance of £147, 12s. 4d. due by the defenders

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to the pursuer on account of money advanced by him to or for them on certain consignments of herrings made to him by them for sale; (2) that the defenders do not dispute the accuracy of the said account, except in so far as they allege that in consideration of receiving the said consignments the pursuer undertook to make good to them prices at the rate of 26s. per barrel for herrings of one quality, and 12s. per barrel for herrings of another quality, whether these prices were realised on sale or not, and free of all charges; (3) that the defenders have failed to prove that the pursuer came under the obligation alleged: Therefore dismiss the appeal," &c.

H. & H. Tod, W.S.—WILLIAM GUNN, S.S.C.—Agents.

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June 9, 1887.
Sinclair v.
Leslie.

Mrs ELIZA LAMB or SINCLAIR, Complainer (Respondent).—

R. Johnstone—M'Lennan.

JAMES LESLIE, Respondent (Reclaimer).—*J. A. Reid—Orr.*

Lease—Removing—Title to sue.—The estates of A were sequestrated in 1876, and his trustee sold to B his right and interest in an inn (which he held of the proprietor under a verbal lease). The trustee granted an assignation of the rents under declaration that "I have no title to the said subjects" beyond the act and warrant, and that "I will not be bound to give any, there being no written title or right either in me or in the said A, the subjects being possessed merely at the will of the proprietor." A continued in possession of the inn till his death in April 1886. In March 1886 B had raised an action of removing against him, which was in dependence at the date of his death. In May 1886 B presented a petition in the Sheriff Court, for a warrant for the summary ejection of A's widow, in which he averred that he was proprietor of the subjects occupied by the defender, and founded on the assignation as his title. On this petition the Sheriff found that A's widow had no right or title to occupy the subjects, and granted warrant for her removal. A's widow brought a suspension thereof in the Court of Session. In his answers B averred that after the date of the assignation, A occupied the subjects as his tenant under a verbal agreement to that effect. The Court (*diss.* Lord Shand, *aff.* judgment of Lord M'Laren) refused B a proof of his averments of tenancy, and suspended the proceedings complained of, on the ground that B had no title to sue the removing.

1st DIVISION.
Lord M'Laren.
B.

PRIOR to 1876 William Sinclair was tenant of an inn at Urquhart, Elgin, under a verbal lease from the Earl of Fife, who was proprietor of the ground on which it was built. The building had been largely added to by Sinclair.

In 1876 Sinclair's estates were sequestrated.

On 27th January 1877 the trustee exposed to public sale his right and interest as trustee foresaid in and to the subjects possessed by Sinclair under the Earl of Fife. That right and interest was purchased by James Leslie, brewer, Elgin, for £82. By assignation, dated 5th and 6th February 1877, the trustee, with consent of the commissioners on the sequestrated estate, made over to and in favour of James Leslie, All and Whole his, the said trustee's, right and interest in the subjects in question. The assignation contained this clause:—"And I, as trustee and with consent foresaid, assign the rents, and I declare that I have no title to the said subjects beyond the foresaid act and warrant in my favour, and that I will not be bound to give any, there being no written title or right either in me or in the said William Sinclair, the subjects being possessed merely at the will of the proprietor: And I, as trustee, and with consent foresaid, bind myself to free and relieve the said James Leslie, and his forebears,

of all ground-rent and other public and parochial burdens: And I, as trustee, and with consent foresaid, grant warrandice from fact and deed." No. 149.

On 18th March 1886, Sinclair having up to that date remained in possession of the inn, Leslie raised in the Sheriff Court of Elgin an action of removing against Sinclair. In the condescendence Leslie averred that he was heritable proprietor of the subjects, and that they were occupied by Sinclair as his tenant for the year ending Whitsunday 1886. Sinclair entered appearance in the action, but he died in April 1886. June 9, 1887.
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On 26th May 1886 Leslie raised an action in the Sheriff Court craving for warrant to summarily eject Mrs Sinclair and her family from the subjects. In his condescendence he averred:—(Cond. 1) "The pursuer is proprietor of the hotel and other premises situated in the village of Urquhart, and county of Elgin, as at present occupied by the defender, who is the widow of William Sinclair, sometime hotel-keeper, Urquhart. The pursuer's title to said premises is herewith produced. . . ." The only title he produced was the assignation above set forth.

Mrs Sinclair denied the pursuer's title, and pleaded that as she had been confirmed executor-dative to her husband, she was entitled to the *tempus deliberandi* to determine whether she should sist herself in her husband's room as defender to the above-mentioned action.

After certain procedure the Sheriff-substitute, on 16th June 1886, sustained the plea that the action was premature, and sisted the process until the expiry of the *tempus deliberandi*.

Leslie appealed to the Sheriff (Ivory), who, on 29th September 1886, pronounced this interlocutor:—"Recalls the interlocutor appealed against: Finds that the defender has no legal right or title to occupy the subjects in question: Therefore decerns; and grants warrant against the defender, in terms of the prayer of the petition."

On 7th October Mrs Sinclair presented a note of suspension.

The above facts were stated in the complainer's condescendence.

The respondent averred;—(Ans. 2) At the time of purchase the building was in the course of erection, and he paid for finishing it; he subsequently improved it. "On Sinclair's failing to pay the ground rent due in June 1883, Lord Fife's factor wrote to the respondent requesting payment, and the amount was paid by the respondent on 10th September 1883." On 19th March 1886 the respondent sold the property for £186. Lord Fife's factor agreed to grant a feu-charter to the purchaser. The respondent was recognised by Lord Fife as proprietor. He also paid the county assessments as proprietor. (Ans. 3) "Denied that after the date of said assignation, Sinclair occupied the said subjects as tenant of the Earl of Fife. Explained that, from that time, he occupied the said subjects as a yearly tenant of the respondent, under a verbal agreement to that effect with the respondent. According to said agreement, the rent payable by Sinclair to the respondent was to be £15 a-year. Sinclair was generally in pecuniary difficulties, and frequently entreated the respondent not to exact the rent, nor turn him out of the premises. In February 1883, the previous Martinmas half year's rent remained unpaid, and the respondent took out sequestration, and obtained decree therefor on 21st February 1883. At the same time, he also took out sequestration for the half year's rent then current, and obtained decree of the same date. The decrees are herewith produced. On 5th February 1883, the respondent caused a notice of removing to be served on Sinclair, warning and charging him to remove at the following term of Whitsunday. Execution of intimation of removing is herewith produced. The respondent did not proceed further with the sequestrations or removing, owing to Sinclair producing a cautioner for the rent. This was a man named Scott, a foreman on the

No. 149. railway then being constructed between Elgin and Buckie, and who was living in Sinclair's house. On Scott becoming cautioner, and the complainer; Mrs Sinclair, promising verbally to attend to the house, and pay the rent, the respondent granted the delay asked."

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The complainer pleaded, *inter alia*;—(1) The respondent has no title to sue an action of removing against the complainer. (6) The respondent's averments of ownership are not relevant for probation; and *separatim*, all parties interested in the question of ownership have not been called.

The respondent pleaded;—(2) The complainer having no legal title to occupy the subjects in question, the action is groundless, and the suspension should be refused.

Receipts for the rent of the subjects (£1, 0s. 4d.) were produced for the years 1884-85-86. These receipts bore that the rent had been received from Mr Sinclair (the last from his heirs) by the Earl of Fife's factor.

In the Valuation-roll for 1886-87, Sinclair's representatives were entered as tenants under the Earl of Fife.

On 1st February 1887, the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the respondent has no title to sue a removing in reference to the subjects libelled, and therefore suspends the proceedings complained of."*

* "OPINION.—I am of opinion that the decree of ejection complained of ought to be suspended. The defender's husband, William Sinclair, was a tenant under Earl Fife of a hotel in the village of Urquhart, which, I understand, he had erected at his own cost and risk, but to which he had no title, and no right to demand a title. On his bankruptcy in the year 1876, the trustee for William Sinclair's creditors exposed Sinclair's right and interest in the hotel and pertinents to sale, and the respondent became the purchaser. But inasmuch as Sinclair had no right susceptible of being asserted in a Court of law, the purchase, though followed by a deed of assignation, carried nothing except the right to occupy the premises as tenant until the next Whitsunday term. Sinclair accordingly remained in possession until his death in 1886, a period of nine years, counting from the date of his bankruptcy. If we count from the date of his entry to the subjects, the period of his occupation would, of course, be longer—how much longer does not appear, and is not essential to the case. On Sinclair's death his possession was continued by his widow, against whom the respondent has obtained decree of ejection before the Sheriff Court of Elgin.

"In this process of suspension the respondent avers that William Sinclair recognised his, the respondent's, right, and paid him rent for the hotel. He does not found upon receipts for rent, but he refers to two decrees of sequestration for rent which he obtained against Sinclair in the Sheriff Court.

"The question which I have at present to consider is, whether the respondent has a title to prosecute an action of removing. The title on which the respondent founds is the assignation granted to him in 1876 by the trustee for Sinclair's creditors. I have already expressed the opinion that this assignation carried nothing except the right to possess the subjects until the ensuing term. The proprietor, Lord Fife, might have given a lease, but no lease was obtained, and the assignation, not being followed by possession, came to an end at the ensuing term. I cannot hold that it was continued by tacit relocation; because I conceive that possession, actual or civil, is the foundation of every title of tacit relocation, and in the present case the possession was that of William Sinclair. The Sheriff has found 'that the defender (suspender) has no legal right or title to occupy the subjects.'

"This is very probably true in fact. But before I can reach that fact, or apply my mind to its consideration, I must first be satisfied that the person who is going to eject the actual possessor of the building has himself a title of possession. I assume, without proof, that the suspender is in possession. If she were not, the present proceedings would be inappropriate. The proprietor is not interfering. I suppose he is satisfied with Mrs Sinclair as a tenant. If he

Leslie reclaimed to the First Division. The argument of the reclaimer is fully set forth in Lord Shand's opinion, and that of the respondent in the opinions of the other Judges.

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LORD PRESIDENT.—There is no doubt that the owner of the hotel and the ground on which it is built was the Earl of Fife. How long William Sinclair was in possession of that hotel does not quite appear, but for a number of years apparently he was so. He had originally acquired the ground with some little building upon it, and he himself expended money on the erection of an hotel. This state of matters continued to subsist until the year 1876, when Sinclair's estate was sequestrated and Mr Kynoch was appointed trustee. Notwithstanding the sequestration, however, there is no doubt that William Sinclair continued in possession of the hotel. He had no title as tenant beyond a merely verbal lease. In short, he was a tenant at will; but on the faith of Lord Fife not removing him he had expended money on the building of the hotel, as I have already mentioned; and there is no doubt that if the building had been Mr Sinclair's own property it would have formed a valuable asset of his estate. But, unfortunately, he had no title to it at all. He had no title to the ground. His right could only endure till the next term; that was the only legal right he had to possession of the subjects at all. It was in the power of Lord Fife to do anything in his favour that he thought equitable and right; but, as far as the mere title was concerned, William Sinclair never had any right to that ground, or to the buildings upon it, except merely from year to year. The building was erected on Lord Fife's property, and it became the property of Lord Fife just as much as the ground itself.

Now, the trustee in Sinclair's sequestration thought he might make something of the supposed right of William Sinclair, and accordingly he persuaded the reclaimer here to give him £80 for what is called an assignation, and that assignation bears that he was to assign any right that Sinclair had; but it contains this important declaration—"And I, as trustee, and with consent foresaid, assign the rents, and I declare that I have no title to the said subjects beyond the foresaid act and warrant in my favour, and that I will not be bound to give any, there being no written title or right either in me or in the said William Sinclair, the subjects being possessed merely at the will of the proprietor." Now, that is certainly a curious declaration on buying such a subject as that at the price of £80; but with that we have nothing to do. The result was, that the reclaimer got it, but it seems to me he got nothing except the right to enter into and occupy the place of William Sinclair until the next term. If Lord

were supporting the respondent, the case would be very different. Now, at the close of the argument I inquired if the respondent had any further written evidence to offer in support of his claim to the character of principal tenant under Earl of Fife, and in particular whether he could produce receipts for rent in his own name. The answer was, that the respondent desired a proof of his averments. A proof on the question of title to sue is not a proceeding which we would be disposed to allow as a matter of course; and, looking to the admitted facts as to possession, I am of opinion that this is not a question which can be elucidated by parole evidence. Apparently the respondent has been proceeding upon the assumption of some kind of tenant right which he thinks he acquired by the trustee's assignment in his favour. But it has not been made clear to me that any such right is known to the law, and I therefore sustain the plea that the respondent has no title to sue, and suspend the whole proceedings, and find complainer entitled to expenses in the Sheriff Court and in this Court."

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Fife chose to recognise him as tenant of the ground and give him a lease of it, well and good; but he did not derive such a right from the trustee, nor had he the smallest shadow of right to make any demand on Lord Fife. That being the case, we are met by the fact that that is the title upon which the reclainer sued the action in the inferior Court, and he sets it out quite distinctly that he is proprietor of the subject—that he is heritable proprietor of the subject—that is his title in the libel for removing; and in support of that allegation he produced this assignation, which demonstrates that he is not proprietor. And then he goes on to say that Sinclair is tenant of the subject, having been tenant of Lord Fife at one time, but being now the tenant of the petitioner, who is now the proprietor; and there is not another word of averment in the record except what I have read. He produces his assignation, and says—"I am proprietor, and you the defender are tenant, and you won't pay your rent, and therefore you must remove." That is the whole case. Now, the question that naturally occurs to one at first for consideration is, What was it the duty of the Sheriff to do in such circumstances? There surely can be but one answer to that, and that is to dismiss the action for want of title. If a man sues an action as proprietor, and has not any title as proprietor, it seems to follow of necessity that the summons must be dismissed. But this was not done, and consequently we have this complaint against the decree of removing; and in this process of suspension it is averred for the first time that the pursuer in the removing, instead of being proprietor of the subject, which he obviously is not, is a lessor of the subject through William Sinclair, who is now succeeded by his widow. And it is in that capacity that it is averred in the third statement—"That the respondent having taken no enforceable right under his said assignation, the said William Sinclair continued for a period of nine years or thereby after the date of the said assignation to occupy the said subjects as tenant of the Earl of Fife, to whom he paid his rent," and so forth; and then an answer to that averment is made that "he occupied the said subjects as a yearly tenant of the respondent under a verbal agreement to that effect with the respondent"; and that "according to said agreement the rent payable by Sinclair to the respondent was to be £15 a-year."

Now, that statement is made for the first time in the answer to the complainer's statement of facts in support of the suspension, and the respondent asks a proof on that. I see perfectly well from the statement of facts, as we have them before us, that this is a statement made merely as an after-thought. It never occurred to this gentleman to represent himself in the inferior Court as a lessor at £15 a-year. He was proprietor, and nothing but proprietor; and on that case, as proprietor, I think his case must stand or fall from beginning to end. The fact is, that William Sinclair never was out of possession of this subject, and his widow has possessed it since his death, and the rent has been paid by Sinclair and his widow to the proprietor of the subject, and not a penny of the alleged £15 which is said to be payable to the reclainer has ever been paid. It is said that proceedings have been taken to enforce payment of the rent, but they were not brought to a point, plainly because the reclainer saw very well that he could not succeed. In fact, the position of Sinclair remains undisturbed from the time he became tenant-at-will of that ground under the Earl of Fife down to his death, and has since been continued by his widow.

Now, what was the right? What kind of a right was it that Leslie, the respondent, took under that assignation? As I have already said, it was simply

a right to possess the subjects until the next term as a tenant-at-will. But it was said that that must be held to be fortified by tacit relocation. Well, there must be some foundation for tacit relocation; there must be some sort of possession or there can be no tacit relocation. I shall assume the possession might be civil possession, and not actual possession. The actual possession was with Sinclair, and it could not be that. But was there civil possession—the only possession which it was possible Leslie could have? He did not receive a penny. Where was the possession? There was neither actual nor civil possession, and, therefore, there could be no tacit relocation; and the consequence is, that the right of this reclaimer, whatever he had under that assignation, has long ago come to an end. In short, he has no more interest in that subject than any of your Lordships. For these reasons I am quite clear that the Lord Ordinary has done right, and that his interlocutor should be adhered to.

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LORD MURK.—I have come to the same conclusion. The suspension which is now before us was brought against Leslie on the allegation that he was not proprietor of this hotel. Has he a title? If not, he is not proprietor; and in the circumstances, when that objection is taken, I fail to see what answer there is to it. It is quite plain that the assignation is not a title to the property. There are a variety of documents produced to shew that there has been a sale of this property to him, and that the factor for Lord Fife had intimated that he was quite ready to recommend Lord Fife to grant a feu-charter; but, so far as I can see, that has never been done. That being the state of matters, as your Lordship pointed out, the case comes before us on a new view—that Sinclair, on the faith of that arrangement, held, as a sort of subtenant, under the respondent Leslie, at a rent of £15 a-year. Now, that statement is made for the first time in this action, and it is not alleged that there has ever been any payment made of rent by Sinclair to Leslie, or that it has ever been asked. Now, on that there is a proposal to send the case to proof. I do not see, looking at the variety of the documents, that, *ex facie*, there ought to be such a proof. For there are the receipts granted to Sinclair after this assignation for five consecutive years, in which Lord Fife gives Sinclair a receipt on paying £1, 0s. 4d. of ground-rent; and, in the face of that, the reclaimer alleges an agreement, and asks for a proof to shew that, in point of fact, he held of Leslie. I do not see that that can be granted. I admit the doctrine that was stated distinctly—that if a party, who was not a proprietor, but had some charge of a property, or right to it, lets that property to another individual, and that individual declines to pay his rent, he is bound to pay it. But there is confusion and contradiction in this case; and I cannot think that the allegation of this verbal agreement, if it was acted on at all, should be sent to proof in an action of ejection which was brought by the reclaimer here as the proprietor of an hotel of which he was not proprietor.

LORD SHAND.—I feel constrained in this case to differ from your Lordships and the Lord Ordinary. I concede to the fullest extent that the respondent, the reclaimer, has not a good title to the property; but I think the case ought to be decided on this principle—that if a party takes a tenancy from a man who has a defective title, the person who so takes that tenancy cannot challenge the title of his lessor. The title of his author may be utterly bad, but it is not in the mouth of the man who takes that tenancy to say to the other, "You have no title." And it appears to me that on the facts of this case as averred, it

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being as I think well averred that the present suspender took and holds the property from the respondent, the case ought to go to inquiry, and that there is a risk of injustice in deciding it on the view which your Lordships take, without inquiry.

The state of facts as averred—and to that alone we are entitled to look here. for the case has been disposed of upon the respondent's own statement—is this: William Sinclair, a hotel-keeper in the village of Urquhart, seems for a number of years to have held one of these long leases or feus common in northern counties, from Lord Fife. A house seems to have been put up on that feu, and the property was held from his Lordship for payment of £1 a-year. We all know that that is a very common tenancy in the north of Scotland. People do not take care to obtain their titles. They hold on, year by year, knowing that the landlord who has a record of his feus or leases in his books will act fairly by them and give them a regular valid title if required; and they go on, year by year, putting up buildings on these feus on the faith that the landlord will recognise them as the owners. Mr Sinclair was in possession of the property on an understanding of that kind, and the house was worth very much more than £1 a-year. He was sequestrated in 1876, and the trustee then acquired his right to the property, such as it was, against Lord Fife, and the reclaimer came forward and bought that right, paying £80 for it. It may be that Lord Fife was not bound to recognise that transaction. If he was not, I should think he was probably bound to regard the value of the buildings on the feu, if that was a melioration, and that the claim for such melioration was at least a strong ground on which a pecuniary claim could have been based. But however that may be, what followed next, according to the respondent's averments, is that, having paid £80, he arranged with Sinclair that Sinclair should become his tenant, not at £1 but at £15. The relation then which arose between parties, if that statement be proved, was plainly this, that in the first place, whatever the respondent's right in the subject was, Sinclair agreed to become his tenant; in the next place, that the respondent was the person liable in £1 a-year to Lord Fife; and third, that Sinclair agreed to pay him £15 a-year. So that there was the relation of tenancy or proprietorship, whichever you choose to call it, with reference to a long lease or feu, and a subtenancy was created, if that statement be true—and the case has been decided on the footing that it is true. Having made that arrangement, Leslie proceeded to lay out a large expenditure on this property. His averment is that he has thus laid out £80, and he has produced vouchers for some of the expenditure. In what capacity was that done? Plainly in this capacity, that, following out the arrangement on which he was to get £15 a-year from the complainer as his tenant, he laid out money in his character as proprietor. In the next place, we find that in addition he at one period took out sequestration against this tenant, and there was no appearance, and decree was granted. It is explained that the decree was not followed out, as he did not wish to deal harshly with the tenant, and because he got caution for the rent. In the third place, we find him assessed for taxes and county assessments, and that he pays these assessments; and in the fourth place, there is at least one if not more payments by him of the ground-rent of £1 to the landlord towards the end of the period we are dealing with. Further than all this is the fact that in the exercise of the right which he had he proceeds to sell the subject, and sells it at a price beyond £180; and finally we have documents

that go to shew that the landlord's factor intimated that he was prepared to recognise his right, and would give a feu-charter to the purchaser. Now, it is in that state of facts as averred that this respondent is turned out of Court in a question with the party who, he says, took the subjects from him as tenant—and turned out of Court on the ground that he, the respondent, has no title. Supposing it to be conceded that this title is open to a serious or even fatal objection in a question between him and Lord Fife, it appears to me in that state of the facts that it is not in the mouth of Mrs Sinclair, the widow of Sinclair, to plead want of title; for the respondent is prepared to prove that Sinclair did take his hotel from him, and has held it from him since that time; and I think there is a great body of *prima facie* evidence in the matters I have alluded to tending to shew that that is the case. I am clearly of opinion that in these circumstances there ought to be a proof.

I am bound to say I do not much admire the record that has been made up on behalf of the respondent. There is a want of explanation as to the continued dealings between Leslie and Sinclair year after year, such as I think was called for in the circumstances of the case; and, second, there ought to have been explanation as to the payment of £1 from time to time made by Mrs Sinclair. It was a very right thing that Mrs Sinclair should have made at least the payment of £1 of rent to Lord Fife as she failed to pay her rent to the respondent. The case appears to me to be one, however, in which the respondent has well averred facts and circumstances which go to shew that the suspender's husband took and held the property from the respondent, and that his widow takes and holds it still from him. She has never got any title. The property stands in Lord Fife's books now in name of Sinclair's representatives simply because there never has been any transfer of the title. But I think the case as stated is one in which the tenant disputes the title of the person from whom he took his premises; and I therefore think it ought to be sent to proof, and that it is not sufficient to say the respondent has no title. As to the record in the Sheriff Court, the respondent there averred that the complainer had been his tenant for a number of years. That is the substance of his case, and is sufficient. The farther detail is specification merely. It should have been given in the Court below, but may, in my opinion, be properly admitted, if necessary, as it has been admitted, in the record in this Court. On the whole matter I think the case ought to be sent to proof.

LORD ADAM.—I think the question for us to decide is whether the decree of ejectment was properly pronounced in the Sheriff Court or was not. In order to ascertain whether that be so or not I think we must go to the averments on which the reclamer founded his case *ab initio*. I do not think that in a case of summary action of this sort you can defend a decree in an action pronounced in the Sheriff Court by averments of other rights and titles for the first time in the Court of Session. If that be a correct view of the case, and I think it is, the question is, what was averred in the Sheriff Court? The only averment in the Sheriff Court was that the pursuer there was proprietor of premises in the village of Urquhart, in the county of Elgin, occupied by Mrs Eliza Lamb or Sinclair, who is the widow of William Sinclair, sometime innkeeper at Urquhart. I think the first duty of the Sheriff was to see the title produced. If he looked at the title produced it was as clear as anything could be that he was not the proprietor. I think the Sheriff should have dismissed the action, and it is of

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that ground that my judgment here is founded. I do not know, nor have I made up my mind, whether or no the averments now made would be sufficient to support the eviction. I could very well see that it might require a great deal of inquiry. But I think it is too late. I quite endorse all that has been said by Lord Shand and by Lord Mure—that if a party takes a right from another he cannot question it. I do not dispute that in the least. But that was not what was said in the Sheriff Court. Mr Lealie did not say that he had a right to this subject under certain documents, and that Mrs Sinclair was a sublessee. If that had been the case that would have been a matter for inquiry in the Sheriff Court into the right of Mr Lealie and Mrs Sinclair. But that was not the case in the Sheriff Court. The pursuer in that Court produced a document which shewed that he had no title at all—at least not the title he founded on in the Sheriff Court—and that was the ground of judgment. I have only to add that so far as my judgment goes, what we decide ought to have no influence with Lord Fife as to which of the two shall get a title to the subjects. I think the case is apart altogether from that question.

THE COURT adhered.

ROBERT STEWART, S.S.C.—PHILIP, LAING, & TRAIL, S.S.C.—Agents.

No. 150. June 14, 1887.
Adam v. Crowe.

A. M. ADAM, Pursuer (Appellant).—*A. S. D. Thomson.*
JOHN CROWE, Defender (Respondent).—*C. J. Guthrie—M^r Clure.*

Meditatio fugæ—Jurisdiction—Execution in a foreign country.—Held (1) that a *meditatio fugæ* warrant could not be put into execution furth of Scotland, and (2) that a creditor who had by means of such a warrant brought a debtor from England to Scotland was not entitled to avail himself of the fact that he had brought the debtor within the jurisdiction of the Courts of Scotland.

1ST DIVISION.
Sheriff of Lanarkshire.
M.

ON 12th March 1887, on the petition of Archibald Mason Adam, the Sheriff-substitute of Lanarkshire (Lees) granted a warrant to apprehend John Crowe who was stated to be *in meditatio fugæ*, and about to leave Scotland for America without making payment of a sum of £300 alleged to be due to Adam by him.

ON 9th April 1887 the warrant was endorsed by a Liverpool magistrate, and Crowe was thereupon apprehended when on board a steamer about to sail for Montreal.

ON 12th April Crowe made a deposition before the Sheriff-substitute of Lanarkshire (Spens), and on the 13th the Sheriff-substitute found that the apprehension was not a competent proceeding, and that Crowe was not lawfully within the jurisdiction, and dismissed the petition.

ON 14th April, the Sheriff (Berry), on appeal, adhered to his Substitute's interlocutor.*

* "NOTE.—After consideration I agree in the conclusion of the Sheriff-substitute that this petition should be dismissed. I think it impossible to shut one's eyes to the fact that the respondent has been brought against his will from England to Scotland under the warrant of apprehension granted by Sheriff Lees on 12th March last, and indorsed by a Justice of Peace for Liverpool on 9th April. To grant under such a concurring warrant of an English magistrate a warrant for incarceration of the respondent as meditating flight from Scotland seems to me contrary to the principle on which a *fugæ* warrant proceeds. It may be a question how far I can consider under what authority the English magistrate proceeded in indorsing the warrant, but there can be little doubt

The pursuer appealed to the Court of Session, and argued ;—(1) It had been the custom in Glasgow to have *meditatio fugæ* warrants executed in the same way as the present.¹ The apprehension having proceeded upon an *ex facie* legal warrant, the Sheriff was bound to deal with the respondent on the footing that he was legally brought before him. He had nothing to do with the *modus* of the apprehension.² It was the tendency of the law to allow a warrant granted in one country to be executed in another.³ (2) No objection had been taken by the respondent when he made his deposition to the competency of the apprehension. The defect of jurisdiction on the part of the Sheriff ought to have been pleaded *in limine*, but instead of that the respondent, without taking any such objection, had deponed that he was illegally apprehended, because he was under contract to go to America, and was to return shortly. The respondent had prorogated the Sheriff's jurisdiction.⁴

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The respondent was not called on.

LORD PRESIDENT.—I think this case is so clear that it is not necessary to call for any answer. The argument has been very well stated. The ground on which I proceed in dismissing the appeal is precisely that stated by the Sheriff, that it was "an abuse of the warrant granted by Sheriff Lees to bring back the respondent forcibly from England to Scotland, and that the petitioner is not entitled to avail himself of the fact that by such a proceeding he has brought the respondent within the jurisdiction of this Court." The respondent is not in my opinion legally within the jurisdiction of the Court, and I think the apprehension in England was altogether beyond the warrant on which it proceeded. The circumstance that the English magistrate authorised his officers to execute the warrant does not affect the question. The respondent was not *in meditatione fugæ* when apprehended, and Sheriff Lees' warrant had no efficacy for apprehension in England.

LORD MURE concurred.

LORD SHAND.—As pointed out by Lord Rutherford Clark in *Kidd v. Hyde*, 9 R. 803, the fact that imprisonment for debt has been abolished has materially affected the utility of *meditatio fugæ* warrants. I agree with your Lordships that the Sheriff was right in dismissing the application. It is quite clear that

that such an indorsement is not authorised by the Act 11 and 12 Victoria, c. 42, relative to the indorsement of warrants against persons for crimes or offences against the laws of Scotland. But the ground on which I proceed mainly is that it was, in my opinion, an abuse of the warrant granted by Sheriff Lees to bring back the respondent forcibly from England to Scotland, and that the petitioner is not entitled to avail himself of the fact that by such a proceeding he has brought the respondent within the jurisdiction of this Court. There is a conflict of authority between different Sheriffs-substitute on the point, and I have the highest respect for the opinion of Sheriff Glassford Bell, who took a different view in 1855 from that which I have expressed. But the opinion since acted on by Sheriff Dove Wilson, and substantially adhered to in his work on Sheriff Court practice, commends itself more to my approval. The pursuer's agent asked that I should grant a warrant for the detention of the defender, but I declined to do so, as inconsistent with the view I take of the case."

¹ Sellar's Forms for Sheriffs and Sheriff Clerks (Sheriff Glassford Bell's Decision), 172.

² Stair, iv. 47, 23.

³ Act 11 and 12 Vict. cap. 42 (Act to facilitate the performance of the duties of Justices of the Peace within England and Wales), sec. 15.

⁴ Stair, iv. 37, 12.

No. 150. if the appellant had stated at the first that the respondent was not merely in *fuga*, but was outwith the country, the Sheriff would have refused the deliverance or dismissed the application. The warrant was got on the footing that the respondent was still in this country. It completely fell the moment he went out of Scotland. If the appellant's argument is sound, the result would be that even after the *fuga* had been completed by the arrival of the person against whom it was sought to execute the warrant—it may be at a place on the other side of the globe—he could be brought back as still *in fuga*. Such a proposition is extravagant. The warrant has a limited effect, and its use is to arrest a man *in fuga* in the country and jurisdiction from which he is about to flee.

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I do not think anything can be made of the second point. In a matter of this kind, where the liberty of the subject is involved, I think the respondent was quite in time in stating his defence.

LORD ADAM.—I CONCUR. I think the case is perfectly clear.

THE COURT dismissed the appeal.

WILLIAM OFFICER, S.S.C.—FODD, SIMPSON, & MAERWICK, W.S.—Agents.

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DONALD MANSON AND ANOTHER, Petitioners (Respondents).—

Jameson—G. W. Burnet.

JAMES FORREST, Defender (Appellant).—*D.-F. Mackintosh—*

G. R. Gillespie.

Et c contra.

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Nuisance—Interdict—Erection of byre in burgh.—Held that the business of cowkeeping may be so conducted and regulated within burgh as not to be a nuisance.

Circumstances in which the Court refused to grant interdict against the erection of a byre for twelve cows within burgh—the cowkeeper having come under an undertaking to regulate his business so as in the view of the Court to obviate the possibility of its creating a nuisance to the neighbouring proprietors.

Nuisance—Restriction in feu-contract.—Opinions as to the effect of a stipulation in a feu-contract against the erection upon the feu of any house “for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars.”

Burgh—Dean of Guild—Jurisdiction—Nuisance.—The Dean of Guild having refused to sanction the erection within burgh of a byre for the accommodation of twelve cows on the ground that it was likely to create a nuisance, on appeal the Court, doubting the Dean of Guild's jurisdiction to entertain the question of nuisance, sisted the process to enable the objectors to bring an interdict against the erection of the building in question. This having been done, after proof the interdict was refused, and in respect thereof the Dean of Guild's interlocutor in the other process was recalled, and a remit made to him to proceed with the lining.

1st DIVISION.
Sheriff of the
Lothians.
M.

JAMES FORREST was proprietor of a house, stable, and garden, known as 11 Jordan Lane, Edinburgh, about a quarter of an acre in extent between Jordan Lane and Nile Grove. Jordan Lane was a *cul-de-sac*, and contained a number of houses and villas. At the foot of the garden was a wooden shed, in which Forrest kept cows for some time previous to May 1885, when the magistrates refused to renew his licence to do so, on the ground that the premises were unsuitable for cowkeeping.

In December 1885 he presented a petition to the Dean of Guild Court for leave to alter or remove the premises in question, and to erect a new byre to accommodate not more than twelve cows, and also a straw and turnip shed adjoining.

The adjoining proprietors in Jordan Lane and in Nile Grove lodged

answers objecting to the erection of the byre as a nuisance to the neighbourhood and injurious to health. They further stated,—“The respondents aver that twelve cows travelling up and down the lane when taken to and from pasture will be a constant terror to timid persons living there, besides keeping the roadway in an offensive state, both to sight and smell; the lowing of the beasts night and day, accumulation of manure, and loading and carting away of the same, will altogether completely destroy the amenity and salubrity of the locality. The manure from the eleven cows now on the premises accumulates at the rate of two cart-loads a-week, so that for twelve cows there will be an accumulation of offensive matter to even a greater extent. The petitioner also proposes to enlarge the stable, and erect a boiler and tubs for the boiling and mixing of cows’ meat, both of which will be offensive and a nuisance.” They also founded upon the following condition, both in Forrest’s titles and in their own, binding the feuar “not to erect or allow to be erected on any part of the ground thereby feued any house or houses for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars”; and upon the provisions of the Public Health (Scotland) Act, 1867.*

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The petitioner denied the respondents’ averments, and stated that the cows would only travel along the lane twice a-year—when going to pasture in spring, and returning in the beginning of winter—the byres being unoccupied during a part of spring and the whole summer and autumn—and that while the byre was occupied the manure would be removed daily if the Court required it.

The Dean of Guild, on 11th February 1886, found that the keeping of cows by the petitioner had caused a nuisance, and refused the petition.

Forrest appealed to the Court of Session, and argued that the Dean of Guild had no jurisdiction to entertain a question of nuisance, or at least that he had jurisdiction on such questions only in so far as they were architectural.

The respondents argued that the proposed structure was in contravention of the titles of both parties, and that the Dean of Guild was the proper judge of that question.² Further, he could entertain the question of nuisance.³

Ultimately, on the respondents’ motion, the First Division pronounced an interlocutor sisting the process to allow the objector to apply for an interdict against the erection of the proposed building.

Accordingly Donald Manson and Mrs Ferguson, proprietors of the subjects on either side of Forrest’s property, brought an interdict in the Sheriff Court of the Lothians to have Forrest interdicted from erecting

* By the Public Health Act, 1867, the following are among others declared “a nuisance”—

Section 16, subsec. (c).—“Any stable, byre, pig-stye, or other building in which any animal or animals are kept in such a manner as to be injurious to health.”

Subsec. (d).—“Any accumulation or deposit of manure or other offensive matter, within fifty yards of any dwelling-house within the limits of any burgh or wherever situated, if injurious to health.”

Subsec. (e).—“Any work, manufactory, trade, or business, injurious to the health of the neighbourhood, or so conducted as to be offensive or injurious to health.”

¹ Erskine’s Inst. i. 4, 24; Donaldson v. Pattison, Nov. 14, 1834, 13 S. 27; Colville v. Carrick, July 19, 1883, 10 R. 1241; Pitman, &c. v. Burnett’s Trustees, Jan. 26, 1882, 9 R. 444 (Lord Shand’s opinion, p. 452); Mitchell v. Dean of Guild of Edinburgh, March 18, 1885, 12 R. 844.

² Morrison v. M’Lay, July 1, 1874, 1 R. 1117.

³ Fleming v. Ure, Feb. 24, 1750, M. 13,159; Proprietors in Carrubber’s Close v. Reoch, Feb. 26, 1762, M. 13,175.

No. 151. any building for the purpose of carrying on the trade of a cowfeeder, and, in particular, from erecting the building in question.

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The averments on both sides were a repetition of those set forth in the Dean of Guild Court case.

The pursuers pleaded;—1. The subjects belonging to the defender being unsuitable for keeping cows or for the erection of byres for that purpose, and the situation being unsuitable for carrying on the business of cowkeeping, without destroying the amenity of the locality, creating a nuisance, and injuriously affecting the health of the neighbourhood, the pursuers are entitled to interdict as craved. 2. The defender's present premises, or the proposed byres, and the business carried on, or intended to be carried on, are nuisances in the sense of the statute before mentioned. 3. The construction of the proposed byres, and the carrying on of the said trade or business, will be as nuisances contraventions of the feu-right of the ground on which it is proposed to erect the byre, and the pursuers are entitled to object to the same.

The defender pleaded, *inter alia*;—2. . . . *Et separatim*, In any event the action is premature. 4. The action ought to be dismissed, in respect (1) that the erection of the said proposed buildings is within the defender's rights of property; and (2) that they can be used and enjoyed by the defender without creating a nuisance.

The Sheriff-substitute (Hamilton), after proof,* on 25th November

* The petitioners adduced several witnesses, who deponed that the smell of the cows had been very objectionable, and that they had been disturbed by their lowing; that Jordan Lane was very narrow, and that a cab could not turn in it except at two places; that the accumulation of manure in the lane was very unpleasant, that numerous complaints had been made against the respondent, and that he had been twice convicted of nuisance in connection with the place. Dr Russell, one of the magistrates of the city, deponed,—“I do not think it would be a proper thing to erect such premises. I think they would constitute a nuisance. The keeping of straw and turnips, and the boiling of the food for the animals, will always generate a bad smell. The accumulation of manure from twelve cows will be very considerable. There is no other way, so far as I know, of taking the manure from the byre except along Jordan Lane. I think the carrying on of the trade of a cowfeeder at defender's place may operate as a nuisance to the neighbouring feuars. (Q.) Will it lower the value of their property? (A.) Probably.” In cross.—“I know the byres throughout the town, or at least a great many of them. . . . I have never examined Mr Reid's byre” (which was also in the Morningside district, with villas near it), “and I know that there have been complaints from the neighbours on account of it. I know that Mr Reid keeps over a hundred cows, and several horses. (Q.) He boils all his cows' and horses' meat on the premises? (A.) I may state that there are a great many conditions of things which we are trying to get rid of. (Q.) Do you consider Mr Reid's byre a nuisance? (A.) I will state generally my opinion, that all byres should be outside the town. There are many things in an unsatisfactory state which we are trying to reform, but we cannot do it all at once.” Dr Littlejohn, medical officer of health for the city, gave evidence to a similar effect.

The defender led evidence that the proposed byre was to be built of brick, and cemented to the height of 7 feet inside, the floors and water-channels to be of concrete, and the troughs of fire-clay. Dr Stevenson Macadam, city analyst, deponed—“Taking into consideration the nature of the proposed buildings and the situation, I think it is a suitable place for keeping cows. . . . I believe it would not be a nuisance to keep cows there. Cross-examined—(Q.) You would not choose a residence yourself next door to a byre? (A.) Not if I could help it.” Professor Walley, Principal of the Royal Veterinary College, Edinburgh, deponed—“(Q.) You don't think that twelve cows being kept there would be a nuisance if they were properly attended to? (A.) Certainly not, in

1886, pronounced this interlocutor:—"Finds that the business of cow-keeping, which the defender proposes to carry on at his property in Jordan Lane, cannot be conducted without being a nuisance to the neighbouring feuars: Finds, therefore, that said business falls within the prohibition in the defender's titles, which is quoted on record: Repels the defences: Interdicts, prohibits, and discharges the defender from erecting, or allowing to be erected, on any part of the ground belonging to and occupied by him at No. 11 Jordan Lane, Edinburgh, any house or houses or other buildings or erections for the purpose of carrying on the trade or business of cowfeeder or cowkeeper in said ground, and decerns." No. 151.

The defender appealed, but on 31st December 1886 the Sheriff (Crichton) adhered to his Substitute's interlocutor.*

Mr Forrest appealed, and argued;—The restriction in the petitioners' titles did no more than declare the common law rights of parties. If the word "may" could be read as "may possibly" or "may probably," it would be different, for the clause would then have prevented the erection of any building for the purpose of trade or manufacture. But a byre was not necessarily a nuisance, as a slaughter-house or a house for the boiling of blubber was. But even in the case of declared nuisances, the Court had hesitated to grant an interdict *ab ante*,—if it was at all possible to take means to obviate the nuisance.¹ But a byre was not a nuisance, so far as decision went, any more than a stable was.

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the proper acceptation of the word nuisance, if the manure was to be removed frequently. Cross-examined—There is always a little smell connected with the conducting of a byre, but if the place is properly attended to the smell is not harmful." Professor Williams, Principal of the Veterinary College, Leith Walk, deponed—"I think the place is a very good one for such a byre. I don't think there is any chance of a nuisance being created by the keeping of twelve cows there, if the byre is properly constructed and well kept." William Secular, inspector of markets and byres, deponed—"Assuming that the byre was well conducted, and the manure regularly removed, it would not create a nuisance in my opinion."

* "NOTE.— . . . The pursuers and defender hold the subjects respectively belonging to them under titles which contain an obligation not to erect on the ground belonging to them 'any house or houses for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars.' It appears to the Sheriff that the question to be decided in this case is, has it been proved that the business of cowkeeping, which the defender proposes to carry on in Jordan Lane, could not be conducted without being a nuisance to the neighbouring feuars? The Sheriff is of opinion that this has been proved. In the first place, there is evidence as to the way in which the defender conducted his business while he had only a licence for six cows; and that evidence shews that the byre was not well kept, and that the defender had been twice convicted of nuisance in connection with the place. In the second place, there is evidence to shew that the business of cowkeeping, no matter how well conducted, would, in the locality in question, be a nuisance to the neighbouring feuars. No doubt there is a good deal of conflicting testimony on this point, but the Sheriff concurs with the Sheriff-substitute in thinking that the weight of the evidence is in favour of the pursuers. Dr Stevenson Macadam, who is the leading witness for the defender, when asked if he himself would choose a residence next door to a byre, says, 'Not if I could help it'; and Professor Walley, another witness for the defender, has to admit, on cross-examination, 'that there is always a little smell connected with the conducting of a byre.'

"In the circumstances, the Sheriff thinks that the pursuers are entitled to the interdict which has been granted."

¹ Swinton v. Peddie, March 9, 1837, 15 S. 775, 9 Scot. Jur. 365, Aug. 26, 1839, M'L. & Rob. 1018; Scott v. Leith Commissioners of Police, May 29, 1830, 8 S. 845, and March 7, 1835, 13 S. 646, 7 Scot. Jur. 317.

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This was the first case in which an interdict had been asked against the erection of buildings, where the nuisance complained of was not among hitherto recognised nuisances. Before an interdict could be granted, the nuisance must be shewn to be inevitable.¹ The Court would not proceed upon the extreme views which were enounced by Drs Littlejohn and Russell in their evidence. Cattle-sheds, cow-houses, and byres were dealt with under the Act 29 Vict. cap. 17 (sec. 3 of which is quoted *infra* in the Lord President's opinion) as quite legal within burgh, but as requiring supervision and inspection. Under that Act the magistrates had to grant a licence to such places each year, which was an effectual check against their being neglected or mismanaged so as to cause nuisance. Further, the Public Health Act, 1867, secs. 16 and 30, drew a distinction between things which were necessarily nuisances and things which might or might not become so. Under that Act byres were not necessarily nuisances.

As matter of fact there were many byres in the suburbs of Edinburgh and within the burgh. Mr Reid's byre for 100 cows was in the immediate neighbourhood. Where a nuisance existed, and a complaint was made against it by anyone having an interest to complain, it made no difference whether the locality was town or country. What was a nuisance in a town was equally so in the country, if anyone was so near it as to feel it. But in the present case there was no sufficient evidence to support the petitioners' case. The medical witnesses made vague general statements which went too far about offensive smells, injury to health, and loss of amenity, but the Court would not proceed upon these.

The petitioners argued;—The law of nuisance was a branch of the law of good neighbourhood. What amounted to a nuisance was a matter which depended to a large extent on degree and locality.² It was conceded that there was no case where a byre had been held to be a necessary nuisance. But the business of a cowfeeder, although quite unobjectionable in the country, was not so in the town. And the evidence which had been adduced shewed that it would create a nuisance in the present case. The lowing of the cows of itself constituted a nuisance in town. If the common law was not enough to warrant the granting interdict against a possible nuisance,—the words of the title in the present case supplemented what was wanting.³ It was proved that a nuisance—which need not necessarily be injurious to health, although there was evidence in this case that the byre had hitherto interfered with the health of the neighbourhood—had existed in the past, and that it was likely to be aggravated in the future. If there had been a clause in *Swinton v Paddie*⁴ like that here, interdict would have been granted at once. Besides it was to be kept in view that the defender had been previously convicted of nuisance. It was no doubt the case that the existence of byres in town was recognised in the Public Health Act, 1867, and the Cattle Sheds Act, 1866 (29 Vict. cap. 17), but these Acts provided for their regulations on the footing that they were nuisances. They could not be said to legalise them. It had been held that the magistrates' licence did not amount to a legal warrant to commit a nuisance.⁵

¹ *Pattison v. Gilford*, 1874, L. R., 18 Eq. 262; *Frame v. Cameron, &c.*, Dec. 21, 1864, 3 Macph. 290, 37 Scot. Jur. 131.

² *Hialop, &c., v. Fleming, &c.*, Dec. 22, 1882, 10 R. 426, *affd.* March 1, 1886, 13 R. 43; *Rankine on Landownership*, 336 and 337.

³ *Porteous v. Grieve*, Feb. 23, 1839, 1 D. 561.

⁴ 15 S. 775, and *M'Lean & Robinson's Appa* 1018.

⁵ *Pentland v. Henderson*, March 2, 1855, 17 D. 542, 27 Scot. Jur. 241.

Before the close of the discussion, the following minute was put in by the appellant:—" *Gillespie*, for the appellant, James Forrest, stated that in the event of the said appellant being found entitled to erect a byre as proposed upon his property in Jordan Lane, and to keep cows therein, he undertakes that he will not boil or steam turnips to feed his cows upon the premises in Jordan Lane; that he will remove the manure from the said premises once every day except on Sundays, and that before eight o'clock A.M.; and that the carts which remove the manure shall be loaded within his own property. The appellant further undertakes that the cows belonging to him shall not, unless in exceptional circumstances, pass along Jordan Lane oftener than twice in the year, viz., once in spring, when they go out to pasture, and again towards the beginning of winter on their return from pasture."

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LORD PRESIDENT.—The contention of the petitioners in the action for interdict in the inferior Court was that the proposal of the defender to erect buildings of the nature of a byre or cowhouse was illegal, and ought to be prevented. A proof was allowed by the Sheriff-substitute, and a great deal of evidence was led upon both sides. I think the result of the petitioners' evidence amounts very much to this that a cowhouse or byre within a town is necessarily a nuisance, and ought not to be permitted under any circumstances. To affirm such a proposition would certainly be to introduce a novelty into the law, and also into the practice as it obtains in all towns in Scotland where cows are kept within burgh for the use of the inhabitants. This would be a very startling doctrine, which the Court could not adopt without the most serious consideration. But I do not think the case has been pressed to that length, seeing that the pursuers have other contentions of a much more plausible nature, which they have supported upon other grounds.

The pursuers' first argument is founded upon the restriction which is contained in the titles of all the feuars who have appeared. I shall consider this immediately, but, in the first place, I think we must start with this as a general proposition that byres and cowhouses, under proper regulations, are not only lawful in a burgh, but are necessary and expedient. They have been made the subject of legislation in the Act of 1866 (29 Vict. cap. 17), which was passed expressly for the purpose of "regulating the inspection of cattle-sheds and cowhouses and byres within burghs and populous places in Scotland. And the third section of that Act provides:—"The magistrates of royal burghs, and also of parliamentary burghs in Scotland, shall have power to require, and shall require, all cattle-sheds and cowhouses and byres within their burghs to be inspected by an officer appointed by them, and, if found to be suitable for such purpose, to be licensed by them for the period of one year; and the magistrates shall likewise have power from time to time to make rules and regulations for the proper sanitary condition of the same, and to fix and determine in each licence the number of cattle which may be kept in each such cattle-shed, or cowhouse, or byre; and if any person shall keep any cattle within any burgh without such inspection and licence, or shall violate any of the conditions of such licence, or of any of the rules and regulations made by the magistrates, he shall, on conviction before any two of them, be subjected to a penalty not exceeding £5 for each such offence, and a like penalty for every day after the conviction for such offence, upon which such offence is continued." These are very strong provisions, which are very well calculated to prevent all improper, careless, and negligent keeping of such premises. That they are necessary provisions, I can quite believe, but the fact

No. 151. that they exist shews that the practice of cowkeeping in towns is thoroughly recognised, and that towns are not required to look to the country districts for their supply of milk. Not only is cowkeeping not necessarily a nuisance, but the practice is at least a matter of convenience, if not of necessity, and is rather to be encouraged than the reverse. Of course, if it becomes a nuisance, it can be interdicted. The mere fact that the business is quite a legitimate one does not prevent its being put a stop to, if it is conducted in an improper fashion, and it is in the power of anyone to apply to have it interdicted.

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But apart from these considerations the petitioners found upon the condition which is contained in the titles of all the feuars under which they were taken bound "not to erect or allow to be erected on any part of the ground thereby feued any house or houses for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars." Mr Jameson has construed this provision as meaning that it is absolutely illegal to erect a building for the purpose of carrying on any trade which under any circumstance may come to be a nuisance, *i.e.* which, if carried on in an improper manner, may become a nuisance. For my part, I am not disposed to construe a restriction on the use of property in an extensive or liberal way, and I do not think the fair meaning of this provision is that which is contended for. I think the fair meaning is that no house or houses shall be erected which are likely to become, or under ordinary circumstances would become, a nuisance to the neighbouring feuars. If it were to be construed literally, it would mean that no houses were to be erected where any trade or business might be carried on, which, although in the ordinary case innocuous and harmless, may be so conducted as to create a nuisance. It would therefore come to this that the carrying on a trade of any kind would be prohibited. If this had been what was intended, I think the restriction should have been differently worded, and should have in terms prevented the erection of all buildings except dwelling-houses only. But I am of opinion that the clause as it stands does not extend the rights of the feuars further, or at least much further, than the common law does.

It is said that the respondent has kept a dairy before now, and that he appeared in a bad light at that time, and there appears to be some ground for this. At all events, I take it for granted that this was so. But if this proposed building is allowed, and a cowhouse is put up, he will be subject to the provisions of the Act of 29 Vict. cap. 17, and of the subsequent Public Health Act, 1867 (30 and 31 Vict. cap. 101), which contains a great many very important provisions for the suppression of nuisances.

Further, a minute has been lodged by the appellant, which I think very much alters the complexion of the case. It must be kept in view that the action is brought not for the purpose of suppressing an existing nuisance, but for the purpose of interrupting the progress of a building, and it will depend upon the use to which the building is afterwards put in carrying on the business whether it can be interfered with. At present, all is speculation in regard to the future conduct of the business. In the minute the appellant undertakes that he will not boil or steam turnips on the premises, that he will remove the manure once a-day, and that the carts which remove it shall be loaded within his own property, that his cows shall not pass along Jordan Lane oftener than twice a-year, once in spring when they go out to pasture, and once in the beginning of winter when they return to the byre. It rather appears to me that if this undertaking is fairly fulfilled, a great deal will have been done to prevent the pos-

sibility of the byre being converted into a nuisance. The particulars which are enumerated in the minute, and which it is said will be avoided, are just the particulars which are founded on by the petitioners as constituting the nuisance. I think the appellant has made a very fair offer, and it would be a strong thing to prevent him from beginning his business in the face of this undertaking. But, having made this offer, if he violates it, and recourse is had to the Court, it is very clear that we should be obliged to see that its terms have been strictly fulfilled, and complied with.

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I should propose to your Lordships to recall the interlocutors of the Sheriffs, and to embody the appellant's undertaking in our judgment, so as to shew the conditions upon which he has been allowed to proceed with the erection of the building.

LORD MURE.—The Sheriffs have here granted interdict substantially in terms of the prayer of the petition,—the finding of the Sheriff-substitute, to which the Sheriff has adhered, being that “the business of cowkeeping, which the defender proposes to carry on at his property in Jordan Lane, cannot be conducted without being a nuisance to the neighbouring feuars.” If I thought that this was clearly established, I should have been disposed to take the same course as that which has been followed by the Sheriffs. But I cannot adopt that view of the evidence. For it appears to me that there is a good deal of contradiction on the part of the witnesses who have been examined, and that there is evidence of weight leading to a different conclusion from that at which the Sheriffs have arrived. That evidence amounts to a clear expression of opinion on the part of men thoroughly competent to judge, that the business of a cowfeeder may be carried on without creating a nuisance in the neighbourhood. Having regard to these opinions, and to the terms of the minute which has now been put in by the appellant, I am satisfied that the course which your Lordship has proposed is the one which ought at present to be adopted, and that the interdict may be recalled until it is seen whether a business conducted in the manner undertaken by the appellant can be carried on without creating a nuisance.

LORD SHAND.—I have come to the same conclusion, seeing that the appellant has now given the undertaking to which your Lordship has referred. The case with which the Court has usually to deal is an application to interdict an existing nuisance,—where a work or manufacture is being carried on so as to produce an offensive smell or other unpleasant or injurious consequences amounting to a nuisance, or where a business is being actually engaged in causing a nuisance. But in the present instance the application is to interdict buildings which are being erected for the subsequent conduct of a business.

If the question had arisen in this state of circumstances as one of common law, irrespective of title, I should have had very great difficulty in entertaining it. I do not say there would have been difficulty if it were quite clear that the buildings when built and in use would certainly produce a nuisance. But in such a case as the present, where I think I may safely say that everything depends upon the mode upon which the business is conducted, I should have had great difficulty in interfering with the erection of buildings by an interdict.

The petitioners have, however, founded upon the terms of their titles, and I think these make the case to some extent a special one. The titles prohibit even the erection of buildings for carrying on a trade which may cause a nuisance, and if the buildings were of that character, and there were no under-

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taking so to carry on the business as to prevent this, I am disposed to think the complainers would have been entitled to an interdict. The special undertaking by the defenders, however, makes all the difference, for if that be carried out I am satisfied that the business so carried on would not be a nuisance.

The question of nuisance is to a great extent one of circumstances and of neighbourhood, and I agree with your Lordship that it is impossible to say that byres within burgh are in all circumstances a nuisance. The Legislature recognises their existence within burgh as reasonable and usual. It is no doubt the case that no one is entitled so to use his own property as to materially injure the health or materially affect or diminish the comfort of his neighbours, as, *e.g.*, by the storing of offensive materials, or the carrying on of a business causing offensive smells or deleterious gases. And when this is done the act complained of will be put a stop to. The result of the evidence which has been led in this case is that the boiling of the cows' food, the carting of manure, and the frequent passing of the cattle through the narrow lane in question, looking to the character of the houses adjoining the lane, would, I think, have created a nuisance. But the defender has come under an undertaking that none of these things shall be done in future. A byre will be built, in which twelve cows will be accommodated, but the neighbours will know little about them beyond the fact that they are there. I cannot say that under these circumstances the building will constitute a nuisance which can be put down either at common law or under the statute. It will be a different matter if the undertaking is not honestly or fairly implemented, and it will then be for those interested to make application to the Sheriff for the necessary protection.

LORD ADAM.—If parties had been relying upon their common law rights only I should not have had much difficulty in refusing the petition for interdict, because before granting an interdict *ab ante* in a matter like the present, I should have needed to be satisfied that the business could not be conducted without its necessarily creating a nuisance. In that case, I think the respondent should have been allowed an opportunity of starting his business, and of shewing how he would conduct it; and in the event of his doing so, so as to create a nuisance, the feuars might then have applied for interdict.

But the respondents also found upon the clause of restriction which is contained in their titles. I think it is impossible to give a literal meaning to the words which are found there, "which may operate as a nuisance to the neighbouring feuars"; and I agree with Lord Shand that they may possibly confer more than the common law rights of parties. If, for example, it had been proposed to carry on any trade or manufacture which in the ordinary mode of conducting it would have had the result of creating a nuisance, I think it might possibly have been interdicted; but I do not think it necessary to decide that now.

If we were to decide the case against the appellant, there would be an end of the matter. But if, with all the care which can be given to the conduct of the business, which will now be carried on in terms of the appellant's undertaking, the respondents should still find they have a grievance, it will be open to them to come to the Court and apply for a remedy. This appears to me to do away with any objection which can be urged against the course which we are now to take.

THE COURT pronounced these interlocutors:—

I. In the interdict case: "Find that the building proposed to be erected by the appellant on his property in Jordan Lane, Edinburgh, is intended to be used as a byre or cowhouse: Find that:

the respondents have failed to prove that the carrying on the business of cowkeeping in the proposed building will necessarily be a nuisance: Find that the said business, if conducted properly, and under proper conditions, will not be a nuisance: Recall the interlocutor of the Sheriff-substitute, dated 25th November, and of the Sheriff, dated 31st December 1886, and in respect of the undertaking of the appellant contained in the minute for him, No. 26 of process, refuse the prayer for interdict: Find no expenses due to or by either party, and decern," &c.

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II. In the Dean of Guild Court process: Recall the sist contained in the preceding interlocutor; and, in respect of the judgment of the Court pronounced this day in the appeal in the relative process of interdict in the Sheriff Court by the respondents against the appellant, Recall the interlocutor of the Dean of Guild, dated 11th February 1886, and remit to him to proceed with the lining in conformity with said judgment, and decern: Find the appellant entitled to expenses in this Court," &c.

GEORGE M. WOOD, S.S.C.—DUNCAN SMITH & MACLAREN, S.S.C.—Agents.

JOHN FRASER, Pursuer (Appellant).—*Rhind—Wilson.*
JAMES ADAM BELL, Defender (Respondent).—*J. G. Smith.*

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Fraser v. Bell.

Reparation—Dangerous animal—Dog—Consequential damages.—A porter brought an action against the occupier of a house at which he had been delivering coals, alleging that he had received injuries through the occupier's dog leaping upon another porter who was working along with the pursuer, and causing him to drop a piece of coal on the pursuer's foot; and further that the dog was known by its owner to be of vicious and ferocious habits. *Held* that the action was relevant.

JOHN FRASER, a coal-porter in the employment of coal-merchants in Edinburgh, brought an action against James Adam Bell, residing in Lauder Road, Edinburgh, to recover £100 as damages for an injury alleged to have happened to him through the defender's fault.

2D DIVISION.
Sheriff-sub-
stitute of
Midlothian.
I.

The pursuer stated that on 24th March 1887 he was in the course of his employment engaged, along with a fellow-servant, in conveying a quantity of coals to the defender's house and delivering them there; that the coals were in large lumps, which he and his fellow-servant had to carry from the cart into the cellar of the defender's house. "While the pursuer's fellow-servant was in the course of doing so the pursuer himself had necessarily occasion to stand beside him, to assist and relieve him at the cellar of large and heavy pieces of coal which were on the back of the pursuer's fellow-servant. When that was being done a large dog belonging to the defender suddenly rushed out of the defender's house and sprang upon and attempted to bite the face of the pursuer's fellow-servant, who, in consequence, was suddenly and irresistibly compelled to drop the burden of coals which he was holding on his back, and the coal fell and seriously crushed and fractured one of the pursuer's feet. The pursuer and his fellow-servant did nothing to provoke the dog on the occasion."

He further alleged that he had suffered great pain and loss, that the injury arose from the culpable neglect of the defender, or of his servants, or others there for whom he was responsible. (Cond. 3) " . . . The dog referred to, by its ferocious and sudden attack on the pursuer's fellow-servant as before stated, was the direct occasion of the pursuer's injury. It is believed and averred that the dog was of vicious and ferocious

No. 152. habits. The defender knew that fact, and that it was dangerous for strangers like the pursuer to pass near to it on his (defender's) premises. On occasions before the said accident the defender and others of his household had to take means to control it when attempting to jump on and alarmingly attack persons in a similar manner. On the occasion when the pursuer was injured as aforesaid, the dog had immediately before shewn to the defender's servants in the house a vicious and ferocious inclination to rush out of the house and attack the pursuer and his fellow-servant while discharging the duty which they were engaged at on the premises. The defender knew that the pursuer had to convey the coals into his house on the date referred to. He also, knowing the dangerous character and habits of the dog, should have taken precautions by way of chaining up the dog while the pursuer was lawfully on the premises, or to have taken some similar precaution to prevent the dog getting out of the house at the time the pursuer and his fellow-servant were at the place for the purpose stated on the occasion referred to. The defender, however, culpably and recklessly failed to adopt precautions of any kind, or to give the pursuer any warning of the danger which existed from the presence of such a dog on the premises."

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The defender denied liability, attributing the injury to the fault of the pursuer's fellow-servant or to accident. He averred that the dog was quiet and domesticated, though sometimes frolicsome.

He pleaded;—The pursuer's averments are not relevant and sufficient to support the prayer of the petition.

The Sheriff-substitute (Hamilton) sustained this plea in law, and dismissed the action.*

The pursuer appealed to the Court of Session.

Argued for him;—The cause of injury was the act of the dog in leaping at the pursuer's fellow-porter, and so causing him to drop the lump of coal on the pursuer. The case was as if one had wrongfully pushed another, and he had come against a third person and injured him. The action would lie against the person who gave the original push.¹

There was sufficient averment of ferocity on the dog's part, and of the defender's knowledge of that. It was sufficient to aver that the dog was ferocious, and that the defender knew it. It was not necessary to go on to state individual instances in which the dog had bitten individuals before.² In any view, even if it were not such a dog as required always to be chained, it was negligence not to chain it on this particular occasion when the pursuer was working about the house, and the dog had been, as he alleged, trying to get at him to bite him.

Argued for the defender;—It was clear from the pursuer's statements that he had been hurt in consequence of an innocent gambol of the dog. Against the dog's character there was no relevant statement, because there was no specification of particulars from which vice might be inferred. If a dog were known to be vicious, the owner must, no doubt, restrain it at all hazard. That was all that was decided in *Burton v. Moorhead*.² Again, if a dog, though not vicious, were known to be mischievous—e.g., to have a habit of poaching—there might be an action against the owner if he allowed him to indulge in his troublesome pro-

* "NOTE.—In the opinion of the Sheriff-substitute, the pursuer's statement shews that the occurrence through which he met with the injury libelled was purely accidental, and not one for which the defender can be held responsible."

¹ See *Scott v. Shepherd* (1770), 3 Wilson's Reports, 403.

² *Burton v. Moorhead*, July 1, 1881, 8 R. 892; *Renwick v. Von Rothberg*, July 2, 1875, 2 R. 855; *Worth v. Gilling and Another*, Nov. 2, 1866, L. R., 3 C. P. 1.

pensity and harm resulted.¹ But there was a third case, that in hand, of a dog which was frolicsome but not vicious. It was not a duty to chain up such a dog, or to restrain it in any way from going about. It was lawful to have it going about the premises unless it were fierce, and there was no sufficient statement that it was. It was an accident without fault.²

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LORD JUSTICE-CLERK.—I am of opinion on the whole that this case, which is a somewhat peculiar one, ought to be sent to proof. I am not prepared to throw it out on the ground that it is not relevant.

It seems that the pursuer was, along with another man, engaged in putting coals into the defender's cellar. This dog, which we are told is a collie dog, was on the premises, and it is said by the pursuer, in the first place, that it is ferocious, and in the second place, that for some time before the accident which occurred on the day in question it had shewn a disposition to assail these two men, and that that was what the dog ultimately did. Whether or not it was to do them any injury that the dog did act so, we cannot say; but the result of what it did was that it alarmed one of the men, who dropped a piece of coal on his companion's foot. That is the whole case as it now stands, and the result of the inquiry which must take place will depend on how far the allegations—somewhat strong allegations—which are made in condescendence 3 are supported by the proof. I think, as I have said, that the case must go to proof.

LORD CRAIGHILL.—I concur. The case is peculiar; it is not clear whether the dog flew out to bite the pursuer and his companion or not, but it is said that it caused alarm on the part of the pursuer's companion, with the consequence that a piece of coal was dropped upon the pursuer's foot. If the defender was in fault in not restraining the dog, it seems to me plain, and I did not understand it to be disputed, that, though the sufferer was not the person on whom the dog leaped, still the pursuer may recover, because the dog was the cause of the piece of coal being dropped or thrown from the man's back.

It is contended, however, on the part of the defender, that there is no relevant allegation as to the character of the dog, that though it is said to be ferocious—and illustrations of that are given in article 3 of the condescendence—still, without specification of particulars as to its alleged vicious character, enough has not been stated. I think, however, on the contrary, that enough has been stated, and I am the more persuaded of this because I think the pursuer will not succeed in his action unless he proves knowledge of the dog's vicious or mischievous character. If that is not proved the action will fail. I agree that the action must be sent to proof.

LORD RUTHERFURD CLARK.—I am of the same opinion. I think it is relevantly stated that the dog was ferocious, and that the defender knew it. That being so, the action is relevant. If the pursuer requires to prove ferocity, and the defender's knowledge of it, I think he had better consider whether he should go further—whether, in fact, he can possibly succeed.

LORD YOUNG was absent.

THE COURT recalled the interlocutor of the Sheriff-substitute, repelled the defender's first plea in law, and remitted the cause to the Sheriff.

D. HOWARD SMITH, Solicitor—MACRAE, FLETT, & RENNIE, W.S.—Agents.

¹ Read v. Edwards, June 18, 1864, 34 L. J. C. P. 31.

² Shaw v. Croall & Sons, July 1, 1885, 12 R. 1186; Holmes v. Mather, June 24, 1875, L. R., 10 Ex. Div. 266.

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ROBERT MARTIN, Pursuer (Appellant).—*Shaw—Patrick Smith*.
GEORGE WARD Senior, Defender (Respondent).—*A. J. Young—Orr*.
GEORGE WARD Junior, Defender (Respondent).—*A. J. Young—Orr*.
NEWTON & BLAIR, Defenders.

Reparation—Carriage—Child—Contributory negligence.—Two children, aged three and five, who were crossing a crowded city street, unattended by any person in charge of them, were knocked down and injured by a passing vehicle. In an action by their father for reparation, it was proved that the driver was to blame. *Held* that it was not a good defence that the pursuer had contributed to the accident by allowing such young children to be in a place of danger without someone in charge of them.

Reparation—Master and Servant—Master's liability for servant's fault.—A shopkeeper instructed his salesman to remove certain articles from one of his shops to another. The salesman borrowed a van from a friend, who came with it to drive it, and the articles were placed on it with the shopkeeper's knowledge and assent. While the van was passing through the streets the salesman assumed the reins because his friend had become intoxicated, and owing to his careless driving an accident occurred. *Held (diss. Lord Craighill)* that the shopkeeper was not responsible for the consequences of the accident, because the salesman was acting outwith his duty in undertaking to drive the van.

2D DIVISION.
Sheriff of
Lanarkshire.
I.

ROBERT MARTIN, boltmaker, Glasgow, brought this action against George Ward senior, wine and spirit merchant there, George Ward junior, his son, and Newton & Blair, plumbers and gasfitters there, to recover £500, as damages for injury done to his two pupil children, Robert and William Martin (whose ages were five and three years respectively), through the fault, as was alleged, of the defenders.

George Ward senior had a spirit-shop at Partick, and another at Parkhead, Glasgow. George Ward junior was a servant in one of his father's shops. It was admitted that the pursuer's children were knocked down and injured, the elder severely, on the afternoon of 24th March 1887, in Main Street, Anderston, Glasgow, by a van driven by George Ward junior. The accident occurred at a point near its junction with Sharp's Lane, in which the pursuer lived, while the children were crossing Main Street towards North Street. The pursuer averred that the accident occurred through the fault of George Ward junior, or some other person in the van who had charge of it at the time, in the course of George Ward senior's business as a spirit-merchant; that the driver was intoxicated, and the van being driven recklessly and furiously, and without any proper lookout being kept.

The defenders denied these averments. It appeared from the proof that George Ward senior being desirous of having a number of bottles removed from his Partick shop to his Parkhead shop, had told his son George Ward junior to get them removed. He had given no instructions to have a van procured for the purpose, and deposed in this action that he had expected a barrow to be used. George Ward junior, however, went to the shop of Newton & Blair, who were plumbers at Parkhead, and had been doing plumber work for the Wards, and were on friendly terms with them, and arranged with them for the use of their van gratuitously for the purpose of removing the bottles. George Newton himself, one of the partners of Newton & Blair, accompanied him, and drove to Partick. A brother of Newton was also in the van. At Partick they went into Ward senior's shop, and George Newton was treated by Ward senior to drink. A man named Priestly joined them there, and he also had some drink. Newton and Priestly became the worse of drink, but

the younger Ward and the other Newton did not. The bottles were placed in the van with the knowledge and assent of George Ward senior, and the van again started for Parkhead containing the Newtons, George Ward junior, and Priestly, George Newton again driving. After they had got some distance on the way George Ward junior took the reins, for the reason, as explained by him, that George Newton was driving unsteadily, and that he thought it would be safer. As he was driving through Main Street, Anderston, between four and five in the afternoon, the accident occurred. It was proved that the horse was proceeding quickly at the time, but not that the pace was furious. A number of witnesses who had been on the street at the time and had seen the accident gave evidence to the effect that the van was being driven carelessly, and that care was not being taken. On the other hand, George Ward junior and the other men in the van deponed that the pace was moderate, and the driving careful. They attributed the accident to the children having come out from behind a tramway-car which was passing at the time, and having been run over before George Ward junior, with every effort he could make, could pull up the horse. The bystanders, however, gave evidence that though a car had passed shortly before there was no car in the way at the time. The defenders did not call any witness who was on the car which they alleged had obstructed the view of the children from the van. The result of the accident was that both children were injured.

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The Sheriff-substitute (Spens) found that "*culpa* is not proved against the driver, George Ward [junior]: Finds, *separatim*, that even had *culpa* been proved there was such contributory negligence on the part of the pursuer or of his wife in allowing such young children to be at such a period of the day in such a busy thoroughfare without some person to look after them to bar any claim of damages otherwise competent; therefore sustains the defences, and assoilzies the defenders, but finds no expenses due."*

On appeal, the Sheriff (Berry) adhered, on the ground that fault had not been proved against the driver.

The pursuer appealed, and argued;—It had been proved that the van was being recklessly driven, and that no tramway-car obstructed the view of the driver. Such young children could not be said to be guilty of contributory negligence. At all events, there was no negligence in their being on the street or in crossing. *Greer's* case shewed that there was no rule of law that a father or other guardian must have someone taking charge of a child if he allowed it to go out on the street.¹ The children were lawfully there, and it was for the driver to take reasonable care to avoid running down children. That was just one of his ordinary duties. Assuming such children to be capable of being guilty of contributory negligence, none had been proved.

Argued for the defenders George Ward senior and George Ward junior;—It was not proved that the driving of the van was reckless, and it was proved that, as the Sheriffs had held, a car obstructed his view. Even if the driving of George Ward junior were held to have been careless, the conduct of the children, and of their father in allowing them to be where they were, was contributory negligence. The carelessness of the children themselves lay in crossing the street without sufficient care when the tram-car was passing, that of the father in allowing such young children

* The Sheriff-substitute stated his opinion that the accident happened through the children suddenly stepping out from behind a tram-car, as described by George Ward junior.

¹ *Greer v. Stirlingshire Road Trustees*, July 7, 1882, 9 R. 1069.

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to be in a place of danger without proper precautions for their safety.¹ The case of *Greer*, quoted on the other side, was not in point, because there the parents of the injured child had no reason to believe that the child had wandered to a place of danger. Here, as in *Morran v. Waddell*, it was proved that the parents knew the children were in the habit of wandering along the streets. In any view, George Ward senior could not be held liable, as he was not in the van, nor had he any control of it. The utmost that could be said was that he knew it was being used by his son.

LORD JUSTICE-CLERK.—(After stating his opinion that the driver ought to have seen the children, and that the defenders had failed to prove that the driver's view had been obstructed by a tramway-car, from behind which they had emerged)—I do not think that this was a case of contributory negligence at all. The children were entitled to be on the streets, and it is impossible to lay it down as a rule that every young child out upon the public streets must always have some person with him to look after him. Every driver knows that it is part of his duty—often the most agitating and difficult part of it—to avoid running over children on the streets, and experience shews that with ordinary care that can be done. I know of no case in which a child has been run over on a public thoroughfare in which a defence has been successfully stated that the child had no business to be there, and to get in the way of the vehicle. The cases quoted to us of a child allowed to stray on a canal bank or near a railway crossing are different, for these are examples of places whither the child ought not to be allowed to go. We have had occasion more than once lately to find that it is the duty of a driver to avoid injury to persons walking on the roadway. Therefore I am of opinion that there is here no place for a plea of contributory negligence. I am for altering the judgment, and finding the defenders liable.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

Young, for the defender George Ward senior, then submitted that he could not be held liable for the fault in the driving of the van. His son was indeed his servant, but only to sell in his shop, and had no employment to drive. The proper driver, indeed, was present, and George Ward junior only took the reins to avoid an accident. It was no ground of liability that the bottles in the cart were the property of George Ward senior, nor that he knew of the van being borrowed to convey them. All the orders he had given were to remove them, and the borrowing a van was his son's doing altogether. He was no more liable than if his son had been removing the goods in a cab and an accident had occurred.

The pursuer argued;—George Ward senior was liable because his work was with his knowledge being done at the time of the accident by his son and servant George Ward junior. It was true the latter was usually engaged in the duties of a salesman, but at the time in question he had been entrusted with other work, and his father had perfect knowledge of and had approved his mode of doing it.

¹ *Grant v. Caledonian Railway Company*, Dec. 10, 1870, 9 Macph. 258, 43 Scot. Jur. 115; *Ramsay v. Thomson & Sons*, Nov. 17, 1881, 9 R. 140; *Fraser v. Edinburgh Street Tramway Company*, Dec. 2, 1882, 10 R. 264; *Morran v. Waddell*, Oct. 24, 1883, 11 R. 44; *Davidson v. Monkland Railway Company*, July 5, 1855, 17 D. 1038, 27 Scot. Jur. 541.

LORD RUTHERFURD CLARK.—The point which we have now to consider is the **No. 153.**
 most obscure and delicate in the case, viz., whether George Ward senior is liable
 for the consequences of the accident. The van was not his. It belonged to **June 15, 1887.**
 Newton & Blair. But it is said on the part of the pursuer that he is responsible **Martin v.**
 for the accident, because the van was at the time being employed in his business, **Wards.**
 in other words that he was the hirer and user of the van when the accident
 occurred.

It is certain that Ward senior had occasion to remove articles from his shop
 at Partick to his shop at Parkhead. These articles were bottles, and owing to
 their number some vehicle was required. Ward thought a barrow would
 be sufficient, but he entrusted the removal to his son, and he found that the son
 had got a van from Newton & Blair. He saw the goods put upon the van and
 sent away, but the van was then in charge of Newton, the owner of the van. It
 did not occur to Ward senior that his son had anything to do with the driving
 of the van; on the contrary, he considered that his son had employed Newton
 & Blair to remove the bottles by means of their van from the one shop to the
 other.

If Ward senior had hired a van and the services of a vanman to remove bottles,
 and if in the course of doing so the vanman had run down a person on the street
 and injured him, I do not think that Ward would have been responsible. He
 would not have been in anyway to blame for the accident. I think that that was
 his true position. He allowed his son to take the use of the van when under
 the charge of the owner of the van. In other words, he allowed his son to em-
 ploy Newton & Blair to remove the bottles in their van. He never understood
 or agreed that his son was to drive. It is of no moment whether Newton &
 Blair undertook to perform the work gratuitously, or for hire. In either case
 they undertook to perform it, and Ward senior agreed to nothing else.

No doubt Ward junior came in the end to be the driver, and was the driver
 at the time of the accident. But the reason was that the person who ought to
 have been driving had become drunk. In consequence, Ward junior seems to
 have thought it best to take the reins, and perhaps he was right enough to do
 so. But I do not think that that makes Ward senior liable for the driving of
 the van. The son is the father's servant, but only in the shop. He was not
 his father's servant when driving the van, for he had no authority from his
 father to drive it. He was then acting for Newton in consequence of Newton's
 incapacity.

I think, therefore, that we ought to assoilzie Ward senior. But I feel bound
 again to say that it is very unfortunate that this point was not stated till the
 very close of the debate, and that I come to this result not without mis-
 giving.

LORD CRAIGHILL.—I confess that my impression was different, and that even
 now that impression is not removed. I am inclined to think that Ward senior
 is liable. There is no doubt that the van was being used for the purposes of his
 business, and that a person engaged in his business obtained it. It is true that
 Newton went also with the van, but not on his own concerns, but in the service
 of Ward and for his purposes. If there had been no knowledge by Ward that
 the van was employed on his business, then Ward would not be liable, but he
 had knowledge of it and had left to the son's discretion the arrangements as to
 the removal. It is said that a van was not to be got, but a barrow. But the

No. 153. son obtained a van and not a barrow, and the father when the van came made no objection to it, and the question is whether, seeing what he did, he must not be taken as content to take things as they might turn up without making any inquiry. I incline to think Ward liable because the van was given for his benefit, with his knowledge, and he did not repudiate what his son had done. But while that is the inclination of my opinion, I understand that the judgment will be as Lord Rutherford Clark has suggested.

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LORD JUSTICE-CLERK.—I agree with Lord Rutherford Clark.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the appeal, Find in fact (1) that on the occasion referred to in the record Robert and William Martin, children of the pursuer, aged respectively five and three years, when crossing Main Street, Anderston, Glasgow, were knocked down and run over by a horse and van, whereby the elder of the two was severely hurt, three of his ribs having been broken, and his chest crushed, while the younger was injured in his right arm; (2) that the horse and van were the property of the defenders Newton & Blair, and had been lent by them to the defender George Ward junior for the purpose of carrying certain articles belonging to his father, George Ward senior, from his shop in Partick to Parkhead; (3) that on leaving the said shop the van was driven by the defender George Newton, but afterwards, and when the accident happened, by the defender George Ward junior; (4) that it was then proceeding rapidly, and the children were injured as aforesaid by the fault and negligence of the defenders George Newton and George Ward junior, in failing to pull up the van on coming in sight of them; (5) that it is not proved that the said defenders were prevented from seeing the children by the intervention of a tramway car: Find in law that the defenders George Ward junior and Newton & Blair are liable to the pursuer in damages for the injuries sustained by his children as aforesaid: Therefore sustain the appeal; recall the interlocutors of the Sheriff and Sheriff-substitute appealed against; assess the damages due to the pursuer at £150 sterling; ordain the defenders the said George Ward junior and Newton & Blair to make payment of that sum to the pursuer; find them liable to the pursuer in the expenses incurred by him in the inferior Court and in this Court; remit to the Auditor to tax the same and to report; assoilzie the defender George Ward senior from the conclusions of the action, and decern."

A. B. CARTWRIGHT WOOD, W.S.—WINCHESTER & NICOLSON, S.S.C.—Agents.

No. 154. BRITISH LEGAL LIFE ASSURANCE AND LOAN COMPANY, LIMITED, Pursuers (Respondents).—*M'Kechnie—C. N. Johnston.*

June 15, 1887.
British Legal
Life Assurance
and Loan Co.
Limited, v.
Pearl Life
Assurance Co.
Limited.

PEARL LIFE ASSURANCE COMPANY, LIMITED, Defenders (Appellants).—*D.-F. Mackintosh—W. Campbell.*

Reparation—Slander—Company—Interdict.—Where the officials of a company had prepared and published, but without the authority, knowledge, or assent of the directors, a libellous circular concerning another company, and the latter company asked for interdict against the former circulating the document in question, the Court found that the publication and circulation by

the officials of the defenders' company having been allowed to continue after the action was raised and the facts were brought to the knowledge of the directors, the pursuers were entitled to interdict. No. 154.

THE BRITISH LEGAL LIFE ASSURANCE AND LOAN COMPANY, LIMITED, brought an action against the Pearl Life Assurance Company and their Dundee superintendent, Mr Dewars, to have the defenders interdicted from printing, publishing, or circulating certain handbills containing representations of a nature calculated to injuriously affect the pursuers' business, and from otherwise interfering with it by influencing persons assuring with the pursuers to transfer their policies to the defenders or otherwise. There was also a conclusion for damages. June 15, 1887.
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Ultimately the only handbill founded on was one entitled "Scandalous Revelations," which represented the pursuers as conducting their business in a scandalous and improper way, as having defrauded a woman who was insured with them by paying her 40s. instead of £20, and of having withheld payment of moneys legally due under their policies.

In answer the defenders pleaded, *inter alia*;—(2) The proceedings alleged against the defenders' company being *ultra vires* of the officials of the said company, the said action is incompetent against the defenders as a limited company incorporated under the Companies Acts. (3) The allegations of the pursuers are irrelevant, and insufficient in law to warrant the prayer of the petition.

On 29th March 1886 the Sheriff-substitute (Campbell Smith) found the pursuers' allegations relevant to sustain the claim of damages, but not the interdict.

On appeal the Sheriff (Comrie Thomson) recalled his substitute's interlocutor, and found there were no relevant or sufficient statements on record to support the conclusion for damages, and in regard to the conclusion for interdict, he allowed both parties a proof.

The defenders having appealed to the Court of Session, the pursuers stated at the hearing that they now insisted upon the conclusion for interdict alone, and having been allowed to amend their record to the effect of specifying with more detail the method of circulation and its injurious effects, the Court, on 26th June 1886, remitted to the Sheriff to proceed.

The Sheriff-substitute (Campbell Smith), after proof, pronounced this interlocutor:—"Finds that the handbill entitled 'Scandalous Revelations' was prepared and printed in Dundee, and extensively published in and about Dundee by officials of the defenders' company, including the district superintendent, John Dewars, who is called as a defender; but finds that the preparation and uttering of the said slanderous document was not directly effected by the Pearl Insurance Company, or expressly authorised by them, or carried out with their knowledge or assent: Further, finds that the composition and printing of said handbill was executed on the employment of one or more officials of the defenders' company, and that the uttering of it was effected by canvassers and other officials of said company, including the defender Dewars, on purpose to improve its business through inflicting injury on pursuers' business: Further, finds in fact that the defenders, as a company, authorised (1) canvassing and transference of the contributors of the British Legal; (2) canvassing by means of handbills, though not of the handbill complained of; and (3) that the defenders' business derived benefit from said conduct of the officials: Finds in law that the defender Dewars is liable to answer as an individual for the utterance of said handbill, and further, that the defenders are liable for the illegal acts of their officials in respect that they acted in the defenders' interest and within the scope of their implied mandate: There-

No. 154. fore decerns and grants interdict against uttering or publishing said handbill headed 'Scandalous Revelations': Finds the pursuers entitled to expenses," &c.*

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* "NOTE.—The main question arising on the proof is whether the corporate defenders fabricated and uttered the said handbill entitled 'Scandalous Revelations,' either directly or by agents for whom they are responsible.

"The pursuers in their minute of amendment, No. 268, aver direct authorship and uttering by the defenders and the defender Dewars 'acting on their express instructions.' If this averment be essential to the pursuers' case, then I cannot help thinking that they have failed in the proof except as against the defender Dewars acting according to his own instructions and devices.

"There is no proof whatever that any direct or leading official of the defenders' company composed this handbill, or uttered it, or knew of its existence until the raising of this action had forced it upon their attention. Two representatives of the defenders from London, Mr P. J. Foley and James Roll—the former managing director, the other an ordinary director who appears to take special interest in the Scotch department of the business—both swear that they had nothing to do with the publication of this bill. A minute of directors is the proper evidence of a resolution binding a large company, but of the pursuers' allegations there is neither written nor oral evidence. But although a company may not be the direct authors of a legal wrong—the express instructors to print and publish slander—they may be the indirect, but nevertheless responsible, authors, because of the acts of their agents or servants. An agent can bind his principal within the limits of his mandate, a servant within the scope of his employment. . . . Here what the defenders gave their servants to do was canvassing—that is, puffing their own company, disparaging rivals, and, when possible, 'transferring' to themselves the contributories of rivals with all their obligations, but no part of the premiums they had been paying, it may be for years. They taught their servants by precept and example to canvass by means of handbills, the gist of the handbills being the disparagement of rivals. The servants were imitative rather than intelligent, and the zeal with which they set about doing their masters' work in their masters' own way has carried them over the bounds permitted by the law of libel. If a master enlists the zeal of a servant for purposes of aggression or aggressive business competition, and if he has not selected a servant with the proper knowledge or discretion, or has not instructed him sufficiently, and if the uninstructed zeal serves the master's ends, why should he not be responsible?

"There are, in my opinion, four material elements of fact established against the defenders. First, They authorised an attack to be made upon the business of the pursuers' company by directing or encouraging their canvassers to persuade the contributories of the pursuers' company to desert the pursuers and go over to the defenders. Second, They prepared and printed handbills in London, and placed them in the hands of their canvassers for distribution in Dundee, thus by implication authorising this mode of canvassing by handbills as a mode fit to be adopted and used by their canvassers. Third, Their canvassers and collectors being so led to believe that canvassing by handbill was within the sphere of their mandate, prepared, printed, and uttered handbills, and, *inter alia*, the slanderous handbill complained of. Fourth, That said bill was an effective although illegal instrument for canvassing purposes, and was used to the benefit of the defenders and to the prejudice of the pursuers.

"Now, are these elements of fact in their combination sufficient to involve the defenders as a company in liability? The difficulty lies in the fact rather than in the law, and it lurks in the uncertainty that is left to exist about the exact scope of the employment given to the defenders' servants. They for certain thought they were doing well both for themselves and for their masters when they were using this offensive handbill. It is asserted that the master is not liable for the servant's crime, and generally speaking he is not, because crime is for the most part personal. But the railway company is often liable for the

The Pearl Company appealed to the Court of Session, and argued;— In England, before the recent legislation, a libel was established in the common law Courts by the verdict of a jury.¹ Now that law and equity were fused, the English Courts no longer experienced a difficulty in granting injunctions. But while they were competent, they were unusual, and the Court only granted them in very exceptional circumstances, and, as a matter of statutory duty, under the Judicature Act. Here an interdict was the only remedy now sought, and it would be the first time that the Scottish Courts had granted interdict in such circumstances. But it was sought against a corporation in respect of the issue of the bill by their officers, for whom they were said to be responsible. But a corporation could only act through its agents, and as its constitution certainly did not confer power upon the directors or upon its inferior officers to commit criminal or quasi-criminal acts, the only redress open to the pursuers was to have repetition of the profits, *i.e.*, by way of damages.² But damages were not now sought. And further, a corporation was only liable even then in so far as they had taken benefit. Further, there was no example of an interdict being granted against a corporation on account of the malice of its officials. The proper course was to interdict the wrongdoers. The case against Mr Dewars was special, but he had acted under great provocation, and the action against him should be dismissed, with expenses to neither party.

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The British Legal Company, the respondents, argued;—It was enough for their case if they could shew upon the evidence that the libel had been kept in circulation after the action was raised, the directors of the corporation taking no steps to stop it. This was clearly proved. A principal would not escape merely because he did not know of the action of his subordinates—if only he took benefit from the wrongous act, and if it was done within the scope of the employment.³ The benefit in this case was seen in the increased membership of the appellants' company, owing to the measures which were taken to withdraw members from the respondents' company. In these circumstances interdict was a compe-

railway servant's culpable homicide; and the master is often liable for the offence of the servant against laws applicable to the manufacture and sale of spirituous liquor. The legal quality of the servant's wrong scarcely affords any available test of the master's liability. The true test lies in what the servant was employed to do; if he does it right, all well for his master; if he does it ill, and to the injury of some extraneous person, his master is liable for his wrong-doing, just as much as if he had done it himself.

“Had I been left to give untrammelled effect to my own judgment, I should have held that the right conclusion to come to would be to give the pursuers one shilling of damages, and modified expenses. But the pursuers, by their skill in pleading and in refraining from pleading, have for this cause apparently established the proposition in law that, though the circulation of the slander of which they complain may be stopped by interdict, it affords no just ground for entitling them to claim damages. The only remedy I can give them is interdict, and that I must do, though I have not the least idea how they can apply it, except as against Dewars. . . .”

¹ *Newton v. Fleming*, March 10, 1846, 8 D. 677, rev. Feb. 17, 1848, 6 Bell's App. 175.

² *Houldsworth v. The City of Glasgow Bank*, July 4, 1879, 6 R. 1164, aff. March 12, 1880, 7 R. (H. L.) 53, L. R., 5 App. Ca. 317; *Waldie v. Duke of Roxburgh*, March 1, 1822, 1 S. 366, aff. Feb. 10, 1825, H. L., 1 W. & S. 1; *Wardrope v. Duke of Hamilton*, June 24, 1876, 3 R. 876.

³ *Mackay v. The Bank of New Brunswick*, 1874, L. R., 5 P. C. App. 394.

No. 154. tent remedy even against a corporation.¹ It was a protection for the future, which no award of damages could be.

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At advising,—

LORD PRESIDENT.—[After going over the evidence, and coming to the conclusion that it was proved that the circulation of the pamphlet entitled “Scandalous Revelations” had gone on after the present action had been raised, and consequently after the matter had been brought to the knowledge of the directors]—That being so, I am of opinion that this interdict should go out against the company just as it has against Mr Dewars, because although it may be very true that when a company comes forward and denies any participation in the acts of their agents which are complained of as libellous, they cannot be held responsible therefor,—yet if when a libel is complained of and brought fairly under their notice by legal proceedings, they do not take instant and very energetic steps to put a stop to the evil complained of, they subject themselves to a liability to be interdicted and to be held responsible for anything that may happen afterwards.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THIS interlocutor was pronounced :—“ Find that the handbill entitled ‘ Scandalous Revelations ’ was prepared and printed in Dundee, and was, in the months of November and December 1885, extensively published in and about Dundee by officials of the defenders’ company, including the district superintendent, who is called as a defender; but find that the preparation and uttering of the said slanderous document before the present action was raised was not directly effected by the defenders’ company, or expressly authorised by them, or carried out with their knowledge or assent; but find that since the present action was raised, and the facts above found were brought to the knowledge of the directors of the defenders’ company, the said handbill continued to be published and circulated in Dundee and its neighbourhood by the officials of the defenders’ company, and that such continued publication was caused by the negligence of the said company and its directors in not sufficiently superintending and controlling their officials in and about Dundee, and preventing them from continuing said publication: Therefore refuse the appeal, and decern: Find the pursuers entitled to expenses in this Court,” &c.

T. & W. A. M’LAREN, W.S.—J. & J. GALLETT, S.S.C.—Agents.

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June 17, 1887.
Robertson v.
Thomas.

ROBERT ROBERTSON, Petitioner (Appellant).—*Darling—Watt.*
MOSES THOMAS (Burgh Surveyor of Govanhill), Respondent.—*C. S. Dickson—Law.*

Dean of Guild—Jurisdiction—Nuisance.—The surveyor of a burgh objected to warrant being granted by the Dean of Guild Court for the increase of certain stabling accommodation belonging to a carriage-hirer, on the ground that the buildings proposed to be enlarged were in the middle of a square of buildings densely populated, and that the smell and noise from them would constitute a nuisance, and that the danger of fire in the district would be

¹ Quartz Hill Consolidated Gold Co. v. Beall, 1882, L. R., 20 Chanc. Div. 501; Hermann Loog v. Bean, 1884, L. R., 26 Chanc. Div. 306; Thorley’s Cattle Food Co. v. Massam, 1879, L. R., 14 Chanc. Div. 763 (V.-C. Malins, p. 779).

increased by them. The Dean of Guild having allowed a proof as to these objections, the petitioner appealed, and maintained that they related only to the use of the proposed building and to alleged nuisance, which were beyond the jurisdiction of the Dean of Guild. The Court (*disc.* Lord Rutherford Clark) refused the appeal on the ground that it was expedient that the facts should be ascertained before determining whether the questions raised by the objections fell within the jurisdiction of the Dean of Guild.

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ROBERT ROBERTSON, carriage-hirer, Govanhill, and proprietor of certain 2^d Division. stables there, presented a petition to the Magistrates of the Burgh of Govanhill, as having the jurisdiction within that burgh which any Dean of Guild of a royal burgh has therein, for warrant to execute certain Guild Court. alterations thereon. I.

The petition was served on the neighbouring proprietors, who lodged no answers, and on Moses Thomas, the burgh surveyor.

The burgh surveyor objected to the proposed buildings on the following grounds:—(1) That the proposed buildings would cause very disagreeable smells, which would be prejudicial to the public health by vitiation of the air; (2) that there would be continuous and great noise arising from the petitioner's large business of stable-keeping; (3) that the presence of large numbers of horses (thirty to forty) which the proposed buildings would accommodate might be the cause of epidemic disease of a serious kind in the neighbourhood; (4) that the proposed buildings would greatly vitiate the air by the emission of the large amount of smoke which must arise in the preparation of food for so many horses, and otherwise in connection therewith; (5) that the stables would give rise to the presence of large numbers of rats in the neighbouring houses, to the annoyance and danger of the inhabitants; (6) that the risk of fire in the neighbourhood would be much increased by the existence of the proposed buildings; (7) "this respondent's objections are accentuated by the fact that the proposed buildings will be in the centre of what is almost already, and will soon be entirely, a hollow square (that is a square built on all four sides), the area of which is little more than an acre in extent, through which there is no provision for a current of pure air, or for ready access in case of fire or otherwise, and dwelling round which there is already a population of about 500, which will be increased when the square is entirely built to 700 or 800"; (8) "the proposed buildings are in contravention of section 16 of the Public Health (Scotland) Act, 1867,* and section 177 of the General Police and Improvement (Scotland) Act, 1862."†

* Section 16 of the Public Health (Scotland) Act, 1867, 30 and 31 Vict. c. 101, provides that "the word nuisance under this Act shall include . . . (c) any stable, byre, pig-stye, or other building in which any animal or animals are kept in such a manner as to be injurious to health; (d) any accumulation or deposit of manure or other offensive matter within fifty yards of any dwelling-house within the limits of any burgh, or wherever situated if injurious to health; . . . (e) any work, manufactory, trade, or business injurious to the health of the neighbourhood, or so conducted as to be offensive or injurious to health; . . . (f) any chimney, not being the chimney of a private dwelling-house, sending forth smoke so as to be injurious to health. . . ."

† Section 177 of the General Police and Improvement Act, 1862, 25 and 26 Vict. c. 101, provides—"It shall not be lawful to form, lay out, or build any court unless the same shall be of a clear width of fifteen feet, measuring from the buildings or intended buildings therein; provided always that to any such court in which there shall be more than eight houses, there shall be an additional width of one foot for every such additional house; provided also that there shall be an entrance to every such court of the full width thereof, and open from the ground upwards."

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The petitioner pleaded, *inter alia*;—(3) No jurisdiction relative to objections. (4) Objector's pleas are irrelevant.

The respondent, Mr Thomas, pleaded, *inter alia*;—(2) The proposed buildings being of a nature to cause serious annoyance and discomfort to the neighbours, and danger to the public health, the petition should be refused. (3) The proposed buildings being a nuisance both at common law and by statute, should not be sanctioned.

The magistrates, after hearing parties, allowed the respondent a proof of the averments in his objections, and to the petitioner a conjunct probation.

The petitioner appealed to the Court of Session.

No objection was stated in the Single Bills to the competency of the appeal, but when the case was called in the Summar Roll the respondent objected to the competency, and argued that the judgment of the inferior Court, being an interlocutory judgment allowing a proof, and not a final judgment, could not be appealed. There was no provision for such an appeal in the Court of Session Act, 1810.* The whole ground of the appeal was that the Dean of Guild had no jurisdiction to deal with the objections, but it was not disputed that he had jurisdiction to deal with the petition, and the proof was required to shew whether the matters detailed in the objections, when established, would or would not be of a nature with which he was competent to deal. It would be premature in the state of the averments to decide without any inquiry that the whole objections stated in the public interest were outwith the jurisdiction of the Dean of Guild. With regard to the cases cited on the other side, that of *Millar v. Crawford*¹ was distinguishable, because the Dean of Guild there had thought he ought to ascertain who was proprietor of the disputed ground, and allowed a proof of possession, in the first place; while *Colville v. Carrick*² was a question of disputed title arising between private parties, whereas this was a question raised in the public interest, and not involving any dispute as to title. In *Lang v. Bruce*³ the point was not raised, and the reason probably was that the Dean of Guild had erred in the interlocutory judgment by directing certain operations to be performed, and there was no interest to raise the question of competency, since it was more convenient for the parties to have the merits of the judgment decided. In *Moffat v. Denham*⁴ it was held "premature to allow advocacy on proper defect of jurisdiction while a proof has been allowed in the inferior Court, with a view to give a judgment on an objection to the jurisdiction." The Dean of Guild had jurisdiction where a building would naturally, if not necessarily, lead to a nuisance.⁵

* The Act 50 Geo. III. c. 112, sec. 36, provides "that bills of advocacy from the Sheriffs or other inferior Judges in Scotland against interlocutory judgments shall be allowed only upon the following grounds,—first, of incompetency, including defect of jurisdiction, personal objection to the Judge, and privilege of party; secondly, of contingency; thirdly, of legal objection with respect to the mode of proof, or with respect to some change of possession, or to an interim decree for a partial payment, provided that in the cases specified under this head leave is given by the inferior Judge."

¹ *Millar v. Crawford*, Jan. 15, 1881, 8 R. 385 (Lord President).

² *Colville v. Carrick*, July 19, 1883, 10 R. 1241.

³ *Lang v. Bruce*, Feb. 5, 1873, 11 Macph. 377, 45 Scot. Jur. 257.

⁴ *Moffat v. Denham*, June 20, 1829, 7 S. 781.

⁵ *Donaldson v. Pattison*, Nov. 14, 1834, 13 S. 27, Lord Mackenzie's opinion; *Lamont v. Cumming*, June 11, 1875, 2 R. 784, opinion of Lord Deas, and case of *Buchanan v. Bell*, Nov. 15, 1776, M. 13,178, there referred to; Proprietors

Argued for the appellant;—The appeal was competent both at common law and under the Act of 1810. The Dean of Guild had here gone into a matter with which he had no right to deal. He had jurisdiction to entertain the petition, but no jurisdiction to take up a mere allegation of nuisance, and the Supreme Court could restrain him whenever he proposed to enter on a field outwith his competency, both at common law and on the ground of incompetency under the Act of 1810. It was analogous to the case of a competition of heritable right. The Supreme Court would not allow the Dean of Guild to enter on an inquiry involving a competition of heritable right, or to go outside any statutory limit of his powers and an appeal was competent against a judgment by him which involved such an incompetent inquiry.¹ In *Pitman v. Burnett's Trustees*² the appeal, if competent at all, which was not disputed, must have been under the Act of 1810. The Dean of Guild Court had no jurisdiction as to the use of a building, or as to a mere question of nuisance. That was now well settled, and *Colville's* case was directly in point,³ as was also *Forrest v. Manson*, decided in the First Division more recently.⁴ If, then, the respondent's averments were all established, the case would require to come back to this Court, on the ground that the Dean of Guild could not competently deal with it. It was, therefore, not only competent, but in the interest of both parties, that the Court should decide between them now.

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LORD JUSTICE-CLERK.—There is difficulty in this case arising from the extreme slenderness of the statements on record. I have come, however, to the conclusion that the appeal cannot be sustained.

The petition prays the Magistrates of Govanhill, exercising the jurisdiction of Dean of Guild, to appoint service on neighbouring proprietors and on the burgh surveyor, and thereafter to "line the ground described in the condescendence, and approve of the proposed alterations thereon, conform to the plans and sections herewith produced."

The only person who has appeared to object is the surveyor of Govanhill, and he makes these statements:—First, that the buildings will be the cause of very disagreeable smells, which will be prejudicial to the public by vitiation of the air; second, that the petitioner's business will cause great noise; third, that the presence in the proposed buildings of the large number of horses which it is proposed to accommodate will be the cause of epidemic disease; fourth, that the emission of smoke from the proposed buildings in the course of preparing food for so many horses will cause vitiation of the air; fifth, that the stables will give rise to the presence in neighbouring houses of numerous rats; sixth, that there will be a risk of fire; and then he makes what seems to embody the most substantial objection in his seventh and eighth statements, which are as follow—(his Lordship quoted those statements). Now, the Dean of Guild Court allows a proof, and the petitioner appeals on the ground that the objections

of Carrubber's Close, Feb. 26, 1762, M. 13,175; *Vary v. Thomson*, M. Appendix, *vide* Public Police, No. 4 (July 2, 1805); *Blakeney v. Bisset*, July 10, 1886, 13 R. 1151; *Glass v. Glasgow Master of Works*, *supra*, p. 567.

¹ *Lang v. Bruce*, Feb. 5, 1873, 11 Macph. 377, 45 Scot. Jur. 257; *Millar v. Crawford*, Jan. 15, 1881, 8 R. 385 (Lord President).

² *Pitman and Others v. Burnett's Trustees*, July 7, 1881, 8 R. 914.

³ *Colville v. Carrick*, July 19, 1883, 10 R. 1241.

⁴ *Manson v. Forrest*, June 14, 1887, *supra*, p. 802; and *Donaldson v. Pattison*, Nov. 14, 1834, 13 S. 27.

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taken are beyond the cognisance and jurisdiction of the Dean of Guild. To the competency of this appeal it is objected by the respondent that it ought not to be entertained by us because the judgment appealed against is an interlocutory judgment only. In order to maintain its competency the appellant powerfully argued to us that the allowance of proof is an excess of jurisdiction. If I were quite satisfied on the face of these objections that they include matters only which are entirely beyond the jurisdiction of the Dean of Guild Court, I should give effect without difficulty to the appellant's argument. But I am of opinion that that is not the nature of the case. This stable is in the centre of a square of buildings. That is the nature of the building which is the subject of dispute, and while it may be quite true that the Dean of Guild has no legal authority in a simple case of nuisance unconnected with questions of the structural nature of the building, still he may be a competent judge as to a question of nuisance which is connected with structural alterations on a building, or with the structural arrangements of a building within his jurisdiction. That is the ground of my judgment. I am clearly of opinion that there are cases of nuisance, and cases as to the use of buildings, which cannot come under the jurisdiction of the Dean of Guild because they do not involve questions of the character for which he is the proper judge, but that, on the other hand, it is no answer to say what the appellant says here, if the nuisance is connected with a structural alteration of the building itself, and the use is the use of that building. But I say more. A building may be innocuous in one place and a nuisance in another. This stable, for example, might be quite innocuous in another place, but noxious in the place here in question. I think, though I have not come to that result without difficulty, that that is the result of the cases quoted to us, and that there is no case in which the objection was one taken to a building in regard to its particular locality and surroundings in which it has been held that there was no case for inquiry. If I were to take some of those objections by themselves, I might be inclined to say that they are not within the jurisdiction of the Dean of Guild, but I do not think we ought at this stage to limit the inquiry. I think the Dean of Guild is entitled to make the proposed inquiry. The result of that may be to bring out that the matters put forward as objections are outside of his jurisdiction, but I do not think we can say so as yet.

LORD CRAIGHILL.—I concur in your Lordship's opinion, and in the grounds of it. The view of the Dean of Guild is that he is not without inquiry able to say that all the objections stated are such as to be outside his jurisdiction, although in the end of the day it may turn out that all the objections are beyond his jurisdiction. I am not satisfied myself that all these objections are outside his jurisdiction, and I think it would be a strong thing for us at present to say, for example, that the objections founded on the General Police Act and the Public Health Act as to the natural consequences of the proposed erections, and the carrying on of the appellant's business in them, are matters entirely beyond the jurisdiction of the Dean of Guild. Unless satisfied of that, I think it was right to make sure of the grounds of judgment by allowing a proof. I think it would be inexpedient to recall this interlocutor. We do not by supporting it assert that the Dean of Guild's jurisdiction will in the end be sustained, but only that a decision upon that would at present be premature.

LORD RUTHERFURD CLARK.—I have felt, and still feel, great difficulty here. If I had to give an opinion on the merits of the question between the parties,

I should have taken more time to consider my judgment. But your Lordships propose that the proof shall go on, every question of competency and otherwise being reserved. That judgment cannot prejudice these questions, though it may cause delay and expense, but as it is suggested by your Lordships I am relieved from entering on the important questions as to the jurisdiction of the Dean of Guild. I only add, but without stating reasons, that I am not prepared to concur in the judgment proposed. I do not enter on my reasons, because to do so would be to discuss matters on which in future I may have to give an opinion.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Having heard parties on the appeal, dismiss the same, and affirm the judgment of the Dean of Guild appealed against," &c.

ANDREW URQUHART, S.S.C.—MACPHERSON & MACKAY, W.S.—Agents.

LIQUIDATOR OF THE NORTH BRITISH BUILDING SOCIETY, Petitioner.— No. 156.

R. Johnstone—Ure.

DAVID GORDON M'LELLAN AND OTHERS, Respondents.—*D.-F. Mackintosh—* June 23, 1887.
Strachan. North British Building Society v. M'Leilan.

Building Society—Winding-up—List of contributories.—In the winding-up of a Building Society, the liquidator presented a note to the Court setting forth a scheme of settlement of the list of contributories. The following questions, arising on the construction of the rules of the society, were settled by the Court:—

Bank Interest.—Rule 13 of the society provided that "Any member holding any share, in respect of which no advance has been made, which, by the subscriptions paid and the profits thereon, shall have accumulated to £25 (the amount of said share), shall be entitled to receive the amount thereof, with bank interest from the date of completion, and his connection with the society in respect of the same shall cease." *Held* that there being no stipulation to the contrary, and as the funds of the society were operated on from day to day, interest was due at bank current account rates.

Advanced and unadvanced shares.—A shareholder who held forty shares of the society of the nominal value of £1000 obtained an advance of £500 from the society. *Held* that in the winding-up he was to be treated as having received payment by anticipation of twenty completed shares and as a holder of twenty unadvanced shares, and not as having obtained a loan on the security of his forty shares.

Fines.—Rule 3 of the society provided that members in arrears two fortnightly instalments should pay a fine. The liquidator admitted that at the date of the last balance-sheet of the society no fines had been levied on certain members, and that it was not the practice of the society to exact fines in terms of the rule. *Held* that the liquidator was not entitled to enforce the rule in the winding-up.

Non-timeous withdrawal of shares.—By rule 12 it was provided that members on whose shares no advances had been made might "on one month's notice in writing to the manager withdraw his or her subscriptions paid thereon," with interest at a certain rate, "and the same shall be paid as soon after the expiry of the month's notice as the funds will permit." *Held* that members who only gave notice of withdrawal within one month of the date of the winding-up could not benefit by the rule.

Interest on advances.—Rule 15 provided,—"Any member who has been granted an advance shall, from the date of granting the same, become liable for such a rate of interest as along with the interest allowed by the bank will amount to five per cent until said member has received said advance, when he shall pay to

No. 156. the society interest thereon at the rate of five per cent on the full amount of said advance; and all interest shall be payable at the terms of Martinmas and Whitsunday; and members failing to pay the same within fourteen days thereafter shall be charged interest thereon at five per cent from the term of payment." Held that the rule ceased to be operative when the society ceased to be a going concern.

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CERTAIN questions, arising in the liquidation of the North British Building Society, were brought before the Court in special case *Tosh v. North British Building Society*, and were decided by the Court of Session, of date July 10, 1885 (12 R. 1271), and by the House of Lords, of date July 30, 1886 (*ante*, H. L. 6).

The proceedings in the Society prior to 9th July 1884, when a petition for liquidation was presented, are narrated in the House of Lords report in the present volume, p. 6 (H. L.).

On 19th July 1884 the Court pronounced a liquidation order and appointed Mr J. L. Selkirk official liquidator.

On 18th March 1887 the liquidator presented this note in the liquidation, in which he craved the Court, *inter alia*, "to settle a list of contributories in the liquidation of the Society in conformity with the list hereto appended."

In the petition he stated that the contributories were classified in that list "in accordance with the judgments pronounced by the Court of Session and House of Lords," above referred to. The scheme was divided into the following four sections:—"Section A embraces the names of those members who had completed or withdrawn their shares prior to the commencement of the liquidation, and shews the sums due to each respectively. In accordance with the judgment of the Court of Session, members in this section are entitled to be paid out in the order of the priority of the completion or withdrawal of their shares, and preferably to all the other members of the Society, borrowing or non-borrowing. The liquidator has therefore ranked the members in this section in the order of date of their completion or withdrawal; and he proposes to pay them out from time to time as the funds in his hands permit.

"Section B of the list embraces the names of non-borrowing members who had not withdrawn or completed their shares prior to the commencement of the liquidation. The liquidator proposes to pay out these members *pari passu* after the members whose names are included in section A have been paid out.

"Section C of the list embraces the names of those borrowing members who gave due notice prior to the commencement of the liquidation of their intention to redeem their securities and renounce their shares.

"Section D of the list embraces the names of the remaining borrowing members. The liquidator proposes to deal with these members in accordance with the judgment of the House of Lords, as having impliedly given due notice of their intention to redeem, and as being bound to redeem their securities at Martinmas 1882."

Answers were lodged to this note by various members of the Society. They raised the following questions:—

I. *Bank interest*.—John Taylor and others stated in their answers,— "The respondents are shareholders holding completed shares in said Society. As such they are entered in section A in the list of contributories appended to the note. . . .

"In a note at the foot of the list of contributories embraced in said section the liquidator states that 'the contributories who hold completed shares will be entitled to "bank" interest, in terms of Rule 13. The liquidator understands the term "bank" interest to mean the rate allowed

by Scotch banks on sums at the credit of current accounts kept with them, No. 156. and will act accordingly.'

"Rule 13 provides that 'any member holding any share in respect of which no advance has been made, which by the subscriptions paid and the profits thereon shall have accumulated to £25 (the amount of said share), shall be entitled to receive the amount thereof, with bank interest from the date of completion, and his connection with the Society in respect of the same shall cease.'

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"The respondents maintain that 'bank' interest means interest at the rate allowed by Scotch banks on sums lodged with them on deposit-receipt, and that they are entitled to interest at that rate on the amount of their shares from the date of completion until the date of payment."

The liquidator, acting on a suggestion of the Court, lodged a minute in process, which set forth his arguments on each question raised by the respondents. In that part of his minute which dealt with Mr Taylor's answers he stated,—“The liquidator maintains that 'bank interest' means interest at current account rates. He refers to Rule 13, which provides that 'bank interest' is to be payable on completed shares from the date of their completion, but that the shares shall only be payable in their order and as the funds of the Society will permit. The funds of the Society consisted of small sums—entry-moneys, fines, and subscriptions—paid in from day to day. These sums were lodged in bank on open account. They were not lodged on deposit-receipt, but on account-current; and the liquidator maintains that the 'bank interest' which the rule contemplates as payable to the member holding completed shares was the interest which the Society received on their current account with the bank, and not interest at a higher rate. That was the meaning attached to the rule and acted on while the Society was a going concern.”

II. *Advanced and Unadvanced Shares*.—D. G. M'Lellan was entered on the list as a borrowing and an investing member. He stated in his answers,—“On 11th September 1876 the respondent subscribed for forty shares in the said Society, and obtained a pass-book in which these forty shares are entered as numbering 7525 to 7564 inclusive, and in which are also entered the instalments paid on said shares from time to time. There is also credited yearly in a stock-account at the end of said pass-book the profit from time to time allocated upon said shares. At 30th November 1881 (the date of the last balance-sheet) the said instalments amounted to £340, and said allocated profits to £14, 18s. 11d. Since that date the respondent has paid to the Society instalments on said shares amounting to £95, also credited in said pass-book, making the total instalments paid in respect of said shares £435.

“On or about the 26th September 1877 the respondent obtained from the Society, in respect of said forty shares, an advance of £500, and granted in favour of the Society a bond and disposition in security therefor over heritable property belonging to him at Duke Street, Glasgow. The said bond and disposition in security is herewith produced. The respondent regularly paid at the terms of Whitsunday and Martinmas yearly interest at the rate of 5 per cent on the full amount of said advance, up to Whitsunday 1882.

“On or about the 13th May 1882 the respondent sent a notice to the Society withdrawing the shares in the Society standing in his name; and on 23d May 1883 the respondent's agents, without prejudice to said notice of withdrawal, gave the Society notice, in terms of Rule 27 (quoted *infra*), of the respondent's intention at Martinmas 1883 to redeem his property by renouncing said forty shares and paying any balance that might be due to the Society, after deducting the instalments paid in

No. 156. respect of said shares and interest thereon, as provided in the first part of the above-quoted rule.*

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M'Lellan's name was entered on the list in schedule B in respect of twenty of his shares on which the liquidator alleged no advance had been made, and also in schedule D in respect of shares held by him as representing the advances made to him.

M'Lellan stated his contention thus in his answers:—"The respondent contends that the advance of £500 was made to him in respect of the whole of said shares; that the subscriptions or instalments from time to time paid on these shares have extinguished *pro tanto* said advance of £500; and that the liquidator is not entitled now to treat the half of said shares as advanced and the other half as unadvanced shares. The effect of the liquidator's proposal will be to rear up against the respondent a debt which has been by said payments from time to time extinguished, and notwithstanding the decision of the House of Lords, to convert the respondent's shares *ex post facto* from borrowing to non-borrowing shares, and so render the respondent liable for a share of the losses of the Society."

William M'Geoch junior was in the same position as M'Lellan.

With reference to these members the liquidator stated in his minute,—
"2. The respondents, David Gordon M'Lellan and William M'Geoch junior, are both borrowing members and at the same time investing members. In respect of the shares held by them, against which no advance has been made, their names have been placed by the liquidator in section B as 'non-borrowing members who had not completed or not withdrawn their shares prior to 13th May 1882,' and in respect of the shares held by them representing their respective advances, their names have been placed by the liquidator in section D as 'borrowing members who fall to be dealt with as having given due notice of their intention to redeem and as being bound to redeem their securities at Martinmas 1882.' The entire losses of the Society, in terms of the judgment of the House of Lords, fall to be borne by the investing or unadvanced members (sections A and B of the note), as distinguished from the borrowing members (sections C and D of the note). At the date when the respondent M'Lellan got his advance he held, and had held for a considerable time, forty shares, representing a nominal capital of £1000, and the advance made to him was £500, representing a capital of twenty shares, in respect of which he granted in favour of the Society a bond and disposition in security in ordinary form; and at the date when the respondent M'Geoch got his advance he held, and had held for a considerable time, fifty shares, representing a nominal capital of £1250, the advance made to him being £450, repre-

* By Rule 14 of the Society it is provided that "Any member desirous of an advance shall make application to the directors for the same, who shall thereupon consider and determine said application. Any person holding shares on which six months' subscriptions have been paid, and who is not more than one month in arrears, shall be entitled to apply for an advance in the manner above provided."

By Rule 27 it is provided,—“Any member who has given any property in security to the Society may, on giving three months' notice prior to the term of Martinmas or Whitsunday in any year, redeem the same by renouncing the shares representing the advance made thereon, and paying the amount of said advance under deduction of the instalments paid in respect of the same, and interest thereon, and his interest in said Society, so far as said shares are concerned, shall cease; . . . or when the subscriptions, with the share of profits of any member who has received an advance, are equal to the amount of said advance, then the payments of said member, in respect of said shares on which the advance has been made, shall cease, and his connection with the Society in respect of the same shall terminate.”

sending the capital of eighteen shares; and in respect of which he granted a similar bond. The accounts kept in the books of the Society in connection with the shares of each of these respondents were in both cases opened a considerable time before they applied for their advances, and remained unaltered after the advances were given without distinguishing them into advanced and unadvanced shares. But for the rules of the Society and the Building Societies Act, under which the Society is established,—6 and 7 William IV. c. 32,—the respondents would be obliged to repay the full amount of their advances, and all the shares held by them would bear their proportion of the Society's losses. The effect of the House of Lords' judgment in *Brownlie v. Russell*, 10 Rettie (H. L.), page 19, is that an advance under the statute and under the rules does not mean a loan upon the security of the shares, but that the Society pays to the member by anticipation the amount or nominal value of the shares which represent the loan, and each instalment paid upon the shares representing the loan is practically a payment to account of the bond until all the shares representing the loan are paid in full, when the loan is held to be paid up, the advance of the amount of the shares being extinguished. That judgment was followed in the appeal in the special case for this Society.

"The liquidator has applied the judgment of the House of Lords by placing the respondent M'Lellan in section B in respect of twenty shares held by him upon which no advance has been made, and in section D in respect of the twenty shares held by him representing his advance of £500; and by placing the respondent M'Geoch in section B in respect of thirty-two shares held by him upon which no advance has been made, and in section D in respect of the eighteen shares held by him representing his advance of £450. These respondents object to the liquidator dealing with their shares in this manner, and claim that the instalments paid on all their shares, irrespective of the fact that they represent an amount in excess of their respective advances, should be applied towards their bonds. The liquidator founds on rules 12, 14, 16, 26, and 27, on the Lord Chancellor's opinion in the appeal case, 14 R. (H. L.), p. 13; and on Lord Watson's opinion in *Brownlie's case*, 10 R. (H. L.), 19.*"

* 12. *Transfer and Withdrawal of Shares*.—"Any member may transfer any shares held by him or her on which they have received no advance, provided all arrears of principal, interest, and penalties be paid up, and on payment by the new member of a transfer fee of one shilling per share so transferred; and any member holding shares on which no advance has been made may, on giving one month's notice in writing to the manager, withdraw his or her subscriptions paid thereon, with interest at the rate of three per cent for the first and second years, three and one-half per cent for the third and fourth years, and four per cent thereafter, and the same shall be paid as soon after the expiry of the month's notice as the funds will permit."

14. *Disposal of the Funds*.—"When the directors shall consider they have sufficient funds on hand, they shall advance the same in such sums to members as to them shall seem proper, at a rate of interest not exceeding five per cent, and upon payment of such a rate of premium as to them may seem fair and reasonable. Any member desirous of an advance shall make application to the directors for the same, who shall thereupon consider and determine said application. Any person holding shares on which six months' subscriptions have been paid, and who is not more than one month in arrears, shall be entitled to apply for an advance in the manner above provided. No advance shall be made beyond £4000 on a first security, and £2000 on a postponed security. All advances by the Society shall be made on the security of heritable property to the satisfaction of the directors."

16. *Transfer of Advances*.—"Any member who has been granted an advance may, with the consent of the directors, transfer his or her right and interest

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III. *Fines*.—Rule 3 of the Society provided,—“The capital of the Society shall be raised in shares of twenty-five pounds each, payable by fortnightly instalments of one shilling and threepence per share, and by interest arising therefrom. Any member in arrears two fortnightly instalments shall pay at the rate of one penny per share per fortnight for each and every fortnightly subscription in arrear, and should said member continue in arrear until the fines incurred thereon shall equal all the subscriptions actually paid, said member shall then cease to be a shareholder, and shall forfeit all interest therein. But in case of bad health, poverty, or other casualties, the directors shall have power to suspend payment of past and future subscriptions and future fines, on application by the member or any of his or her family, but all suspended payments shall be charged interest at the rate of five per cent per annum.”

The liquidator stated that he had “charged completed shareholders who were in arrear of their instalments with fines up to the dates of completion, the withdrawn shareholders in the same position with fines up to the dates of withdrawal, and the general body of borrowing members with

therein to any other person, along with the shares representing the same, provided all arrears of principal, interest, and penalties be paid, on payment of a transfer fee of two shillings and sixpence for every share so transferred.”

26. *Transfer or Exchange of Property held in Security*.—“Any member who has received an advance from the Society upon the security of any property, may, with the consent of the directors, transfer his or her right and interest in the same to any other person, along with the shares representing the same, provided all arrears of principal, interest, and penalties due thereon are paid; and the purchaser thereof shall become a member of the Society, and subject to all the rules and entitled to all the privileges thereof; and shall pay on entry a transfer fee of two shillings and sixpence for each share represented by the property so transferred; and he shall grant, if required, a bond of corroboration for the advances, interest, and penalties, so far as unpaid. Any member who has received an advance may exchange the same from one property to another, provided the directors are satisfied with the proposed new security, on payment of a fee of two shillings and sixpence for each share representing the advance so transferred.”

27. *Redemption of Property*.—“Any member who has given any property in security to the Society may, on giving three months' notice prior to the term of Martinmas or Whitsunday in any year, redeem the same, by renouncing the shares representing the advance made thereon, and paying the amount of said advance, under deduction of the instalments paid in respect of the same, and interest thereon, and his interest in said Society, so far as said shares are concerned, shall cease; or any member who has given any property in security to the Society may redeem the same as above by payment of the whole sum borrowed and other dues thereon, and retain his shares in the same manner as if no advance had been made in respect of said shares, and he shall be entitled to have the same re-advanced to him in terms of Rule 26, or to transfer the same to any other party without the payment of any further premium, but subject to the payment of the difference of interest between the bank and the Society rate until re-advanced, and thereafter the regular rate of interest thereon. Any member redeeming his property by either of the plans aforesaid shall pay a fee of two shillings and sixpence for each share representing the advance so redeemed; or when the subscriptions, with the share of profits, of any member who has received an advance are equal to the amount of said advance, then the payments of said member, in respect of said shares on which the advance has been made, shall cease, and his connection with the Society in respect of the same shall terminate. In the event of any property being redeemed or completed as aforesaid, the deed granted in security thereof shall be duly discharged, by a receipt or acknowledgment endorsed thereon, signed by two of the trustees and the manager, in terms of the Act 6 and 7 William IV. cap. 32, and bonds shall be discharged by the trustees or any two of them.”

fines up till Martinmas 1882, being the date when their implied notice to redeem took effect and the date up to which they were bound to continue paying their instalments. In imposing fines the liquidator has in no case gone back beyond the last payment made by any member, holding that if fines previously incurred were not imposed when that payment was made he is precluded from now opening up the question." No. 156.
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He admitted that no fines were shewn in the account for 1881, and that in practice fines were not enforced when the company was a going concern.

William M'Geoch junior and others were debited with fines. M'Geoch averred;—"The respondent further contends that the liquidator is not entitled to debit him with fines. No fines are debited to the respondent in his pass-book; he was at no time during his connection with the Society charged with fines; nor was it the practice of the Society to exact fines in terms of Rule 3, or otherwise."

4. *Non-timeous withdrawal of shares.*—In respect of Rule 12 (quoted *supra*, p. 831, footnote), John Caldwell and others were placed on the list in schedule B, on the ground that they had not given notice of withdrawal a month prior to 13th May 1882, the date of the liquidation.

In support of his view he referred "to the Court of Session judgment in the special case, 12 R. p. 1286; and to the *Blackburn and District Benefit Building Society* case, July 6, 1883, L. R., 24 Ch. Div. 421, and Nov. 28, 1884, L. R., 10 App. Ca. 33."

5. *Interest.*—By Rule 15 it was provided,—“Any member who has been granted an advance shall, from the date of granting the same, become liable for such a rate of interest as along with the interest allowed by the bank will amount to five per cent until said member has received said advance, when he shall pay to the Society interest thereon at the rate of five per cent on the full amount of said advance; and all interest shall be payable at the terms of Martinmas and Whitsunday; and members failing to pay the same within fourteen days thereafter shall be charged interest thereon at five per cent from the term of payment.”

With reference to cases alleged to fall under this rule, the liquidator stated;—“(5) Several borrowing members whose names appear on section D maintain that they are not liable in interest on the balances due by them from Martinmas 1882, or otherwise that they are only liable in simple interest at bank deposit rates. The liquidator maintains that he is entitled to charge interest on the balances due by these members at five per cent from Martinmas 1882 till payment, in terms of their bonds and dispositions in security. And on each half-yearly payment of interest in arrear he maintains that he is entitled to charge interest, limited, in terms of the bonds and dispositions in security, to one-fifth part of the amount of the half-yearly payment. The liquidator concedes that the judgment of the House of Lords in the special case decides that on payment of the balance of the debt due under their bonds at Martinmas 1882 these borrowing members were entitled to be free of the Society. But the respondents did not consign or tender the amount of their debts, and hence the liquidator maintains that the usual rule must be applied, and that interest under the bond is payable from the date when the debt and interest became due till payment. In charging interest upon the periodical payments of interest in arrear, to the extent mentioned in his note, the liquidator conceives that he is simply giving effect to the stipulation contained in the borrowing members' bonds, which provides that one-fifth part more of each term's payment of interest shall be due in name of penalty in case of failure in the punctual payments. By the failure to pay punctually the Society has received no interest on the moneys which

No. 156. should have been paid, whilst the member has been *lucratus* to a corresponding extent. In charging interest on cash termly payments the liquidator is following what he understands to be the usual practice.”

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M'Lellan and others, who were charged with interest under this rule, maintained that a balance fell to be struck, under the judgment of the House of Lords in the special case, at Martinmas 1882—(*ante*, H. L. 6). That balance had been tendered to the Society prior to the House of Lords judgment, but it was refused. The liquidator was therefore not entitled to interest since that date.

At advising, LORD ADAM delivered the opinion of the Court (the other Judges present being the LORD PRESIDENT, LORD MURE, and LORD SHAND),—

LORD ADAM.—The questions for decision in this case, raised by the note for the liquidator and the several answers thereto, will be found most conveniently stated in the minute lodged for the liquidator, and I propose to give my opinion on them in the order in which they are there set forth.

Before doing so, however, I may state that it has been settled by the previous proceedings in this case—that the 13th May 1882 is the date at which the winding-up virtually commenced—that advanced members are not bound to share the losses of the Society, and that unadvanced members with completed shares, and all members who had withdrawn prior to 13th May 1882, have priority in ranking over members whose shares were not completed or not withdrawn.

The first question is raised by the answers for John Taylor and others, who are members holding completed shares in the Society. It arises under Rule 13, and is whether, in terms of that rule, such members are entitled to interest on the amount of their shares from the date of completion until the date of payment, at the rate allowed by Scotch banks on sums lying on deposit—receipt—or at account-current rates only.

The rule says that the member shall be entitled to receive the amount of his share “with bank interest”; what is here meant by bank interest? In the absence of anything in the rules to indicate any intention to the contrary, I should have thought that interest at current account rates was intended, and I think the matter becomes quite clear when we have regard to the nature of the business of the Society, that the funds came in from day to day in numerous small sums, and were paid out again from day to day. It appears to me that this excludes the idea that the money in the hands of the Society was intended to be lodged on deposit-receipt, or otherwise than on current account, and in point of fact it is stated by the liquidator that they were so lodged. I am clear, therefore, that the liquidator is right in proposing to allow interest at current account rates only.

The next question is raised by the answers for David Gordon M'Lellan, and for William M'Geoch junior. There seems to be no difference between the two cases, and the decision of M'Lellan's case will rule that of M'Geoch.

It appears that M'Lellan, on 11th September 1876, subscribed for forty shares in the Society, representing a nominal capital of £1000. On 26th September 1877 he applied for and obtained from the Society an advance of £500, and at the same time granted in their favour a bond and disposition in security for that sum over property belonging to him in Duke Street, Glasgow.

The liquidator proposes to treat twenty of these shares as fully advanced shares, attributing the advance of £500 to such shares only, and to treat the other twenty as shares not completed and not withdrawn—and to apportion the

instalments since paid between each set of shares respectively. The respondent, No. 156. on the other hand, claims that the advance of £500 shall be attributed to the whole forty shares, and that the whole instalments since paid shall be applied towards payment of his bond. The result is that by the liquidator's mode of stating the account a sum of £266, 6s. 2d., with interest from March 1882, remains due to the Society, while by the respondent's a sum of £2, 3s. 10d. is brought out as due to him by the Society.

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It would appear that the shares in question are numbered in the respondent's pass-book from 7525 to 7564 inclusive. The account kept in the books, in connection with the shares, which was opened a considerable time before the advance was applied for, and remained unaltered after the advance was given, does not distinguish between them as advanced and unadvanced shares. But I understand that, although a number of members may have both advanced and unadvanced shares, the books do not in any case recognise the difference between them.

In the case of *Brownlie v. Russell*, Lord Watson described an advance under the rules of that society in these terms,—“An advance,” he says, “under the statute and under these rules does not mean a loan by the society on the security of the shares; it signifies this, that the society pay by anticipation the amount of a member's shares upon receiving in return certain considerations which are fixed by the rules. The considerations given by a member obtaining payment of his shares by anticipation in terms of these rules were that he should pay interest monthly along with each instalment, and, further, that he should protect the society from loss by giving adequate heritable security for the amount advanced to him.”

When the present case was previously in the House of Lords, the Lord Chancellor referred with approval to the description there given by Lord Watson of advanced shares in *Brownlie's* case, and he says that, when the rules are looked at, the present case is undistinguishable in this respect from *Brownlie's* case, and he then comments in support of this conclusion on Rules 16, 26, and 27 of this society.

An advance is, therefore, under the rules of this society payment by anticipation to a member of the amount of his share or shares. It is not a loan on the security of his share. But the rules do not recognise a partially advanced share or a partially advanced member. A share is either an advanced share or an unadvanced share. An advance being payment of a share by anticipation, it must be either of a sum of £25, the amount of a share or of some multiple of that sum, and in the practice of the Society this was invariably observed.

The advance of £500 to M'Lellan was therefore payment to him by anticipation of a corresponding amount of shares—that is, twenty. He thus became an advanced member as regards twenty of his shares, and an unadvanced member as regards the other twenty. I cannot hold, as contended for by the respondent, that the advance of £500 was made to him in respect of the whole of his forty shares, which would be an advance of £12, 10s. of each share. It cannot be held to be an advance in security of his shares, nor can it be held to be a payment by anticipation of one-half of the amount of his shares. The rules do not recognise advances on such terms, and no practice has sanctioned it, if indeed practice could do so. I think, therefore, that the liquidator has rightly dealt with these shares.

This case, as I have said, will also rule M'Geoch's case.

The third question is, whether the liquidator is entitled, in terms of Rule 3

No. 156. of the Society, to charge non-borrowing members who had completed or withdrawn their shares prior to 13th May 1882, but who were in arrear of their subscriptions at the respective dates of completion or withdrawal of their shares, with fines up to the date of completion or withdrawal, and to charge borrowing members, who were bound to redeem their securities at Martinmas 1882, and were then in arrear of their instalments, with fines to that date.

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Rule 3 is in these terms :—"The capital of the Society shall be raised in shares of £25 each by fortnightly instalments of 1s. 3d. per share and by interest arising therefrom. Any member in arrears two fortnightly instalments shall pay at the rate of 1d. per share per fortnight for each and every fortnightly subscription in arrear, and should said member continue in arrear until the fines incurred thereon shall equal all the subscriptions actually paid, said member shall then cease to be a shareholder, and shall forfeit all interest therein."

This rule appears to be sufficiently clear, and would warrant what the liquidator proposes to do, but it is alleged by the respondents that at the date of the last balance-sheet (30th November 1881) no fines had been levied upon them, that they were never charged with fines at any time during their connection with the Society, and that it was not the practice of the Society to exact fines in terms of Rule 3.

The liquidator admits that no fines were shewn in the account for 1881, so that for the eighteen months prior to the date when the liquidation virtually commenced, no charge was made which could possibly be said to be a fine, and he explains that in imposing fines he has in no case gone back beyond the last payment made by any member, holding that if fines previously incurred were not imposed when that payment was made, he is precluded from now opening up the question; he further explains that the annual accounts for 1870 to 1880 inclusive shew certain profits of small amount (specified by him) which he represents as having been really fines though they were never entered under that name, but under the general charge of interest, and without notice to the members that any fines were ever imposed. The liquidator does not dispute the fact that Rule 3 was not in use to be enforced, and indeed it is admitted that the instalments as a rule were not regularly exacted or paid fortnightly by the members, but at irregular intervals of longer duration. All that the liquidator says is that it appeared to him that he ought to act as if the rule regarding fines was in force.

In the circumstances I am of opinion that the respondents are right in their contention that the liquidator is not now entitled to open up their accounts and to levy fines upon them in respect of their having been in arrear with their instalments at any time during their connection with the Society with the extraordinary pecuniary results which he brings out. It is clear that during the time the respondents were connected with the Society numerous members passed through the Society without this rule having been enforced against them, and I think it would be manifestly unjust to revive it now and enforce it against the respondents.

The next question is raised by the answers for John Caldwell and others, and the facts are these: Charles M'Lellan gave notice of his intention to withdraw his shares on 27th April 1882, John Caldwell on 3d May 1882, and Jane Semple on 4th May 1882. They are all non-borrowing members.

It will be observed that all these notices were given within one month of 13th May 1882, when the liquidation is held to have commenced.

The question is, whether these members are to be held, under Rule 12, as No. 156. non-borrowing members who have withdrawn their shares prior to 13th May 1882. Rule 12 provides that "any member holding shares on which no advance has been made may, on giving one month's notice in writing to the manager, withdraw his or her subscriptions paid thereon, with interest, &c., and the same shall be paid as soon after the expiry of the month's notice as the funds will permit." June 23, 1887.
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The question is not free from difficulty, but I think the respondents cannot be treated as members who had withdrawn their shares prior to 13th May 1882. The rule gave members only a right to withdraw on giving one month's notice. They had no right, therefore, to withdraw before the expiry of the notice, and continued therefore to be members of the Society till the expiry of the notice,—that is, until after 13th May 1882. In short, the one month's notice prior to the date when the winding-up of the Society virtually commenced was a condition precedent to their right to withdrawal. I think, therefore, that the liquidator is right in this case.

The fifth and last question is this, and it is raised by the answers for David Watson and others—The liquidator proposes to debit the balance due by them on their respective bonds with interest half-yearly from and after Martinmas 1882 until the bonds be fully paid, the interest being charged with interest from the date when due till payment. The respondents object to this, and maintain that they are not liable in interest at all on the balances due by them from Martinmas 1882 till the settlement of the list, or, at anyrate, that they are only liable in simple interest at legal rates thereon.

The liquidator refers to Rule 15 as justifying his charging interest on interest. Rule 15 provides that any member who has been granted an advance shall pay to the Society interest thereon at 5 per cent on the full amount of said advance, and all interest shall be payable at the terms of Whitsunday and Martinmas, and members failing to pay the same within fourteen days thereafter shall be charged interest thereon at 5 per cent from the term of payment.

No doubt if the Society were still carrying on business under its rules, this rule would amply justify the liquidator's proposal to charge interest upon arrears of interest. But the Society is not carrying on business, and the rule is no longer applicable. The amount due by each respondent is a debt due by him to the Society, the amount of which is fixed as at Martinmas 1882. It appears to me that it is in the same position and subject to the same rules as regards interest as any other debt.

The respondents say that no interest at all is due because the delay in payment has arisen from the acts of the Society itself in refusing to settle with them on the terms now fixed by the judgment of the House of Lords.

On the other hand, the respondents neither consigned nor tendered the amount of their debts. In the circumstances it appears to me that the several respondents should be found liable only for simple interest at legal rates.

THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of the cause, and heard counsel for the parties on the note for the official liquidator to settle the list of contributories, &c., No. 39 of process, answers thereto, Nos. 64, 65, 66, 67, 68, 69, and 70 of process, and minute for the official liquidator, No. 83 of process, Grant the first, second, and third heads of the prayer of the said note, No. 39 of process, and with regard to the fourth head of the prayer of the said note, repel the answers

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for the respondents John Taylor and others, No. 66 of process, and find and declare that the bank interest to which, under Rule 13 of the Society, the said respondents, as non-borrowing members who had completed their shares prior to 13th May 1882 are entitled, on being paid out of the Society, is the interest allowed by Scotch banks on sums standing at the credit of current accounts kept with them: Repel the answers for the respondents David Gordon M'Lellan and William M'Geoch junior, Nos. 65 and 64 of process, in so far as the said respondents, who are both borrowing and non-borrowing members of the Society, seek to have the whole instalments respectively paid on all the shares held by them, whether advanced or unadvanced, imputed towards extinction of the advances made to them respectively by the Society; and find and declare that the liquidator is entitled to place the respondent David Gordon M'Lellan in section B of the list of contributories annexed to the said note, No. 39 of process, in respect of the twenty shares held by him in the Society upon which no advance has been made, and in section D of said list in respect of the remaining twenty shares held by him therein, representing the advance of £500 made to him by the Society; and to place the respondent William M'Geoch junior in section B of the said list in respect of thirty-two shares held by him in the Society upon which no advance has been made, and in section D of said list in respect of the remaining eighteen shares held by him therein, representing the advance of £450 made to him by the Society: Sustain the answers for the respondents William M'Geoch junior, John Caldwell and others, Elizabeth M'Lachlan and others, Thomas Morrison and another (M'Birnie's Trustees), and David Watson and others, Nos. 64, 67, 68, 70, and 69 of process, in so far as the said respondents object to the liquidator debiting them with fines; and find and declare that the liquidator is not entitled to charge fines against any of the members whose names are included in the list appended to the said note, No. 39 of process, other than the fines entered in the pass-books of the members prior to the liquidation: Repel the answers for the respondents John Caldwell and others, No. 67 of process, in so far as the said respondents contend that they withdrew prior to 13th May 1882 the shares held by them respectively in the Society; and find and declare that the liquidator is entitled to place them in section B of the said list of contributories in respect that they had not given timeous notice of their intention to withdraw the said shares prior to said 13th May 1882: Sustain the answers for the respondents Thomas Morrison and another (M'Birnie's Trustees), No. 70 of process, in so far as these respondents object to their being placed in section B of the said list of contributories in respect of the twenty shares referred to by them in their answers; and find and declare that they are entitled to be placed in section A of said list in respect of said twenty shares as craved: Sustain the answers for the respondents David Gordon M'Lellan, William M'Geoch junior, Thomas Morrison and another (M'Birnie's Trustees), and David Watson and others, Nos. 65, 64, 70, and 69 of process, in so far as these respondents object to the liquidator debiting the balances due by them on their respective bonds with interest half-yearly from and after Martinmas 1882 until the bonds be fully paid, the interest being charged with interest from the date when due till payment; and *quoad ultra* repel the said answers

in so far as they relate to the said question: Find and declare No. 156.
that the said respondents are liable in simple interest at 5 per
cent on the balances respectively due by them to the Society, as June 23, 1887.
at Martinmas 1882, from that date till payment, and decern: North British
Further, allow the official liquidator to lodge an amended list of Building
contributories, giving effect to the foregoing findings, not only in Society v.
the cases of compearing respondents, but also in the cases of those M'Lellan.
not appearing who stand in a like position to them: Find the
respondents Elizabeth M'Lachlan and others entitled to their
expenses against the liquidator, and remit the account thereof
when lodged to the Auditor to tax and report; and *quoad ultra*
find no expenses due to or by any party."

DAVID TURNBULL, W.S.—MACKENZIE & BLACK, W.S.—Agents.

G. F. JARDINE, Pursuer (Appellant).—*Glegg*.
STONEFIELD LAUNDRY COMPANY AND ANOTHER, Defenders (Respondents).
—*James Reid*.

No. 157.

June 24, 1887.
Jardine v.
Stonefield
Laundry Co.

Reparation—Rule of the road—Passenger alighting from tramway-car run down by carriage following—Contributory negligence.—A passenger who had alighted from a tramway-car, and was crossing from the car to the pavement on the left, was knocked down by a van going in the same direction as the car, and passing it on the left-hand side. In an action of damages brought against the van owners for injuries thereby received, the Court *assoilzied* the defenders, holding that fault had not been proved on the part of the van-driver, while there had been carelessness on the part of the pursuer in not looking to his own safety.

Observed (per the Lord President) that the rule of the road requires that a tramway-car shall be passed by a following vehicle on the left-hand side.

G. F. JARDINE sued the Stonefield Laundry Company, Paisley, for damages 1st DIVISION.
in respect of injuries sustained by him owing to the alleged carelessness Sheriff of Ren-
of a vanman named Henderson in the employment of the defenders. frew and Bute.
Jardine had alighted from a tram-car on the Paisley Road on the left side M.
next the pavement, and was walking towards the pavement, when he was
knocked over by a horse yoked to a van belonging to the defenders, which
came up from behind the car, and was passing it on the left-hand side.
The pursuer alleged that Henderson was guilty of reckless conduct and
violation of the rule of the road in passing the car on the left side, instead
of stopping his horse or passing on the right-hand side.

The Sheriff-substitute (Cowan), after proof,* on 17th December 1886,
assoilzied the defenders, on the grounds set forth in the subjoined note.†

* Thomas Burnett, manager of the Paisley Tramways Company, a witness for the defenders, deponed,—“I was sometime engaged as inspector of tramways in Glasgow and also in London. The rule of the road as regards passing cars is to pass on the left side. That is the rule both in London, Glasgow, and Paisley. The reason of this is that tramway-cars coming the reverse way pass on the other side, and there might be accidents if vehicles passing a tramway-car pass on the right side.”

† “NOTE.—In the opinion of the Sheriff-substitute the evidence establishes that on the day in question the defenders' van was overtaking the tram-car, and was about to pass it, when the latter pulled up to stop. Immediately the vanman pulled up, but being close behind the tram-car, his horse passed the end of the car, and the pursuer, who in stepping off the car had not looked behind to see that the way was clear, was knocked down and injured. Fault on the part of the vanman there was none. He was on the proper side of the road, he was within his rights when he sought to pass the tram-car, and he did what he was

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On appeal to the Court of Session LORD SHAND and LORD ADAM, after going through the evidence, adopted the Sheriff-substitute's grounds of judgment.

LORD PRESIDENT.—I so entirely concur with the views which have been expressed by your Lordships that I should not have thought it necessary to add a single word, were it not that I think the case is one of some public importance.

Tramway-cars are no longer a novelty among us. They are to be seen in almost every city in the kingdom, and people who use them and who pass along the street are bound to understand and to observe the rules which regulate that mode of traffic. There is one rule of the road which has been very much altered by the appearance of these new vehicles, viz., that one carriage overtaking another is bound to pass it upon the right-hand side. The new rule requires that when a carriage is coming up behind a tramway-car, and the car stops, the driver of the other vehicle shall pass upon the left-hand side. That is the opposite of the old rule. The new rule has been introduced from considerations of convenience and safety; and the reason is very obvious, because tramway-cars pass upon two lines of tramways, one in one direction and another in the other. If vehicles were to pass a car on the right-hand side, there would be very great danger of their coming into collision with another car coming the opposite way. That is the reason of the rule. If a person gets off a tram-car on the left-hand side, which is the proper side for the purpose, it is quite obvious that in passing from the tram-car to the pavement he is passing across a carriage way, and a carriage way which he ought to know may be travelled over at any moment by vehicles passing alongside of the tram-car. He is just as much bound to look after his own safety in crossing that carriage-way as if he were crossing from one side of the street to the other. It is just as much a carriage-way as the whole street, and while vehicles are bound to go at a steady pace and not to be driven furiously, foot-passengers crossing the carriage-way are bound to look after their own safety, and not to run obvious and unnecessary risk.

Applying these observations to the present case, it appears to me that, while there is no blame imputable to the driver of the van, and no ground for the allegation of undue haste in his driving, or of want of care and attention, there was very great carelessness on the part of the unfortunate man who was struck. He stepped down off the car without ever looking to the left to see whether any vehicle was approaching. If he had looked he would have seen the van, and would have waited until it passed. That is just the same thing as if, in proceeding to cross a street where there were no tramway-cars at all, he had failed to look to see whether there were any carriages close at hand which might run him over.

I think the fault was clearly with the appellant, and not with the defenders' servant.

LORD MURE was absent on Circuit.

THE COURT dismissed the appeal.

ALFRED SUTHERLAND, W.S.—MILL & BONAR, W.S.—Agents.

bound to do, pulled up to stop when the tram-car stopped. What more could he be asked to do? The slightest and most ordinary care on the part of the unfortunate pursuer would have saved him from what happened. . . ."

MISS MARY JANE M'GEORGE and OTHERS, Appellants.—*Ure*.
JOHN PATON, SON, & COMPANY, and OTHERS (M'George's Creditors),
Respondents (Reclaimers).—*Pearson—Goudy*.

No. 158.

June 25, 1887.
M'George v.
M'George's
Creditors.

Bankruptcy—Sequestration—Process—Competency of Reclaiming Note—
Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 171.—Held that the Court of Session Act, 1868, did not apply to proceedings under the Bankruptcy Acts, and that a reclaiming note against an interlocutor of the Lord Ordinary on the Bills in an appeal against a resolution of creditors in a sequestration under the 169th section of the Bankruptcy Act, 1856, was competently brought within fourteen days, and without leave of the Lord Ordinary.

Bankruptcy—Sequestration—Process—Resolution accepting composition offer—Appeal—Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), secs. 138, 139, 169.—Held that an appeal by certain creditors on a sequestered estate against the resolution of an alleged statutory majority of their number accepting a composition offer by the bankrupt was competent under the 169th section of the Bankruptcy Act, 1856, and was not excluded by the fact that the appellants had another remedy under the 138th and 139th sections of the Act.

AN appeal was taken by Miss Mary Jane M'George and others, certain creditors on the sequestered estate of J. C. M'George, to the Lord Ordinary on the Bills against a resolution of certain other creditors (John Paton, Son, & Company, and others), that a composition offer by the bankrupt should be entertained. The appeal was presented in terms of the 169th section of the Bankruptcy Act, 1856,* and on the ground that the resolution was not carried by the statutory majority of votes, certain votes given in favour of it not being valid.

The respondents (who were the creditors by whom the resolution had been carried) pleaded, *inter alia* ;—(1) The appeal is incompetent, in respect of the provisions of sections 138 and 139 of the statute.†

The Lord Ordinary (Trayner), on 4th June 1887, pronounced this interlocutor :—"The Lord Ordinary repels the first plea in law for the respondents : Refuses the motion made by the respondents at the bar for leave to amend their affidavits, and before further answer appoints the respondents to lodge within four days a specification of the documents which they seek to recover in support of their claims."‡

* 19 and 20 Vict. c. 79—Sec. 169 was,—“It shall be competent to appeal against the resolutions of the creditors at meetings either to the Lord Ordinary or the Sheriff, provided a note of appeal shall be lodged and marked . . . within fourteen days after the date of the meeting at which the resolution objected to has been passed . . . ; and it shall in like manner be competent to appeal against any deliverance of the trustee or commissioners to the Lord Ordinary or the Sheriff, provided the note of appeal shall be lodged and marked as aforesaid within fourteen days from the date of the deliverance. . . .”

† Quoted *infra*, p. 844, note.

‡ “OPINION.— . . . It is objected by the respondents that this appeal (which is brought under section 169 of the Bankruptcy Act, 1856) is incompetent, and they maintain that the only competent mode in which the appellants can obtain a review of the resolution, or a consideration of the legality of the votes by which that resolution was carried, is by appearing before the Sheriff when the resolution is reported to him by the trustee as provided for by sections 138 and 139 of the Act. I think there can be no doubt that the appellants could have stated all the objection to the resolution which they now state before the Sheriff on the report of the trustee, if they had been pleased to adopt that course. But the fact that the Act in section 138 provides a certain remedy will not of itself make it incompetent for the appellants to resort to another remedy also provided by the Act. The remedy provided by section 138 is nowhere declared to be the only mode by which a creditor may bring a reso-

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On 10th June the respondents presented a reclaiming note against that interlocutor to the First Division.

Miss M'George and others, appellants, objected in the Single Bills to the competency of the reclaiming note. They argued that the leave of the Lord Ordinary was necessary under the 54th section of the Court of Session Act, 1868. By the 171st section of the Bankruptcy Act, 1856,¹ under which the reclaiming note was brought, it was provided that any "judgment" of the Lord Ordinary might be brought under review. The word "judgment" in that section was to be contrasted with "deliverance," which was the word used in the 169th and 170th sections. "Deliverance" by the interpretation clause of that statute (section 4) included a great deal more than "judgment." The 71st and 127th sections were also in point,—because in these the terms "judgment" and "decision" were used,—both being different from "deliverance." The 171st section containing the term "judgment" must be read along with the Court of Session Act, 1868, the provisions of which in regard to reclaiming notes, and particularly of the 54th section, must be read into it.² The only difference was, that the time within which a reclaiming note must be presented was in every case limited to fourteen days, but in no case could a reclaiming note be presented without leave. Sequestration processes were not necessarily Bill-Chamber proceedings, and reclaiming notes in them fell to be presented according to the rules of the Court of Session Act.³

The respondents argued;—The question fell to be decided upon the terms of the Bankruptcy Statute only, and the Court of Session Act did not apply. The appeal was taken against a resolution of creditors to the Bill-Chamber under the 169th section of the Bankruptcy Act. It was clear that neither the 52d nor the 53d section of the Court of Session Act had to do with the matter, for they had no application to cases in the Bill-Chamber. The 54th section applied solely to cases initiated by some writ in the Court of Session. The distinction between a Court of Session and a Bill-Chamber cause was sharply marked in the 90th section. Further, a Bill-Chamber cause was not marked on the partibus, like a Court of Session case, to any particular Division,⁴ and in every Court of Session case the Division before which it was desired to bring it was so marked. Besides, the Bankruptcy Act had a code of procedure for "judicial proceedings" from section 169 onwards, and unless that was repealed it was still in force. All procedure in a sequestration process was in the Bill-Chamber.⁵ A decision of the Lord Ordinary on the Bills in a sequestration process was subject to review where that was not expressly excluded under the Bankruptcy Act.⁶

LORD PRESIDENT.—This is a reclaiming note against an interlocutor of the Lord

lution to accept an offer of composition under review. On the contrary, section 169 authorises an appeal against any resolution which the creditors may adopt at meetings held by them, without exception. That being so I cannot hold an appeal incompetent which the Act expressly allows. I may refer to the case of *Tennent v. Crawford*, 5 R. 433, as deciding the principle on which I proceed in repelling the objection to the competency of this appeal. . . ."

¹ Quoted in the Lord President's opinion *infra*.

² *Joel v. Gill*, Jan. 11, 1860, 22 D. 357, 32 Scot. Jur. 159.

³ *Mackay's Practice*, 565; *Arnold v. Winton*, March 11, 1852, 14 D. 768, 24 Scot. Jur. 340.

⁴ *Gow v. Bell*, Nov. 14, 1862, 1 Macph. 25, 25 Scot. Jur. 10.

⁵ *Grant v. Wilson*, Dec. 1, 1859, 22 D. 51, 32 Scot. Jur. 26.

⁶ *Davis v. Hepburn*, Nov. 30, 1866, 5 Macph. 80, 39 Scot. Jur. 47; *Mackay's Practice*, 565; *Tennent v. Crawford*, Jan. 12, 1878, 5 R. 433.

Ordinary on the Bills in an application brought under the 169th section of the Bankruptcy Act, 1856. The appeal to the Lord Ordinary was taken against a resolution of the creditors in a sequestration which was carried by an apparent majority of their body in favour of accepting an offer of composition. I do not think it can be disputed that the appeal falls under the 169th section of the Bankruptcy Act. That section provides that "it shall be competent to appeal against the resolutions of the creditors at meetings either to the Lord Ordinary or the Sheriff, provided a note of appeal shall be lodged and marked . . . within fourteen days after the date of the meeting at which the resolution objected to has been passed . . . and it shall in like manner be competent to appeal against any deliverance of the trustee or commissioners to the Lord Ordinary or the Sheriff, provided the note of appeal shall be lodged and marked as aforesaid within fourteen days from the date of the deliverance . . ."; and the question comes to be, what is the proper mode of bringing under review of the Inner-House an interlocutor pronounced by a Lord Ordinary in an appeal of that kind. This seems to me to be settled by the 171st section of the Act. The 170th section, which is interposed between the two other sections to which I have referred, provides for bringing "under the review of the Inner-House, or before the Lord Ordinary in time of vacation, any deliverance of the Sheriff . . . (except where the same is declared not to be subject to review) . . . and such note, together with the process, shall forthwith be transmitted by the Sheriff Clerk to the Clerk of the Bill-Chamber; and the Lord Ordinary's decision shall, when not expressly made final by this Act, be subject to review of the Inner-House. . . ." It appears to me that the 171st section applies to both the previous sections, and therefore to every deliverance of the Lord Ordinary on an appeal under the 169th section and also in vacation under the 170th section.

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The words of the 171st section are,—“Where any judgment of the Lord Ordinary is to be brought under review of the Inner-House, the same shall be done by a reclaiming note in common form presented within fourteen days from the date of the judgment; and such reclaiming note shall be disposed of by the Inner-House as speedily as the forms of Court will allow.” These sections are not repealed by any subsequent Act, and, accordingly, they are binding in regard to all appeals or judicial proceedings taken during the course of a sequestration process. It appears to me that the sections of the Court of Session Act of 1868 to which reference has been made have no application to cases of this kind,—neither to proceedings in the Bill-Chamber nor to bankruptcy appeals—but to Court of Session actions only, which come to the Inner-House from the Lord Ordinary for review.

I therefore think the objection to the competency is unfounded, and that the case is strictly within the provisions of the Bankruptcy Statute of 1856, which allows a reclaiming note to be presented within fourteen days from the date of the Lord Ordinary's judgment.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

The Court, accordingly, on 14th June 1887, repelled the objection to the competency of the reclaiming note, and sent the case to the Summar-roll.

On 25th June following, when the case was called in the Summar-roll, the reclaimers, Paton, Son, and Company, and others, argued;—The appeal

No. 158. under the 169th section was incompetent. The only mode of bringing a resolution dealing with an offer of composition was under the 138th and 139th sections * of the Bankruptcy Act, 1856. Under these sections the trustee might report the creditors' resolution to the Lord Ordinary or the Sheriff. Delay would be inevitable if an appeal under the 169th section were sanctioned, because until it was disposed of the trustee could not lodge his report under the 138th section. The resolution, indeed, required the approval of the Sheriff or of the Lord Ordinary to make it effectual. Such a question as the validity of the votes, which was the matter of dispute in the present appeal, was best brought up in the trustee's report. There was a recognised special form for a report by the trustee in this matter.¹ There were special provisions in the Bankruptcy Act providing for review on special questions. A resolution at the first general meeting of creditors was never taken before any Judge but by the trustee. Under the 77th section questions in regard to the personal protection of the bankrupt were brought by the trustee before the Sheriff.² There was nothing in *Millar v. Dodd* expressly to the effect that an appeal under the 169th section was incompetent, but this was implied (*cf.* Lord Neaves' opinion, 1 Macph., p. 72).

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The appeals contemplated by the 169th section were appeals on the merits. To allow an appeal under that section here would be to abolish the discretion which was vested in the trustee by the 138th and 139th sections. A power of review under the 169th section as well as under these would lead to anomalies. Different objections might be stated on each occasion. It would be to do violence to the general spirit and intention of the Bankruptcy Act, 1856, to hold that the appeal under the 169th section was competent.

The appellants, Miss M'George and others, argued;—Both remedies were competent under the Act, either by the 169th section, or by the 138th and 139th. The Lord President's opinion on the competency of the reclaiming note assumed the competency of the appeal under the 169th section. The practice also was in favour of it.³ Convenience, too,

* The 138th section of the Bankruptcy (Scotland) Act, 1856, enacts,—“If at the meeting held after the examination of the bankrupt a majority in number and nine-tenths in value of the creditors there assembled shall accept such offer and security, a bond of caution for payment of the composition, executed by the bankrupt or his successors or the partners of a company, . . . and the proposed cautioner, shall be forthwith lodged in the hands of the trustee; and the trustee shall thereupon subscribe and transmit a report of the resolution of the meeting, with the said bond, . . . in order that the approval of the Lord Ordinary or Sheriff . . . may be obtained thereto; and if the Lord Ordinary or the Sheriff, after hearing any objections by creditors, shall find that the offer with the security has been duly made and is reasonable, and has been assented to . . . he shall pronounce a deliverance approving thereof. . . .”

The 139th section enacts,—“In like manner, at the meeting held after the examination of the bankrupt, or at any subsequent meeting called for the purpose . . . the bankrupt . . . may offer a composition to the creditors on the whole debts,” and if this is accepted by a majority in number and four-fifths in value of the creditors, “a bond of caution shall be lodged, and a report made, and a deliverance pronounced, all in the same manner and to the same effect as is hereinbefore provided.”

¹ Alexander's Bankrupt Act, 441.

² *Millar v. Dodd*, Nov. 27, 1862, 1 Macph. 67 (Lord Neaves, p. 72), 35 Scot. Jur. 41.

³ *Smith v. Chrystal*, July 11, 1848, 10 D. 1474; *Latta v. Bell*, July 4, 1862, 24 D. 1248, 34 Scot. Jur. 606.

pointed out the same course, because there was often great delay before the trustee presented his report.¹ A resolution rejecting an offer of composition, or refusing personal protection to the bankrupt, would be appealable by the bankrupt under the 169th section; why should not a resolution approving it? It was not the case that a resolution accepting a composition offer required to be approved by the trustee to make it effectual.² The reasoning in *Tennent v. Crawford* (Jan. 12, 1878, 5 R. 433) was in point.³ In *Millar v. Dodd*⁴ there was no resolution of creditors, and that was the ground of the opinion of Lord Neaves, who alone expressed doubts as to the competency.

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LORD PRESIDENT.—I have no difficulty or doubt about the competency of this appeal. The words of the 169th section are very broad and general, and give a right of appeal to any party interested, whether creditor or bankrupt, or anyone else, "against the resolutions of creditors at meetings," as it is expressed. This is undoubtedly a resolution of creditors at a meeting, and upon a very important question. And the point to be determined on the merits, as I understand, is whether that resolution was carried by a requisite number and value of the creditors present, so that *prima facie* the words of the 169th section clearly cover the case.

But it is said that in consequence of the statutory provisions by which this resolution falls to be carried into effect under the 138th and 139th sections of the Act, there is a kind of implied exception of this resolution from the general rule of the 169th section. I do not see any sufficient ground for that argument. No doubt when a resolution is carried it falls upon the trustee to report it either to the Lord Ordinary or the Sheriff, and it would be quite competent, when the case comes before either the Lord Ordinary or to the Sheriff on that report, to raise such a question as the Court has before it now. This must be conceded, but it does not by any means follow that because there is such a remedy to a person dissatisfied with the resolution, he has not also the separate remedy of coming to this Court by appeal. The one remedy is not in the least degree inconsistent with the other. There are two modes in which he may obtain the redress which he desires, and both of them are competent. There is no anomaly in our holding this.

LORD SHAND.—The terms of the 169th section of the Act are so general as to apply to all resolutions which are passed at meetings of creditors. That being so, then undoubtedly this resolution which approves of an offer of composition is within the language of the section, and indeed it is one of the most important resolutions that can be passed by the creditors in bankruptcy proceedings. The question is whether, not by direct enactment, but by inference from other sections, there is anything to prevent an appeal being taken under that section against such a resolution. The argument is that the 138th section provides the only mode of review of a resolution accepting an offer of composition. It is provided by that section that the trustee shall report the resolution of the creditors accepting the composition, along with the necessary bond of caution, to the Lord Ordinary

¹ Goudy on Bankruptcy, p. 164.

² Lee v. Stevenson's Trustee, Oct. 23, 1883, 11 R. 26.

³ Cf. also Robertson v. Robertson's Trustee, Dec. 19, 1885, 13 R. 424.

⁴ 1 Macph. 72.

No. 158.

June 25, 1887.
M'George v.
M'George's
Creditors.

or the Sheriff for his approval, and that the creditors or any of them may then take objections before the Lord Ordinary or the Sheriff pronounces his deliverance. Is it then further open to the creditors to take an appeal under the 169th section? The statute by the 70th section provides a special mode of reviewing the resolution of creditors appointing a trustee, but that is followed by a section (the 71st) directly providing that there shall be no appeal from the judgment of the Sheriff. Further, there appears to be no review open under the statute of a resolution of the creditors renewing the personal protection of the bankrupt in terms of the 77th section. It is said that review of a resolution accepting a composition offer is provided for specially under the 138th and 139th sections, and all other review is therefore excluded. But there is no language from which such exclusion can be clearly inferred as in the case of the election of a trustee, or the personal protection of a bankrupt. While it is contemplated by these sections that the same questions may be raised upon the report of the trustee as are now raised under this appeal, I am not prepared to hold that the implication derived from these sections is such as to deprive creditors of the benefit of the 169th section as well.

As I have said, the words of the 169th section are very general, and I think the argument for the respondents derives considerable force from the circumstance that a practice has grown up under which appeals under the 169th section against the resolutions of creditors accepting composition offers have been frequently entertained. Further, it is conceded that an appeal would be admissible against a resolution rejecting a composition offer, and it would be very difficult to hold that although such an appeal is good, an appeal is bad where an offer has been accepted. I therefore concur in the proposed judgment.

LORD ADAM.—We are dealing in this case with a resolution under the 169th section of the Bankruptcy Act, 1856. It is called a "resolution passed at a meeting of creditors," but that means the same thing as a "resolution of the creditors." The 169th section enacts that "it shall be competent to appeal against the resolutions of the creditors at meetings either to the Lord Ordinary or the Sheriff." There is no limitation there as to the kind of resolutions which are to be appealed. But it has been argued that there are resolutions and resolutions—and that some are appealable under this section and some are not,—that there are some resolutions which require approval by the Lord Ordinary or the Sheriff in order to be operative, and that this is one of these, and cannot be appealed under the 169th section. I cannot find that there is any warrant in the Act of Parliament for such distinctions. These resolutions may be of a most important and serious kind, where a right of immediate appeal would be most valuable; and I have been clearly of opinion ever since the case was opened that this appeal under the 169th section is undoubtedly competent.

LORD MURE was absent on Circuit.

THE COURT adhered.

N. BRIGGS CONSTABLE, S.S.C.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

ROBERT REID, Appellant.—*C. J. Guthrie.*
DAVID STRATHIE, Respondent.—*Ure.*

No. 159.

June 29, 1887.
Reid v.
Strathie.

Bankruptcy Act, 1856—Election of trustee—Review of interlocutory judgment before appointment—Process.—In a sequestration a Sheriff pronounced an interlocutor disposing of certain objections to votes in the election of a trustee, and allowing a proof with reference to another objection. The candidate to whom the Sheriff's judgment was adverse appealed. *Held* that the Sheriff's judgment, in so far as it disposed of the objections, was final, and in so far as it allowed a proof, was incompetent.

At a meeting of creditors on the sequestrated estates of James Cunningham & Sons, bleachers, Barrhead, held in Paisley on 10th May 1887, Mr Robert Reid, C.A., and Mr David Strathie, C.A., were severally proposed for the office of trustee. Mr Reid had an apparent majority of the creditors in value to the amount of £3, 16s. 9d.

The proceedings having been reported to the Sheriff-substitute (Cowan) objections were lodged by each candidate to certain votes.

The Sheriff-substitute, on 19th May 1887, pronounced an interlocutor, which, after sustaining an objection by Mr Strathie and repelling one objection by Mr Reid, proceeded,—“Further, as regards the objection stated by Mr Reid to the vote of Mr Thomas Anderson, merchant, Glasgow, before answer allows Mr Robert Reid a proof of his averments, and to Mr David Strathie a conjunct probation: Grants diligence against witnesses and havers, and appoints the proof to proceed within the Sheriff's Chambers, Paisley, on Tuesday, 24th current, at 10 A.M., and decerns.”

The effect of this interlocutor was to place Reid in a minority, unless his objection to Anderson's vote should be sustained.

Reid appealed to the Court of Session with the view of having the Sheriff's judgment altered in so far as adverse to him.

Counsel for Strathie contended that the appeal was incompetent under section 71 of the Bankruptcy Act, 1856,* and argued;—No proof such as the Sheriff-substitute had allowed was admissible,¹ and that being so, the Sheriff ought to have proceeded to declare Strathie to be elected trustee, and if he had done so there could have been no appeal under the above section.

Argued for Reid;—The interlocutor was not final in the sense of the 71st section, because it did not contain an appointment of a trustee. And if it was appealable at all it was so in its entirety, and therefore it was admissible to attack any part of it, and to deal with the merits of the objections.

LORD PRESIDENT.—In this case there has been a competition for the office of trustee in a sequestration. Objections were lodged in the usual manner under sec. 70 of the Bankruptcy Act, 1856, by each candidate against votes claimed by the other. The Sheriff-substitute heard parties upon these objections, and pronounced the interlocutor of 19th May 1887, which is now before us. That

* The 71st section is,—“The judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession shall be given with the least possible delay, and such judgment shall be final, and in no case subject to review in any Court or in any manner whatever.”

¹ Rhind v. Mitchell, Dec. 5, 1846, 9 D. 231, 19 Scot. Jur. 76; Tennent v. Crawford, Jan. 12, 1878, 5 R. 433; Reid v. Drummond, Nov. 15, 1879, 7 R. 235; Wylie v. Kyd, June 21, 1884, 11 R. 968; Galt v. Macrae, June 9, 1880, 7 R. 888.

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No. 159. interlocutor disposes of various objections which were stated, and it is in the usual form and in terms of the statute down to and including that part of it which repels the objection to the vote of Ross Robertson Auld and others. But then it deals with one objection stated by Reid to the vote of Thomas Anderson, merchant, Glasgow, which objection he was not able instantly to verify.

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In those circumstances the Sheriff-substitute, instead of repelling the objection, as he ought to have done, "allows Mr Robert Reid a proof of his averments, and to Mr David Strathie a conjunct probation." Now, it has been decided in several cases to which I need not separately refer that such allowance of proof is incompetent, and having in view these authorities that part of the interlocutor is beyond the power and jurisdiction of the Sheriff, and is not within the statute. That error being thus before us, I think our course is to quash that part of the interlocutor *ante omnia*. It is obvious that if the Sheriff-substitute had not fallen into the mistake of allowing a proof he would have proceeded in ordinary course to declare one of the candidates duly elected, and we ought therefore to send back the case to the Sheriff-substitute to complete the interlocutor. When that is done it will, I apprehend, be final, and not subject to any appeal *quoad ultra*.

We are not, by taking this course, affirming the competency of this appeal. It is the duty of the Court when such an irregularity is brought before it, consisting of an order which is beyond the statute and *ultra vires*, to put it right at once, and to send the case back to the Sheriff.

LORD MURE.—I concur. I agree that that part of the interlocutor which allows a proof is contrary to the rules which have been laid down in various cases in this Court, and that it cannot stand.

LORD SHAND.—I am of the same opinion. In several recent cases the Court has decided that such proof as is here allowed is incompetent. If the objection had been one that admitted of instant verification by production of documents, or if a diligence had been asked to recover specified documents, the Sheriff might have allowed that. But that it is a proof at large which has been allowed. That is incompetent, and should not have been allowed.

LORD ADAM was absent on Circuit.

This interlocutor was pronounced:—"Recall as incompetent that part of the Sheriff-substitute's interlocutor of date 19th May 1887, which allows a proof of the objection to the vote of Mr Thomas Anderson, and grants diligence: Remit to the Sheriff to complete his interlocutor in terms of the 70th section of the Bankruptcy (Scotland) Act, 1856: Find the respondent entitled to expenses: modify the same to the sum of £5, 5s., for which sum decern," &c.

BOYD, JAMESON, & KELLY, W.S.—GEORGE ANDREW, S.S.C.—Agents.

COLIN CAMPBELL AND OTHERS (Russell's Trustees), First Parties.—
D.-F. Mackintosh—Low.

No. 160.

MARION AGNES RUSSELL OR GARDINER (Mrs Russell's Executrix),
Second Party.—*James Clark.*

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JOHN JAMES RUSSELL, Third Party.—*Jameson—Murray.*

MARION AGNES RUSSELL OR GARDINER AND OTHERS, Fourth Parties.—
Jameson—Murray.

Marriage-contract—Provision to husbands—Implied condition.—A husband by his antenuptial marriage-contract made certain provisions for his wife "if she shall survive him," and she on the other part conveyed to him "and his heirs and assignees whomsoever, All and Sundry the whole means and effects, heritable and moveable . . . now belonging or indebted and owing to her . . . and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour." The marriage was dissolved by the death of the husband, and the wife, subsequently acquired considerable funds, and then died intestate. *Held* that the conveyance by the wife in favour of her husband, and his heirs and assignees, was subject to the implied condition that he should survive her.

WILLIAM RUSSELL, merchant in Glasgow, married in 1857 Miss Marion 1st DIVISION.
Paterson. An antenuptial contract of marriage was entered into between M.
them, whereby Mr Russell assigned and disposed to certain trustees a policy of assurance of £1000 for behoof of his intended wife in case she should survive him, but in case of her predecease, then for the children, if any, of the intended marriage. "And further, the said William Russell hereby assigns, disposes, conveys, and makes over to and in favour of the said Marion Paterson, his promised spouse, in case she shall survive him, the whole household furniture, books, plate, and other household plenishing and effects of every description, which now belong or shall at the time of his death belong to him, and that as her own absolute property." These were all the provisions made by Mr Russell.

On the other part, the intended wife assigned, conveyed, and made over "to and in favour of the said William Russell, her promised husband, and his heirs and assignees whomsoever, All and Sundry the whole means and effects, heritable and moveable, real and personal, now belonging or indebted and owing to her, the said Marion Paterson, and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour, and that as fully and effectually as if every particular of the said estate were herein particularly enumerated."

There were four children of the marriage, John James Russell, Marion Agnes Russell or Gardiner, Louisa Wingate Russell or Murray, and Helen Jessie Russell or Howatt.

The marriage subsisted till 29th August 1884, when it was dissolved by the death of Mr Russell.

Mrs Russell died intestate on 28th August 1886. Her estate, including the marriage-contract provisions of the policy of £1000, and furniture, was calculated to amount to £24,000, a large portion of which she acquired after the dissolution of the marriage.

Mrs Gardiner was appointed her mother's executrix-dative. A question then arose as to whether the whole estate of Mrs Russell, except so much of it as consisted of her marriage-contract provisions, fell in virtue of the conveyance by her in her marriage-contract to be paid over to the testa-

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mentary trustees of Mr Russell. They maintained that it did. On the other hand, Mrs Gardiner as her mother's executrix maintained that it did not, as did also the other daughters and their marriage-contract trustees, and the son Mr John James Russell. A special case was therefore stated for the judgment of the Court, Mr Russell's trustees being first parties, Mrs Gardiner as Mrs Russell's executrix being second party, John James Russell third party, and the three daughters and their marriage-contract trustees fourth parties.

All the parties except the first maintained that Mrs Russell's estate fell to be divided either as intestate estate among her four children as her next of kin, or alternatively, that her children were conditional institutes to their father under the destination in the marriage-contract, and as such entitled in their own right to their mother's estate.

The questions were:—“(1) Are the parties of the first part entitled to receive the estate of the said Mrs Marion Paterson or Russell (with the exception of the provisions in her favour in the said marriage-contract), and to administer the same as part of the estate of the deceased William Russell? (2) Does the estate of the deceased Mrs Marion Paterson or Russell fall to be administered as intestate estate, and to be divided accordingly among her children as her next of kin? Or—(3) Are the third party and his three sisters conditional institutes under the destination in the said antenuptial contract, and as such entitled in their own right to the estate of their mother?”

Argued for the first parties;—The terms of the marriage-contract left no room for doubt that the conveyance by the wife included three things—(1) her estate as at the date of her marriage; (2) her *acquirenda stante matrimonio*; (3) her whole estate which she might have when she died. She might indeed spend what she chose while she lived, but she had contracted as to the disposal of her whole means unspent and extant at her death. There was a material difference between the husband's conveyance and the wife's. He conveyed to her his household plenishing, plate, &c., “in case she shall survive him,” but it was significant that in her conveyance there were no analogous words “in case he shall survive her,” which, so far as it went, indicated that her gift was subject to no such qualification. Again, the threefold gift she made was clear from the use of the word “or,” which introduced the third branch of the gift. It was proposed on the other side to read “or” as equal to “and,” but that, even if admissible, went too far. It would reduce the conveyance of the *acquirenda* during marriage, a very common conveyance in contracts of marriage, so as to make it inapplicable during marriage, and applicable only to subjects which fulfilled the two conditions of being acquired *stante matrimonio* by the wife, and being also extant when she died. Again, it was proposed to give the words the meaning of being a conveyance only of property that was the wife's at the marriage, and came to her during it, and to treat the following words as merely explicative of the conveyance, and intended to provide for the event of the predecease. But then they were needless. The conveyance of *acquirenda* during marriage was complete without them, and provided quite sufficiently for her predecease. Further the words of exception, “with the exception of the provisions above made in her favour,” gave point to the argument that, as she made an exception in the clause in question of what her husband provided for her, she was intending to convey to him the rest. The conveyance too, was to the husband, “his heirs and assignees.” Now, these words used in a contract strengthened the argument that it was intended to give him a *jus crediti* from the first in the wife's property as at her death, and seemed also to indicate that it

was in contemplation to provide for the event of the predecease of the husband whose heirs and assignees were to take his contract right if he died first. The cases of *Bell v. Cheape*¹ and *Earl of Fife v. Mackenzie*² were relied on on the other side to shew that a gift to A and his heirs and assigns, whom failing, to B, goes to B if A die before the testator, and thence it was inferred that as the husband predeceased the wife his representatives could not take, but the children would take as the wife's next of kin. That, however, ignored the distinction between contract and testamentary gift.³ For the same reason the children could not take as conditional institutes, which was their alternative contention.

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No doubt there was a certain presumption against the contention of the first parties, and the Court would, if they could, read the deed as limiting the wife's conveyance to a conveyance for the purposes of the marriage only, and as conveying what came to the wife only during the marriage, instead of as a conveyance to the husband of all she might acquire many years after he died. That was the principle of the cases of *Wardlaw*,⁴ *Carter v. Carter*,⁴ *Dickinson v. Dillwyn*,⁴ and *In re Edwards*,⁴ cited on the other side. But in these cases the Court had found ground in the other parts of the deeds for escaping from the literal construction of a clause, and applying the presumption which was here excluded by the force of very simple and express provisions.

Argued for third and fourth parties;—It was an error to think there was a threefold conveyance. On the contrary, the so-called third head of the conveyance was a limitation of the conveyance of the funds the wife had when she married, and of those which she acquired *stante matrimonio*, to that portion she might happen to possess at her death, and on the assumption only that she predeceased her husband. Indeed, it was impossible to suppose that the conveyance should carry what she might succeed to long after she became, as she might have become, a childless widow. The Court would rather avoid such a construction as the first parties contended for (*Wardlaw*, *Edwards*, *Carter* and *Dickinson*, *supra cit.*),⁵ because it was improbable and unreasonable. No benefit could be derived from the clause of exception founded on on the other side, for the words were mere style taken from the Style Book,⁶ a reference to which shewed that they were really intended to apply to what was called the second head of conveyance, the *acquirenda stante matrimonio*. The Court would supply the words "in case he shall survive her" in the wife's conveyance. The very peculiarity of such words being absent from the wife's conveyance, though found in the husband's, occurred in the *Earl of Fife v. Mackenzie*, and the Court practically supplied them. That case could not *quoad ultra* be disposed of by saying it proceeded on a treatment of the deed as testamentary, as was argued on the other side, because both the opinions of some of the Judges and the interlocutors of Court went on grounds applicable to contract right. But, indeed, such cases as *Bell v. Cheape* (*supra*) were quite applicable. If the children did not take otherwise, they took as conditional institutes.

¹ *Bell v. Cheape*, May 21, 1845, 7 D. 164.

² *Earl of Fife v. Mackenzie*, May 14, 1795, M. 2325, Bell's Folio Cases, 165 (2d part of report), aff. 3 Pat. App. 549 (March 6, 1797).

³ See *Grant*, M. 3596.

⁴ *Wardlaw v. Wardlaw's Trustees*, July 7, 1880, 7 R. 1066; *Carter v. Carter*, July 26, 1869, L. R., 8 Eq. 546; *Dickinson v. Dillwyn*, July 31, 1869, L. R., 8 Eq. 551; *Edwards*, Dec. 6, 1873, L. R., 9 Ch. App. 97.

⁵ And see *Morris v. Anderson*, June 16, 1882, 9 R. 953.

⁶ *Juridical Styles*, 2d ed. vol. 2, p. 204.

No. 160. If "or" were read as equal to "and" in the wife's conveyance, then there was no conveyance of what the wife had during widowhood.

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LORD PRESIDENT.—This is a case of considerable delicacy, and that delicacy is caused, I think, by bad conveyancing. The clauses of the marriage-contract before us appear to have been framed, one might say, in order to raise difficulty in its construction. But in deciding between the two competing constructions of that clause by which the wife makes a conveyance of her funds to her husband, I think that we must, to some extent, be guided by general considerations, as well as by the words of the deed. The general scheme of the marriage-contract is this. On his side, the husband conveys a policy of insurance for £1000 on his own life, and the sum contained in it to trustees; and that is the only trust-conveyance in the deed. Then the next provision is one by which the husband conveys, in favour of the wife directly, "the whole household furniture, books, plate, and other household plenishing and effects of every description which now belong, or shall at the time of his death belong, to him, and that as her own absolute property"; but that is all qualified by the words, "in case she shall survive him."

Then come the counter obligations undertaken by the wife, by which she "conveys and makes over from her, to and in favour of the said William Russell, her promised husband, and his heirs and assignees whomsoever, all and sundry the whole means and effects, heritable and moveable, real and personal, now belonging, or indebted and owing to her, the said Marion Paterson, and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour, and that as fully and effectually as if every particular of the said estate were herein particularly enumerated." Now, the trustees of the husband contend that there are three different branches of this conveyance by the wife to the husband—the first, of whatever she was possessed of at the time of the marriage; the second, of all she might acquire during the subsistence of the marriage; and the third, of all belonging to her at her death. I do not think that is a sound construction of the marriage-contract. Undoubtedly, there is a distinction between the first subject conveyed and the second—what she had at her marriage is one subject, what she acquired during it is another. But, in what remains of the clause, there is no conveyance in direct terms of anything which is to be acquired by her between the termination of the marriage by the decease of the husband, if that should happen, and her own death. It is not what she might acquire during that period that is conveyed, but only things which might belong to her at her own death. These will comprehend the two former classes—things possessed by her at and during the marriage, if not consumed or expended by her; and it is therefore open to us to say that, when she speaks of things belonging to her at the time of her death, she is not necessarily speaking of subjects separate and distinct from those which belonged to her at her marriage and those which she might acquire during her marriage, but that the more natural construction is, that the words are merely applicable to the two sets of things already specially conveyed—that is, that it shall be a condition of her husband taking these things that they shall be her property at the time of her death. That is the most natural meaning to give the clause. And there is

another point also not unworthy of notice. In the conveyance of furniture and household plenishing which is made by the husband there is the qualification, "in case she shall survive him," whereas these words, or rather words equivalent to them, are not in the conveyance by the wife to the husband. But I think they are to be implied from the very nature of the relation between the husband and wife and of the events contemplated. If the case had been put before these parties by their legal adviser at the time, "Suppose the husband died in a year or so after your marriage, and there are no children, is it your intention that the wife is to have nothing of her own, but that all of which she dies possessed—it may be many years afterwards—is to belong to the heirs and assignees of the husband," I think the answer would have been "Certainly not." And, indeed, it is a monstrous idea, for it would be to make a young widow without children penniless during the rest of her life. That is so repugnant to common sense that I think it would require the plainest words to induce us to give effect to such a proposition. Now, the words are not plain at all, but, on the contrary, on a fair construction of the marriage-contract—badly as it is expressed—it seems to me that it is clearly in the contemplation of the parties that this clause is to receive effect so far as the words "belonging or owing and indebted to her at the time of her death" are concerned as being a provision only in the event of the wife predeceasing the husband, or, in other words, of the husband's survivance.

There is not much aid to be derived from authority in a question of this kind; but the considerations which induced us to decide as we did in the case of *Wardlaw* (7 R. 1066) are, I think, quite applicable here. The conveyance made by the wife which we had to consider in that case was of "all and sundry whatsoever lands, heritages, sums of money, and other funds or effects, heritable and moveable, presently owing and belonging or which she, the said Margaret Richardson, may succeed to or acquire in any manner of way." These words are as general and comprehensive as any which we have here; yet we held them capable of being limited, so that what was acquired by the wife after the death of the husband could not be held to be comprehended within them. Now, the general considerations on which we there proceeded are quite applicable, as I have said, to this case. The one case does not rule the other, but the judgment in it is on the same lines as that which, I think, we ought to pronounce here. It is certainly not unworthy of notice also, that in the case of the *Earl of Fife* (3 Pat. App. 549), which has been quoted to us, there is the same contrast between the clause of conveyance by the husband and the clause of conveyance by the wife which we have in the present case. The husband there assigned and disposed to the wife, in case she should happen to survive him, and to her heirs, executors, and successors, "the whole moveable estate that should belong to him at the time of his death," while the conveyance by the wife to the husband was, that she became bound "to convey to her husband, his heirs and assigns, her whole heritable and moveable estate which presently do belong to her, or which may fall, accresce, or belong to her at any time hereafter during the subsistence of the marriage, and particularly," certain heritable estate, while, as to moveable estate, she "assigns and disposes to and in favour of the said Alexander Udny, Esq., her husband, his heirs and assignees, the whole moveable goods, gear, and effects which shall belong to her at the time of her death, including heirship moveables, household furniture, outright and insight plenishing, silver-plate, jewels, and linens, and, in general, all moveable goods and effects of whatever kind or denomi-

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nation which shall belong to her at the time of her death." Notwithstanding the terms of that contract, the Court pronounced this judgment :—" Find that the clause in the said contract, giving to Alexander Udny Duff, his heirs and assignees, the moveable effects that should belong to Mrs Udny Duff at the time of her death, does not entitle the heirs or executors of Mrs Udny Duff to make any claim to these effects in competition with the Earl of Fife, the general donee of Mrs Udny Duff, or with Robert Duff of Fetteresso, who has entered a claim to some of them as a special legatee." So it appears that in that case the Court disregarded the fact that the wife's conveyance did not include the words, "in case he shall happen to survive her," and read the two clauses as if they both contained the same limitation. On these grounds, I am for answering the first question in the negative, the second in the affirmative, and the third in the negative.

LORD MURE.—I am of the same opinion. There is no doubt that if we sustain the contention of the first parties we make over to the husband's representatives everything which the wife may have acquired after the dissolution of the marriage. In one reading of the words of the conveyance by her in the marriage-contract that construction may be given to them, but I think it is well settled by the case of *Wardlaw*, and the older case of *Lord Fife*, that, where such a clause, though it admits of such a construction, can also be read according to the more equitable construction by which it is held as applying to the wife's estate only at the marriage, and her *acquirenda* during it, that more equitable construction will receive effect. The same principle was, I think, acted on by the English Judges in the case of *Edwards* (L. R., 9 Ch. App. 97), which was quoted to us. That being so, I think the construction your Lordship proposes is consistent both with the general object of the contract and with the correlative clause by which the husband makes a conveyance in favour of the wife. Further, it is conceded that if we were to read "or" in the conveyance by the wife as equivalent to "and," the first parties' contention must be repelled. I am of opinion with your Lordship on the whole matter that the true construction is that the words apply to the wife's estate at the marriage and her *acquirenda* during it, and restrict the conveyance to the estate and *acquirenda* which are in existence at the time of the dissolution of the marriage.

LORD SHAND.—I think it is clear on general considerations that in the construction of a provision in a marriage-contract such as we have here nothing short of the most explicit and express words should be permitted to support a claim by the heirs and assignees of the predeceasing spouse to take the estate of the survivor, who may survive the dissolution of the marriage for many years, and enter into another marriage. The spouses with whose marriage-contract we are here concerned were married in 1857. Both of them lived for twenty-seven years,—the wife for twenty-nine years after their marriage. But the case may be figured of the husband dying the year after the marriage, in which case the claim would have been by his representatives to estate which the wife had possessed, or, it might be, acquired, during the twenty-seven years after his death. Every consideration of convenience, and, indeed, of propriety, should, I think, lead to the rejection of such a construction. No doubt such a conveyance as is here contended for by the husband's representatives might conceivably be made, for example, by words expressly assigning *acquirenda* after the dissolution of the marriage so far as not

spent by the wife. But, in that case, there would probably be in the deed not only the words making the conveyance perfectly clear, but also in all probability the special reason for such an unusual provision would be stated, and the Court would give effect to it. But if the language will admit another construction, we ought so to interpret it. That is the principle of the English cases which were cited, and also of the case of *Wardlaw* and of the case of *Fife*. Taking the deed in that view, I have not felt much difficulty as to the decision of the question before us. It is no doubt possible to read the clause under discussion as conveying, first, the wife's property at the date of her marriage, second, her *acquirenda* during its subsistence, and third, her property at the date of her death, as if all three of these different subjects were intended to be conveyed. That is the one alternative view, and leads to the result for which the husband's representatives contend. But the clause may also be reasonably read in another way, and the first and strong observation to be made upon it is that when we come to the third part of it, the description of the property at her death is not a conveyance of all she might acquire after the dissolution of the marriage. That is said to be inferred from the words used, but I prefer to read the words as simply intended in a bungling form to be an amplification of the description of what she had already conveyed. She had given what she had at marriage and what she might acquire during it, and this third alternatively expressed clause is intended to be a sweeping up of what went before, and to be applicable to the case of her being the predeceaser. I am therefore for answering the second question in the affirmative.

Something was said as to the words "with the exception of the provisions above made in her favour." I think that was well met by the argument of Mr Murray that these were words of style to be found in the Juridical Styles, which were probably of no value, but, at anyrate, were really meant to qualify the second branch of the wife's conveyance, and not intended to affect or deal with the property belonging to her at the time of her death.

Therefore, on the whole matter, I have no difficulty in reading the words in question as meant to be applicable in case the wife predeceased the husband, just as in his conveyance the provision is expressly limited by the words "in case she shall survive him." In the case of his conveyance that is expressly stated; in hers I think it is stated by implication. I therefore agree with your Lordship.

LORD ADAM was absent on Circuit.

THE COURT answered the first question in the negative, the second in the affirmative, and the third in the negative.

DONALD MACKENZIE, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—FRASER, STODART, & BALLINGALL, W.S.—Agents.

No. 160.
June 30, 1887.
Russell's
Trustees.

No. 161.

ROBERT DOWNTIE LESLIE (Peter Murray's Trustee), Petitioner
(Reclaimers).—*J. C. Thomson—Glegg.*July 2, 1887.
Murray's
Trustee v.
Wood.ELIZABETH WOOD, Objector (Respondent).—*D.-F. Mackintosh—Craigie.*

Writ—Description of lands—Description by reference—Conveyancing Act, 1874 (37 and 38 Vict. cap. 94), sec. 61, and schedule O.—In a description of lands by reference to a prior recorded deed, under the Conveyancing Act, 1874, sec. 61, and schedule O, the omission to state the day of the month on which the prior deed was recorded will not invalidate the subsequent deed.

Writ—Description of lands.—A bond and disposition in security contained this description of the security subjects,—“All and Whole that piece of ground fronting Baker Street of Aberdeen, in the burgh and county of Aberdeen, being the subjects and others particularly described in the feu-charter thereof granted by” certain persons named and designed “in my favour, dated the 6th and 7th, and recorded in the Division of the General Register of Sasines applicable to the county of Aberdeen on the , all days of November 1882.” The foregoing were the only subjects in Baker Street, Aberdeen, belonging to the grantor. *Held (per Lord Trayner, Ordinary)* that apart from the provisions of the Conveyancing Act, 1874, sec. 61, and schedule O, there was in the bond a sufficient description of the subjects.

1st Division.
Lord Trayner.
M.

ON 13th November 1882 Peter Murray, builder, Aberdeen, granted a bond and disposition in security for £1000 in favour of Miss Elizabeth Wood, in which the description of the security subjects was in the following terms:—“All and Whole that piece of ground fronting Baker Street of Aberdeen, in the burgh and county of Aberdeen, being the subjects and others particularly described in the feu-charter thereof granted by Basil John Fisher, residing now or lately in Aberdeen,” and certain other persons named and designed, “in my favour, dated the 6th and 7th, and recorded in the Division of the General Register of Sasines applicable to the county of Aberdeen on the , all days of November 1882.”

This bond and disposition in security was recorded in the appropriate Register of Sasines on the 20th November 1882, the feu-charter referred to in the bond being similarly recorded on the same day but prior to the bond.

In January 1887 Murray's estates were sequestered, and a trustee appointed thereon.

In April 1887 the trustee presented a petition to the Lord Ordinary on the Bills for the approval of a scheme of ranking and division among the heritable creditors, under section 116 of the Bankruptcy Act, 1856.

By this scheme the trustee, *inter alia*, proposed to disallow any ranking to Miss Wood on the price obtained for the subjects contained in her bond, on the ground that the bond was invalid in respect that, “in the opinion of the trustee, *ex facie* of this bond it is not possible to identify the subject of the security, there being a large extent of feuing ground on both sides of the said street called Baker Street, which feuing ground is to a great extent feued out and built upon. Further, the short description authorised by section 61 of the Conveyancing (Scotland) Act of 1874 having been adopted, it is absolutely essential that the date of recording the prior deed referred to, containing the particular description of the subjects, should be given, and that has been omitted.”

Miss Wood lodged objections, in which she maintained that both grounds of invalidity were unsound.

On 4th June 1887 the Lord Ordinary (Trayner) sustained the objections, appointed the trustee to rank the objector on the price of the sub-

jects in Baker Street, Aberdeen, for the amount due under the bond, and No. 161. found her entitled to expenses.*

The trustee reclaimed, and argued;—(1) Where a person desired to take the benefit of a statute allowing a short mode of procedure instead of the form hitherto in use (and not abolished), he must adopt exactly the method prescribed by the statute.¹ Here the form given in the schedule had not been adopted, and the date was a blank. (2) Apart from the statute, there was not a sufficient description of the subjects here.²

July 2, 1887.
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Wood.

LORD PRESIDENT.—I cannot see any reason for differing from the Lord Ordinary in his first ground of judgment, and therefore it is unnecessary to consider the other ground on which he proceeds.

The reference to the feu-charter is made in a bond dated 13th November, and the feu-charter referred to is dated the 6th and 7th November. It is plain, therefore, that the feu-charter had been obtained and the money advanced almost simultaneously, the builder not being able to complete his build-

* “**OPINION.**—(After narrating the description in the bond)—If the exact date of recording the feu-charter referred to had been inserted instead of being left blank, there can be no doubt that this description would have been sufficient under the provisions of the 37 and 38 Vict. cap. 94, sec. 61, which provides for the description of heritable subjects by reference to other deeds where the subjects are particularly described. But I regard what has been done in the present case as a substantial, if not exact, compliance with the provisions of that statute. The deed referred to is recorded in the appropriate Register of Sasines, and is so recorded prior to the recording of the bond making reference to it; the reference made to it is such as will enable anyone reading to find it, for it is said to be recorded in the month of November 1882. Further, it appears from the bond that the deed referred to was executed on the 6th and 7th days of November 1882, while the bond in which the reference is made was recorded on the 20th November 1882, so that the search for the deed referred to is limited to the period between 7th and 20th November 1882. This appears to me to be such a reference as will enable anyone to find the deed referred to, and I think the statute does not require more to be done. No doubt the statute requires the reference to be as nearly as may be in the terms of the schedule thereto annexed, which runs ‘recorded in the on the day of .’ But, in my opinion, it would be straining the Act (in the present case with an unjust result) to say that no reference will fulfil its requirements unless the exact day of recording is stated. The purpose of the Act was to save the necessity for long description where such descriptions could be got from a deed duly recorded, and which was referred to in such terms as would enable anyone to find it.

“But assuming that I have taken too liberal a view of the requirements of the Act, I am still of opinion that the trustee is wrong. The description of the property is given in a heritable bond for the purpose of identifying the subject of the security, and, in my opinion, there can be no doubt about the identity of the subjects over which the bonds in question were granted.

“In the first place, the subjects are described as Murray’s property in Baker Street, Aberdeen, and it is not said that Murray had any property in that street except one. In the second place, it is not only Murray’s property in Baker Street, but the property conveyed to him by certain persons, fully designed by a certain deed fully described. I think these things, which appear *ex facie* of the bonds, are quite sufficient to identify the subject of the security.—*Cattanach’s Trustee v. Jamieson*, 11 R. 972.”

¹ Johnston v. Pettigrew, June 16, 1865, 3 Macph. 954, 37 Scot. Jur. 505.

² Belches v. Stewart, Jan. 21, 1815, F. C.; Cattanach’s Trustee v. Jamieson, Jan. 25, 1884, 11 R. 972.

No. 161. ings without borrowing money. Now, in these circumstances, the deeds had to be registered in order to make the transaction effectual, and what was done was this: Both deeds were taken to the register on the same day—the 30th November—in order to be registered, instructions being given to have the feu-charter put on record first, so as to preserve the proper order between the deed referred to and the deed containing the reference. All that was quite regular, and in terms of the statute, the only omission being that the precise day of recording the feu-charter was not mentioned in the description in the bond, and the question is whether that is fatal to the validity of the bond. I am of opinion that it is not. I think it is clear that the reference given in the bond is sufficient to enable any person to know that the feu-charter referred to is to be found in the portion of the register applicable to the county of Aberdeen, and somewhere between the date of the charter and the date of recording the bond, that is to say, something like an interval of a fortnight. Therefore, the facilities for finding the deed referred to are, I think, ample. If there had been any difficulty in finding the deed referred to that would have been a substantial and important objection, but if there is no such difficulty, then I think the objection resolves itself into a technical objection as to whether the provisions of the statute have been literally complied with. Now, no doubt the schedule contemplates that the deed containing the reference should set out the date of the deed referred to, but whether the precise day must be set out as well as the month and the year, I cannot quite discover. In the schedule the day is left blank, and the section of the Act which incorporates the schedule says nothing, but merely refers to the schedule, directing, I observe, that the description is to be “in, or as nearly as may be in, the form set forth in the schedule.” I do not say that the day of the month should not have been filled in, but I cannot think that its omission constitutes such a violation of the statute as will infer the nullity of the bond.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT adhered.

THOMAS M'NAUGHT, S.S.C.—PHILIP LAING, & TRAILL, S.S.C.—Agents.

No. 162. WILLIAM BROUGH (*Tertius*), First Party.—*D.-F. Mackintosh—Kennedy.*
 ISABELLA BROUGH or ADAMSON and OTHERS, Second Parties.—
Cheyne—Law.

July 2, 1887.
 Brough v.
 Adamson.

Husband and Wife—Destination—Conjunct fee and liferent—Property coming from wife's family.—A father by an *inter vivos* deed gratuitously disposed to himself in liferent for his liferent use alienably, and to his daughter and her husband “in conjunct fee and liferent, and to the children” of the marriage equally share and share alike, “whom all failing, to the heirs and assignees whomsoever of the longest liver” of the spouses, certain heritable property belonging to him. The husband was the longest liver of the spouses, and he was survived by children of the marriage. *Held* that under the destination no fee ever vested in the husband.

2D DIVISION.
 M.

By a disposition dated 9th January 1834, William Greig, residing in St Cuthbert Street, Edinburgh, “for the love, favour, and affection which I have and bear to Lillias Greig or Brough my daughter, spouse of William Brough [*primus*], . . . and to the said William Brough, as well as to the children procreated or to be procreated of the marriage betwixt them, and for certain other good causes and considerations” disposed to

himself in liferent for his liferent use alienably, "and to the saids Lillas Greig or Brough and William Brough, in conjunct fee and liferent, and to the children procreated or to be procreated of the marriage betwixt them equally share and share alike, whom all failing, to the heirs and assignees whomsoever of the longest liver of the saids Lillas Greig or Brough and William Brough in fee," a shop, dwelling-house, and others, consisting of two stories, situated in Morrison Street, Edinburgh, all then possessed by Brough, together with the ground on which they stood, which shop, dwelling-house, and others composed the entire eastmost half of a tenement of two dwelling-houses of two stories and four apartments each, feued by James Marshall, builder, and forming part of the lands of Orchardfield; "declaring as it is hereby expressly provided and declared that the subjects hereby disposed shall not be sold or burdened at any time during the joint lives of the saids Lillas Greig or Brough and William Brough, except by their mutual consent, nor shall the rents of said subjects be affectable by the debts of the said William Brough, or by the diligence of his creditors during the lifetime of the said Lillas Greig or Brough, which declaration is hereby directed to be engrossed in the infettment to follow hereon."

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Infettment was taken on this disposition in favour of "the said William Greig, Lillas Greig or Brough, and William Brough, for their respective rights of fee and liferent aforesaid."

Greig died in 1846.

Lillas Greig or Brough died in 1873, being survived by her husband and by one son and four daughters.

Brough, believing himself to be proprietor of the subjects, drew the rents and treated them as his own till his death in 1880. By his settlement he conveyed it with his other subjects in that street to his son William Brough *secundus*, who also treated the subjects in question as his own. He died in 1885, having previously entered into a contract of sale of the property. His son William Brough *tertius* made up a title as heir to him, and offered a conveyance. The purchaser declined to take the title, doubting whether the fee was really in William Brough *primus*, and application was made to the four sisters of William Brough *secundus*, the only children of William Brough *primus* other than William Brough *secundus*, to sign the disposition as consenters. They then took advice as to their rights, and were advised that the fee of the eastmost half of the tenement had vested in their mother Lillas Greig or Brough under the disposition of 9th January 1834, and that they were entitled to the same to the extent of four-fifths *pro indiviso* shares, as along with William Brough *tertius*, heirs of provision in special of her.

A special case was then stated,—William Brough *tertius* being first party, and the daughters of William Brough *primus* being second parties,—to have the opinion and judgment of the Court on the question: "Whether, under the said disposition by William Greig, dated 9th January 1834, the fee of the eastmost half of the tenement in Morrison Street was vested in the said William Brough *primus*, or in the said Lillas Greig or Brough?"

Argued for the first party;—The fee of the eastmost half of the tenement in Morrison Street, vested not in the wife, but in the husband. In the first place, the consideration of the deed applied to him as much as to the wife. Her father, the disponent, was moved by the love, favour, and affection which he bore to her "and to" the husband, as well as to their children. In the next place, the ultimate destination was to the "heirs and assignees whomsoever of the longest liver" of the spouses, and the husband was the longest liver. There was nothing at all in the

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deed to lead to the view that the wife was favoured rather than the husband. Now, the husband was *dignior persona*, and even during their joint lives before it was seen who was to be the longest liver the fee was in him. Further, his assignees, he having been the longest liver, were the persons favoured. The destination most like that under discussion was that construed in *Fead v. Maxwell*,¹ where one of the spouses, being that one whose heirs and assignees were favoured, was held to be fiar, "not because the substitution did terminate upon her heirs, but because it was in favour of her heirs and assignees, and none but who is fiar can assign." The general canons of construction of such destinations were stated by Erskine.² The cases in which the wife has been held to be fiar were illustrations of the doctrine there stated.³ The case of *Myles* differed from the present, in respect that the property there was the wife's own originally, not as here the gift of one who, though her father, shewed no preference for her over the husband. [LORD RUTHERFURD CLARK pointed out that no fee was given to the longest liver, but only to the heirs and assignees of the longest liver, and suggested that it might be argued that there was a joint fee in the spouses.] Such a construction was favourable to the first party. There was in that view a joint fee in the spouses while they lived, with a right of accretion to the longest liver, who was the husband. The declaration that the subjects should not be burdened during the joint lives of the spouses, nor the rents be affectable by the husband's creditors while the wife lived, was also favourable to that view. In any other view, the difficulty had to be met, either by the one side or the other, that the heirs and assignees of a person who might be, and in this case actually was, only a liferenter were the fiars.

Argued for second parties;—The general principle was wider than the first party admitted, and it applied to this case. It was accurately stated in *Fraser on Husband and Wife*, ii. 1428-29, that while the husband was in *dubio* fiar in such conjunct destinations, the fee was "in that party through whom the subject originally came, so that if it belonged to the wife or her father, and be destined to the husband and the wife in conjunct fee and liferent, and to their heirs, the wife is fiar." The case of *Myles*, having the true scope of the principle in view, was stronger than the present. The same doctrine was borne out by other authorities.⁴ The declaration founded on by the first party, that the subjects were not to be burdened during the joint lives, nor to be affectable by the husband's debts while the wife lived, was surplusage, and it was, in any view, as consistent with a fee in the wife as with a fee in the husband. In the case of *Blair*,⁴ the subject came from the wife's father.

At advising,—

LORD JUSTICE-CLERK.—This case raises questions which I have found to be of some difficulty. The only question to which I intend to address myself at present is that which is raised by the first question of law stated in the special case, which is,—“Whether, under the said disposition by William Greig, dated 9th January 1834, the fee of the eastmost half of the tenement in Morrison Street was vested in the said William Brough *primus*, or in the said Lilius Greig or

¹ Feb. 4, 1709, M. 424; see also *Forrester v. Forrester's Trustees*, June 3, 1831, 9 Shaw, 657, aff. April 13, 1835, 1 Shaw & M'Lean, 441.

² III. 8, 36; cf. *Bell's Lectures on Conveyancing*, ii. 835-6.

³ *Myles v. Calman*, Feb. 12, 1857, 19 D. 408, 29 Scot. Jur. 192; *Paterson v. Paterson*, Jan. 16, 1824, 2 Shaw, 617.

⁴ *Blair v. Henderson*, June 16, 1757, 5 Br. Supp. 335; *Paterson v. Balfour*, Dec. 6, 1780, M. 4212; *Bell's Com.* i. 54; *Ersk. sup. cit.*

Brough?" If we decide that question to the effect of finding that the fee of these subjects was vested in Lilius Greig or Brough then there arises another question, but at present the only question is, where was the fee? Was it in Lilius Greig, or in her husband?

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July 2, 1837.
Brough v.
Adamson.

The case relates to a branch of law on which there has been much decision—the law of conjunct fee and liferent.

The facts are simply these. There seem to have been three William Brouchs, and William Brough *tertius*, the first party to this case, is the grandson of William Brough *primus*. William Brough *primus* married Lilius Greig, and on 9th January 1834 her father William Greig executed the disposition, the construction of which is now in question. By that deed he conveyed to his daughter and her husband certain heritable subjects in Edinburgh, and the destination was in the following terms,—“I hereby give, grant, alienate, and dispose from me, my heirs and successors, to myself in liferent for my liferent use allenary, and to the saids Lilius Greig or Brough and William Brough in conjunct fee and liferent, and to the children procreated or to be procreated of the marriage betwixt them equally share and share alike, whom all failing, to the heirs and assignees whomsoever of the longest liver of the saids Lilius Greig or Brough and William Brough in fee.” Now, the question arises whether the daughter or her husband took the fee of these subjects under that destination.

The theory of the law of conjunct fee and liferent in Scotland was at one time supposed to be analogous to that of joint tenancy in England; that is to say, that there was a joint fee in both the spouses during their life, and an accretion of the fee to the survivor of them. But that has now for a long time been discarded, and it is now held that a destination to the spouses in conjunct fee and liferent gives the fee to one or other of them, and only the liferent to the other. The only question therefore is, who has the fee? There have been various tests applied to solve this question, some of them somewhat inconsistent with each other. In the first place, the presumption is that the fee is in the husband, unless the contrary be shewn, and much has also been made to depend upon the side of the house from which the property came, whether the wife's side or the husband's. Certainly, if the deed was granted by a stranger, then the presumption is that the fee was in the husband. But it may be shewn from the circumstance of who was the granter of the deed that the fee was not meant to be in the husband, and then the presumption is shifted and the fee held to be vested in the wife. A good deal, too, has been held to rest on what is the ultimate destination of the subjects under the deed. Now, that is a most important element here. In this particular case the deed conveying the property came from the wife's side. It was her father who conveyed the property to the spouses, and the ultimate destination was to the children of the marriage, and only in the event of there being no children of the marriage to the heirs and assignees whomsoever of the longest liver of the spouses.

I must say the question is not unattended with difficulty, for the husband was the survivor, and it was said for the first party that if there had been no children of the marriage his heirs would have taken the fee, which is undoubtedly true.

But I think the point is concluded for us by the case of *Myles*, 12th February 1857, 19 D. 408, quoted to us from the bar, and the case of *Blair*, 5 B. S. 335, which was also referred to. I think that if these cases were well decided there can be no doubt here. The case of *Myles* was even a stronger one than the present,

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July 2, 1887.
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Adamsen.

because the disposition of the property there in question was executed by two sisters who held certain property *pro indiviso*, and resolved to divide it and grant conveyances of part to one of them and her husband, and of the other part to the other and her husband. Thus, the conveyance in favour of one of them, Mrs Calman, was granted by the wife herself and her sister, and it was "to and in favour of the said Ann Ritchie (Mrs Calman) and John Calman, and the longest liver of them two in conjunct fee and liferent, and to the child or children procreate or to be procreate betwixt them, which failing, to the said longest liver of them two, and the said longest liver, her or his heirs and assignees whomsoever, in fee." So that was as nearly as possible the same case as we have here. Lord Benholme in that case delivered a most able and exhaustive opinion, in which all the cases were carefully considered—a complete repertory of the law upon the whole subject—and he came to the conclusion that the wife was the *fiar*. With regard to this ultimate destination to the children of the marriage, whom all failing, to the heirs and assignees whomsoever of the longest liver, Lord Benholme says, "that the survivor is here called to the fee only upon failure of children, which is inconsistent with the notion that the fee was vested in the survivor by the earlier part of the clause. According to the pursuers' argument, the surviving husband takes the fee both as institute and afterwards as substituted to the children. Whereas the sounder view seems to be that in the earlier part of the clause the survivor as survivor takes merely a liferent, while in the latter part, where he is called along with his heirs and assignees, he takes a fee as a substitute to the children. The children being thus in the destination preferred to the survivor *qua* survivor, the primary fee must be held to remain with the mother, the true proprietrix, to whom the children are heirs of provision." So here the truth is that the destination to the heirs and assignees whomsoever of the longest liver is only a special destination in the event of there being no children of the marriage. I think that the fee was never in the husband, but was in the wife, Lilius Greig.

LORD YOUNG concurred.

LORD CRAIGHILL.—Apart from authority, the first of the questions presented in this case would be difficult of decision; but fortunately, as I think, there is authority by which it is governed. There is first the case of *Blair v. Henderson*, June 16, 1757, 5 Brown's Supp. 335, and also the case of *Myles v. Calman*, Feb. 12, 1857, 19 D. 408. It may, no doubt, be said, and indeed at the debate was said, that the latter of these cases was distinguishable from the present, because there the subjects conveyed were conveyed by the wife. They were her own property; and consequently there was room for the contention that there was a stronger presumption that the fee was to go to her heirs than in the present case, where the property conveyed was not the wife's, but was the property of her father. This argument, however, is met and is displaced by the former case which I have cited, where the property conveyed was the property not of the wife, but of her father. Taken together, these decisions seem to me decisive of the present controversy, and consequently, in my opinion, the answer to the first question must be to the effect proposed by your Lordship.

LORD RUTHERFURD CLARK concurred.

THE COURT answered the question by finding that the fee of the subjects mentioned therein was in Lilius Greig or Brough.

GREGOR MACGREGOR, S.S.C.—A. P. PURVES, W.S.—Agents.

ROBERT MACKILL & COMPANY AND OTHERS, Pursuers (Reclaimers).—

D.-F. Mackintosh—C. S. Dickson.

WRIGHT BROTHERS & COMPANY, Defenders (Respondents).—

Jameson—Salvesen.

No. 163.

July 5, 1887.
Mackill & Co.
v. Wright
Brothers & Co.

Ship—Charter-party—Guarantee that vessel should carry a certain dead weight of cargo.—By charter-party for a voyage it was stipulated that the vessel (then at sea) should proceed to G., and there load all such goods and merchandise as the charterers should tender alongside for shipment, including machinery, the dimensions of the largest pieces thereof being specified; but not beyond what the ship could reasonably stow and carry; that the charterers should pay a slump freight for the voyage, of £2200; that the “owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo”; that, “should the vessel not carry the guaranteed dead weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made” from the freight; and that a regular stevedore, to be appointed by the charterers, should be employed by the owners to stow the cargo, “to be paid by and to be under the direction of the master, who is responsible for improper stowage.” The charterers tendered 2000 tons of cargo, consisting partly of pieces of machinery, partly of coal, and partly of general goods. Had the coal and the machinery been stowed together the whole cargo tendered could have been loaded, but as the coals and the machinery were stowed in separate holds, only 1691 tons were shipped.

In an action for payment of the balance of the freight, which the charterers refused to pay except under a deduction in respect of the 309 tons not shipped, *held* (per Lord Trayner, Ordinary) that the guarantee that the vessel should carry not less than 2000 dead weight of cargo implied not merely that she should have a carrying capacity of that amount, but that she should actually carry the cargo tendered provided it was of such a description as could, to that weight, be stowed on the vessel; and that as the vessel could have carried the whole cargo tendered if the machinery and the coals had been stowed together, although that was an improper mode of stowage without the consent of the owners of the machinery and of the coals, the charterers were entitled to the deduction claimed, the duty of obtaining the consent of the owners of the machinery and the coals being on the shipowners and not on the charterers.

On a reclaiming note the Court (*dis.* Lord Rutherford Clark) *adhered* to the result of the Lord Ordinary’s judgment, but differed on the construction of the charter-party, holding that the clause of guarantee imported a guarantee of the vessel’s carrying capacity merely, but that the clause providing for a *pro rata* reduction applied if the vessel actually carried less than 2000 tons through no fault on either side, which the majority of the Court were of opinion was the case.

Lord Rutherford Clark agreed with the Lord Ordinary’s construction of the charter-party, but, being of opinion that the charterers were in fault in not obtaining the consent of the owners of the machinery and the coals to these articles being stowed together, thought that no deduction from the freight should be allowed.

By charter-party, dated London, 28th May 1886, it was mutually agreed between Robert Mackill & Company of Glasgow, managing owners of the steamship “Lauderdale” (then at sea), therein described as of 1134 tons nett register, and 1738 tons gross register, and Wright Brothers & Company, merchants of London, *inter alia*, as follows:—“That the said steamship . . . shall with all convenient speed proceed to such loading quay berth in Glasgow in such dock as ordered, and there ^{and} in the River as required by charterers, load from the factors of the said charterers all such goods and merchandise * as the said charterers or

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their agents shall tender alongside for shipment (including acids on deck to the extent of 10 tons weight if required by charterers), not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, water, and furniture, the charterers having the full reach of the vessel's hold and 'tween decks (bunkers and engine-room space only excepted), with liberty to remove stanchions, ladders, and wooden bulkheads if required. The whole of the vessel to be at the disposal, except room for 80 tons extra bunker coal, of the charterers for the conveyance of goods, live stock, dogs, &c., excepting such room as is required for the accommodation of the crew and stores for the voyage. Owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo. The extra expense (if any) of putting on board, stowing and taking out any piece or package exceeding 3 tons weight to be borne by the charterers. Should stock or dogs be shipped, owners to see they are properly fed and attended to during the voyage, the ship finding water only, charterers supplying the stalls ^{and}/_{and} kennels and food. . . . A regular stevedore and clerks as customary, appointed by the charterers, to be employed by the owners to stow and take account of all goods received on board, with the measurements, &c., to be paid by and to be under the direction of the master, who is responsible for improper stowage. . . . Cargo to be brought to and taken from alongside the steamer at merchants' risk and expense, and being so loaded, shall, on being despatched by charterers, therewith proceed under steam *via* the Suez Canal to Kurrachee, or so near thereunto as she may safely get, and deliver the same according to the custom of the port or ports on being paid freight as follows,—say for the use and hire of the said steamer a lump sum of £2200, say two thousand two hundred pounds, in full of all port charges and pilotage. . . . Should the vessel not carry the guaranteed dead weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight."

In pursuance of this charter-party Wright Brothers & Company tendered 2000 tons of cargo for shipment, including pieces of machinery not exceeding the measurements, &c. specified on the margin of the charter-party, and two lots of coal of respectively 100 and 270 tons weight. The remainder of the cargo was general goods. The machinery and the coal were stowed in separate holds, and being so stowed, the vessel was able to take on board only 1691 tons of the cargo tendered; had the machinery and the coals been stowed together, so that the coal filled up the interstices of the machinery, the whole 2000 tons tendered could have been loaded. The vessel left Glasgow with only 1691 tons on board.

Wright Brothers paid certain sums to account of freight, but claimed to be entitled to retain from the balance a sum in respect of the 309 tons short-shipped.

Mackill & Company and the other owners thereupon, on 2d November 1886, brought an action against Wright Brothers & Company for payment of the full balance.

The material points at issue were these,—(1). The construction of the pursuers' guarantee in the charter-party that the vessel should carry not less than 2000 tons dead weight of cargo. On that point the pursuers contended that all they had guaranteed was that the vessel should have

particular part of the body of the document, was the following :—"Including machinery, the largest pieces of which measure about say,"—then followed the measurements, number of pieces, and weights.

a carrying capacity of 2000 tons dead weight, *i.e.*, that she should be able to carry some cargoes of that weight, but not that she should be able to carry any cargo of 2000 tons which the defenders might choose to offer. The defenders contended that the guarantee imported that the vessel should be able to carry 2000 tons of any cargo (subject to the conditions as to machinery), provided it was a cargo reasonably to be expected for the voyage. (2) The question whether the duty of obtaining the consent of the owners of the coal and of the machinery to these goods being stowed together lay upon the shipowners or upon the charterers, assuming (what all the Judges held proved) that that would have been improper stowage without such consent. On this question each party maintained the other was in fault in not having obtained the consent of the owners of the machinery and the coals.

On 16th March 1887, the Lord Ordinary (Trayner) after a proof, the results of which sufficiently appear from the opinions, gave decree against the defenders for the portion of the balance of the freight for which they admitted liability, and *quoad ultra* assolized them.*

* "OPINION.— . . . The first question to be decided is, what is the meaning and effect of the clause in the charter-party by which the owners guarantee 'that the vessel shall carry not less than 2000 tons dead weight of cargo.' It is maintained for the pursuers that that clause is only a guarantee that the vessel could carry 2000 tons dead weight of cargo, but not a guarantee that she would carry that quantity on this particular voyage. I do not, however, so read the clause. To me its language is plain and unambiguous; and I think it means exactly what it says, namely that the ship shall carry not less than 2000 tons dead weight, and that upon the voyage with reference to which alone the parties were contracting. Had the carrying capacity of the vessel been the matter guaranteed, the clause could and would have been expressed differently. The other clause of the charter-party, which deals with the quantity of cargo, appears to me to support this view. It is there stipulated that if the ship should not carry the guaranteed dead weight, a reduction is to be made in the freight proportionate to that part of the cargo not carried. The comparison is to be made between what the owners have guaranteed the vessel shall carry, and that which in point of fact is carried, not between what is carried and the carrying capacity of the vessel. Taking the charter-party as a whole, I am of opinion that the defenders agreed to a slump freight, on the guarantee that for that freight 2000 tons dead weight of cargo should be carried, and that if less than that weight was carried the slump freight should suffer reduction in the proportion which the cargo not carried bore to the 2000 tons.

"But even if the pursuers were right in the view for which they contend, the result is not different. Let it be that what was guaranteed was that the vessel could carry 2000 tons. It is also bargained that if the vessel 'should not carry the guaranteed dead weight as above,' the freight should suffer abatement. It is certainly the same thing that is dealt with in both clauses as guaranteed; and so, whether the 2000 tons is the guaranteed capacity, or guaranteed cargo, the freight is to suffer abatement 'should the vessel not carry it.' The vessel did not carry more than 1691 tons, and therefore the freight effeiring to 309 tons falls to be deducted from the slump freight, provided that the short shipment is not attributable to the defenders. I think, however, that the owners' guarantee is subject to the implied condition that the charterers shall tender for shipment 2000 tons of cargo, and cargo of such a description as could, to that weight, be stowed in the vessel.

"There is no doubt that 2000 tons of cargo was tendered to the pursuers, and in my opinion it was cargo that could have been stowed in the 'Lauderdale.' Among the cargo there were two lots of coal, consisting respectively of 100 and 270 tons. These coals were placed in holds 3 and 4, and occupied space which would otherwise have been available for other goods. The defenders say that the coal should have been stowed, as was customary, among the machinery in holds 1 and 2, the size and character of the machinery making it inevitable that

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No. 163. The pursuers reclaimed.

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LORD JUSTICE-CLERK.—I concur in the result at which the Lord Ordinary has arrived, although I am not quite prepared to affirm entirely some of the

large spaces should be left unoccupied in the holds where it was stowed. It is out of the manner and place in which the coals were stowed that the whole difficulty between the parties has arisen, for if the coals had been stowed among the machinery (as could easily have been done), the after holds would have afforded space for at least 309 tons more cargo—that is, the whole cargo not shipped. It is proved that it is quite customary to stow coals among heavy pieces of machinery, provided that the owners or shippers of both coal and machinery consent to this being done. Without such consent it is not customary, and would be improper stowage, for the consequences of which the owners would be liable, not only at common law, but also under the stipulations of the charter-party in question. The pursuers say that they had no right to stow the coals among the machinery unless the consent of the shippers of both had been given, and that this was not given. On the other hand, the defenders say that they had nothing to do with the stowage of the cargo—that their whole obligation was to put the cargo alongside—and that if any consents were necessary to enable the pursuers to stow the cargo, it was their business to get such consents. Further, the defenders say (and I think it is proved), that they did consent, as owners of the 270 tons of coal, to its being stowed among the machinery, at a time when this could quite well have been done at an expense to the pursuers of less than £40. I confess I have had some difficulty with this part of the case, but in the end have come to the conclusion that the pursuers were in the wrong. I think they took and acted upon a false view of their duty and obligation to the defenders. Their view was practically this—‘There is the ship—put in her what you can. We have no responsibility in the matter’—whereas their duty, in my opinion, undoubtedly was to stow and carry the 2000 tons tendered to them, if it could be done, in order to earn the freight.

“It is said by Mr Craig, the stevedore, that he frequently asked for small cargo or broken stowage, and complained to the defenders’ agent of the want of it; and also that, if he had got suitable cargo, he could have put about 400 tons more on board than was carried by the ship. The defenders’ agent says he never heard of any such complaints. Both witnesses seemed to me truthful and frank; I cannot give the evidence of the one any preference over the evidence of the other. But in this conflict of statement I cannot hold it proved that the pursuers ever complained of the want of broken stowage. Even if they did, and assuming it to be the case that at some time there was a want of small goods for broken stowage, it would not alter my judgment. The defenders were not bound to supply cargo either of the kind or at the time demanded by the pursuers. They were bound to give 2000 tons of cargo (the selection or choice of which lay entirely with the defenders) which could be stowed in the ‘Lauderdale,’ and to place it alongside within ten days of the vessel’s being ready to receive it, or pay demurrage. No claim for demurrage is made, and therefore there is no question about the cargo being tendered in time; and as regards the rest of their obligation, the defenders did tender 2000 tons of cargo, which could have been stowed had the pursuers taken the trouble necessary to enable them to do it in a certain way. But how it was stowed, and where, was their business, not the defenders’.

“There is no question here raised of breach of contract on either side, or any claim in respect of such breach. The whole question is, What are the contract rights of parties under the charter-party? These, I think, are not doubtful. The pursuers undertook that their vessel would, or at all events could, carry 2000 tons dead weight of cargo for a slump freight, and it was agreed that if the vessel carried less than the specified weight, the freight should suffer a *pro rata* reduction. The pursuers’ vessel has only carried 1691 tons in point of fact, and left behind 309 tons of cargo tendered for shipment. The short shipment has not been caused by the fault of the defenders, and therefore I think they are entitled, under the charter-party, to the reduction which they claim.”

grounds on which he has proceeded. The case turns upon the construction of the charter-party, and upon certain facts in regard to the stowage of the cargo which lie within a very moderate compass. No. 163.
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It seems that the charter-party, which was executed in 1886, contained certain clauses on which substantially the dispute between these parties has arisen. The steamer was a large one, and the charter-party contains among other clauses one to this effect:—"Owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo." Then, it provides "a regular stevedore and clerks as customary, appointed by the charterers to be employed by the owners to stow and take account of all goods, received on board with the measurements, &c., to be paid by and to be under the direction of the master, who is responsible for improper stowage." Then, in regard to freight it provides—"And deliver the same according to the custom of the port or ports on being paid freight as follows, say for the use and hire of the said steamer a lump sum of £2200 in full of all port charges and pilotage." Then it provides the mode in which the freight is to be paid; and further on, the charter-party provides—"Should the vessel not carry the guaranteed dead weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made from the first payment of freight."

These are the clauses on which the case turns, and I am of opinion, in the first place, that the guarantee contained as to the carrying capacity of the vessel was a guarantee that the vessel was able to carry 2000 tons of dead weight. For the owners to guarantee that she should carry that weight of any cargo would be unreasonable. Then there is the clause providing for a *pro rata* deduction from the freight. I take that to mean that the freight is to be paid on the cargo actually carried, whatever that may be, and that if the cargo actually carried does not come up to 2000 tons, an abatement of the freight payable and calculated on the tonnage is to be made. And the provision does not seem an unreasonable one, because of course it was the interest both of the owners and of the charterers that the vessel should carry as much as possible—of the owners, in order that they might get their freight calculated on that tonnage, and the charterers, that they might have the most profitable use of the vessel. Therefore, it was quite a reasonable provision that while the vessel was capable of carrying 2000 tons, and was guaranteed reasonably to do so, the freight should be paid for in proportion to the actual tonnage of cargo carried. Of course that view implies that there is no fault on either side. If the owners, by improper stowage or otherwise, have diminished improperly the carrying capacity, then unquestionably the charterers will have a claim against them. On the other hand, there are many contingencies in the course of the voyage of a large vessel of this kind that might prevent the vessel carrying up to the 2000 without fault on any part, and it is to meet these contingencies that this clause has been introduced.

Such I take to be the actual meaning and intention of the charter-party, and now, how is application of that meaning to be made to the particular facts? The facts that require to be attended to are simply these—The stevedore was appointed by the charterers and paid by the owners. There was a certain quantity of coals taken on board, and there was also a certain quantity of machinery that had to be stowed on board; and the stevedore, acting upon his own responsibility, put the machinery into one part of the hold of the vessel, and the coals into the other. Unquestionably by so doing a good deal of space was occupied by the

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machinery which might have been occupied by ordinary cargo. One can easily understand how a difficulty on such a matter might arise. Complaint was made after this was done, but not before, that the stevedore had not packed the coals along with the machinery so as to fill up the interstices of space. It rather appears that this might have been done, but on the other hand, it does not appear that there was any duty on the part of the stevedore to do it. On the contrary, the evidence is clear that it was an arrangement which might be injurious both to machinery and to coals, and the stevedore says he never thought of doing so unless the owners of the cargo desired it. In this case apparently the owners of the cargo did desire it, but they did not express their desire until after the thing was done, and ultimately the dispute went off upon who should pay the expense of any alteration involved in the removal of coals from the place in which they had been stowed. I am of opinion that there has been no sufficient evidence that the stevedore did anything but what was reasonable and right in the stowage. If the charterers had sooner expressed their view he might have done otherwise, but I am not prepared to say that there was any failure on his part, and there was no fault on the part of the defenders. Therefore, the question really arises on the terms of the charter-party, and I am of opinion that, as the vessel did not carry cargo up to the 2000 tons, freight is not chargeable on that amount. I think the Lord Ordinary's judgment is right.

LORD YOUNG.—I also agree in the result at which the Lord Ordinary has arrived, although, like your Lordship, I am not able to concur in all the reasons mentioned in the Lord Ordinary's note. At the same time, I am not sure that my dissent from his reasoning is of exactly the same character as your Lordship's. I think there was here no blame imputable to the shipowners in the matter of stowage. I think they stowed the cargo that was presented to them properly, and that under the circumstances they would not have acted properly had they stowed it otherwise. The result was, however, that they were only able to put on board 1691 tons of the cargo which was presented, which was 309 tons short of the guaranteed dead-weight carrying power of the ship. That raises the question—and it is really the only question in the case—whether, under these circumstances, there is a claim for deduction from the stipulated freight to an extent corresponding to this 309 tons.

There are two provisions in the charter-party upon which the question depends. The one is that which guarantees the ship shall carry not less than 2000 tons dead weight of cargo. The other is the provision that should the vessel not carry the guaranteed weight as above mentioned any expense incurred from this cause to be borne by the owners, and a *pro rata* deduction per ton made from the freight.

Now, I do feel great difficulty in the case. I see great force in the view that the owners only guaranteed that this ship was of capacity to carry dead weight up to the 2000 tons, and that there was no failure with respect to that guarantee merely because the particular cargo tendered when properly stowed could be received on board only to the extent of 1691 tons. If you present a cargo which could be properly stowed only to the weight of 1600 odd tons, that does not shew the vessel is not of the guaranteed dead-weight carrying capacity, because whatever the dead-weight carrying capacity of a ship may be, it is quite plain that it will not carry any cargo you like to suggest up to that weight. The area of a ship will not permit it. Even when the cargo is stowed and packed pro-

parly, the vessel may not accommodate anything like 2000 tons. On the other hand, No. 163. the considerations are strong that this was no extraordinary cargo—it was exactly such as was expected, namely, coals and machinery. There was, however, no fault on the part of the shipowners. They were responsible for the proper stowage. They stowed properly, and found that with proper stowage she could only carry 1691 tons. That puts all right in so far as they are concerned. Then the charterers, on their part, presented the very cargo which was expected, and just as the shipowners were disappointed by finding that they could not stow it up to the carrying power of the ship by 309 tons, so the charterers were disappointed by having 309 tons of their cargo left behind. Now, that is a kind of case which one would expect to find provided for in a charter-party. The intended cargo is stowed, but in the result they find that 309 tons must be left behind. Now, that being the actual case which has happened, what then? The charter-party provides that should the vessel not carry under this contract the guaranteed dead weight, then a *pro rata* deduction of so much per ton shall be made from the payment of freight. In point of fact this vessel did not carry the guaranteed 2000 tons by about 300 tons. If that case is not what is provided for by the words I have read, I have a difficulty in figuring the kind of case which would meet the clause. I therefore concur in the result at which the Lord Ordinary has arrived, which is, to allow a deduction corresponding to the 309 tons which the ship with proper stowage was unable to take on board.

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I do not agree with the argument which was addressed to us in support of the view of the Lord Ordinary any more than I agree with the view of the Lord Ordinary, that it was the duty of the shipowner to put coals amongst the machinery. I think it was not his duty to do so. By the charter-party he was liable for proper stowage, and I think it is according to the evidence that no other stowage than that which was practised would have been proper. Therefore I do not proceed upon the view that the shipowner ought to have assented to the irregularity, although it may be frequently permitted, of putting coals amongst the machinery. I proceed simply upon the view which I have stated, that with an ordinary cargo, such as was contemplated to be taken, and without fault on either side, there was a carrying power short of what was expected to the extent of 309 tons. I am disposed, although not without some difficulty, to apply the clause to which I have referred to that case, and to allow a corresponding deduction.

LORD RUTHERFURD CLARK.—I am disposed to agree with the Lord Ordinary in the construction which he has put on the charter-party, and to hold (1) that there was an implied obligation on the shipper to furnish a cargo, which, with proper stowage, could be loaded to the stipulated amount; and (2) that a deduction from the gross freight can only be allowed where there has been a breach of obligation on the part of the shipowner either in not furnishing a ship of the requisite carrying capacity, or in not loading the cargo to the amount of 2000 tons, being able so to do. I think that no breach of obligation in either respect has been committed by the shipowners, for they furnished a ship of the carrying capacity of 2000 tons, and loaded all the cargo which it was possible to load consistent with proper stowage. Hence, in my opinion, it follows that no deduction from the freight can be allowed. I think that the shipper did not furnish a cargo, which, with proper stowage, could be loaded to the extent of 2000 tons. The only condition on which that amount could have been loaded was that

No. 163. machinery and coals should be stowed together. But that would have been improper stowage unless with the consent of the owners of the machinery and the owners of the coals. This consent I think the shippers were bound to obtain, and to furnish to the shipowner before either the machinery or coals were loaded. They did not do so, and these articles were loaded in separate places in accordance with the intention of the shippers. When it was found that the ship could not carry 2000 tons of dead weight with this form of stowage it was proposed that the coals and machinery should be stowed together, for which the shippers had obtained the necessary consent. This would have necessitated the removal of part of the cargo, and would of course have caused expense. It appears to me that the expense should have been borne by the shippers, but they declined to do so. Hence I think that the shipowners were justified in refusing to unload so much of the cargo already loaded, so as to permit of the machinery and coals being stowed together. On the whole I am of opinion that as there was no breach of obligation on their part the shipowners are entitled to receive the full amount of the stipulated freight.

LORD CRAIGHILL was absent.

THE COURT adhered.

WEBSTER, WILL, & RITCHIE, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

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DONALD HORNE MACFARLANE, Pursuer (Reclaimer).—

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ALEXANDER BLACK & COMPANY AND ANOTHER, Defenders (Reclaimers).—
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Reparation—Slander—Issue.—During a contest for a seat in Parliament a newspaper published an article concerning one of the candidates, in which he was described as a “scoffer,” who talked in a “morally offensive way,” and spoke sarcastically about “God Almighty’s earth.” In an action of damages against the proprietor of the newspaper, *held* (rev. judgment of Lord M’Laren) that the expression “scoffer” was *prima facie* defamatory, and that the candidate was entitled to an issue, putting the question whether the article falsely and calumniously represented him as a “scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine Government and Providence.”

During a parliamentary election a newspaper stated that it was alleged that a boat’s crew from the yacht of one of the candidates was captured while poaching, and that it was “affirmed” that a boat’s crew from his yacht had been seen fishing on a Sunday. In an action of damages raised by him, *held* (dis. Lord Young) that he was not entitled to an issue, as it was not averred that the acts alleged had been done with the pursuer’s knowledge or authority.

2D DIVISION.
Lord M’Laren.
M.

DONALD HORNE MACFARLANE raised this action against Alexander Black & Company, publishers in Oban, and John Lorne Stewart of Coll, proprietors of the newspaper called the *Oban Telegraph and West Highland Chronicle*, jointly and severally, for damages and *solatium* for alleged slander contained in articles published in that paper on 9th July 1886.

The pursuer stated that he had represented Argyllshire in Parliament from the beginning of December 1885 till the dissolution of Parliament in 1886; that being a candidate for re-election in the summer of 1886 he visited various parts of the county in his yacht, and was, among other places, at Corpach, off which place and near the mouth of the Lochy his yacht lay over Sunday, 4th July 1886. (Cond. 4) “During the whole

period since before the general parliamentary election of 1885, when the pursuer first became a candidate for the parliamentary representation of Argyllshire, down to and since the last parliamentary election, which took place on 15th July last, the defenders have persistently inserted and published, and caused and allowed to be inserted and published, abusive, malicious, calumnious, and untrue statements regarding the pursuer, not only in his public capacity, but also in his private character as a gentleman, and in regard to his religious views. A paragraph was inserted by the defenders in the issue of said newspaper, which appeared on 9th July last, entitled 'Macfarlane the Scoffer.' This paragraph is throughout couched in most offensive terms, and proceeds, 'The Irish people tolerate a few vices, but a political quack they at once dismiss. He talks to the "rabble" in a vulgar and morally offensive way.' The same paragraph also puts the question, 'Is the man who would stand up before a respectable audience and speak sarcastically about "God Almighty's earth" a man you could admire? The most ignorant crofter in the Highlands would blush to the roots of his ears if he had in an unguarded moment publicly used the same words.' The same paragraph refers to the pursuer, and falsely, calumniously, and maliciously represents him as a scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine Government and Providence. The pursuer has in consequence suffered in his feelings and in the estimation of many of the electors of the county of Argyle. It was inserted and published by the defenders maliciously, falsely, calumniously, and without probable cause, and for the purpose of injuring the pursuer. A copy of the defenders' said newspaper of 9th July last is herewith produced." (Cond. 5) "The defenders in their issue of said newspaper of 9th July last further inserted and published, or caused and allowed to be inserted and published, a paragraph headed 'Mr D. H. Macfarlane's Doings,' in which it is, *inter alia*, stated,—'It is also affirmed that a boat from Mr Macfarlane's yacht was observed fishing near the Lochy on Sunday. Mr John Boyd and other members of the local Land League are reported to be incensed at this conduct, and to have refused to give further support to Mr Macfarlane's candidature.'"

The pursuer then went on to state that it was untrue that any boat from his yacht fished or was observed fishing near the Lochy on Sunday, that he had denied the statement publicly at meetings held on 10th July, but as the polling-day was 15th July, and there was no local newspaper in which these meetings could be reported before the polling, his denial could not be made public till after the election; that the first Argyllshire newspaper published after these meetings was the defenders' paper of 16th July, which contained no proper report of them, "but only refers inferentially to the pursuer's said repudiation and denial in a leading article headed 'The Galled Jade Winces.' In that article the defenders do not withdraw the allegations contained in said last-mentioned paragraph, but rather draw attention to and seek to emphasise it."

(Cond. 6) "The statement contained in the said last-mentioned paragraph that a boat from Mr Macfarlane's yacht was observed fishing near the Lochy on Sunday, taken together with the said heading of the paragraph in which it is contained, is of and concerning the pursuer, and was made by the defenders falsely, calumniously, and maliciously, for the purpose of representing, as it in point of fact does represent, the pursuer as a person who had been guilty of a public breach of Sabbath observance, who was irreligious, and disregarded and outraged the religious opinions of others, and as guilty of such indecorous and improper conduct as rendered him unfit to represent the constituency in Parliament."

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The pursuer further stated that by the false and calumnious statements complained of he had been injured in his feelings and in character and reputation; that the offence of Sabbath-breaking was of a grave character, and was regarded as particularly heinous by a large number of persons in the locality in which the defenders' newspaper circulated, as was well known to them, and that he lost the election, and that he believed and averred that this result was greatly due to the statements expressed and implied in the paragraph complained of, in consequence of the impression conveyed, and intended to be conveyed, as to his conduct and character.

The defenders pleaded that the pursuer's statements were irrelevant, and that the articles libelled having been only fair comment on the pursuer's political attitude, they ought to be assoiized.

The pursuer proposed these issues for the trial of the action:—“(1) It being admitted that on or about 9th July 1886 the defenders wrote and caused to be published in the *Oban Telegraph and West Highland Chronicle* of that date the article contained in schedule A hereto appended, whether said article, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents him as a scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine Government and Providence, or contains similar false and calumnious representations of and concerning the pursuer, to his loss, injury, and damage? (2) It being admitted that on or about 9th July 1886 the defenders wrote and caused to be published in the *Oban Telegraph and West Highland Chronicle* of that date the article contained in schedule B hereto appended, whether said article, or part thereof, is of and concerning the pursuer, and falsely and calumniously represents him as a person guilty of a public breach of Sabbath observance, who was irreligious, and disregarded and outraged the religious opinions of others, and as guilty of such indecorous and improper conduct as rendered him unfit to represent the constituency of Argyllshire in Parliament, to the loss, injury, and damage of the pursuer?”

The Lord Ordinary (Lord M'Laren) disallowed these issues, found that there was no issuable matter on record, and dismissed the action.*

* “OPINION.—In this case I am clearly of opinion that I ought not to allow any issue. There is no issuable matter on record, in my view.

“I take the two charges separately,—the charges that are made the subject of the first and second issues. Under the first of these charges the alleged libel is contained in an article which alludes to Mr Macfarlane, in connection with his candidature for the parliamentary representation of Argyllshire, as having used the expression ‘God Almighty's earth’; and the writer asks whether ‘a man who would stand up before a respectable audience and speak sarcastically about “God Almighty's earth” was a man whom you could admire.’ It is not denied that Mr Macfarlane used the expression. I do not know whether he used it or not, but he does not deny it; and it is not said that the expression is in itself exceptionable. We may not admire it, and I think it is an expression which has come from the New World, and has not yet been fully naturalised in our country. Anything said about the use of it in this article is simply an imputation regarding the good taste and literary qualities of the candidate who used these words; and I am of opinion that the article will not bear the interpretation that is put upon it in the first issue, as representing Mr Macfarlane as ‘a scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine Government and Providence.’ Nor do I think that by any amendment of the issue it is possible to spell a libel out of this article. I regard it as a mere vituperative attack, such as is common at election times, and as meaning nothing but opposition or dislike to the candidate. Of course if there had been anything really libellous,—the imputation of a crime or anything that

The pursuer reclaimed, and argued that the action was relevant. He was called a "scoffer" at religion, and accused of conduct on the Sabbath which was offensive to usual ideas of propriety of conduct. He ought, therefore, to have an opportunity of bringing the accusations before a jury in order to have it established that, as he offered to prove, they were false and calumnious.

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In the course of the pursuer's argument it was suggested to his counsel by the Court to consider whether he ought not to amend his record so as to set forth that the defenders had held him up in a series of attacks to the public contempt and odium, and take an issue appropriate to such a case.¹ Such an issue was in consequence prepared and lodged, but ulti-

would outrage the public conscience or sense of propriety,—the fact of it being made at an election time would not excuse it. But I really do not think this goes beyond the licence of newspaper comment upon election speeches. It is to be observed that the editor quotes the words 'God Almighty's earth,' and whilst he gives his opinion upon them, he does not impute to Mr Macfarlane any intention beyond what he deduces from the words used.

"Now, with regard to the second issue, the alleged libel is of a different character because it is founded upon an erroneous statement of fact. The statement is in substance that Mr Macfarlane, by himself or his servants or guests on board the yacht, fished on the loch on a Sunday. It is said by the pursuer that the statement is untrue, and I must take it that the pursuer comes into Court offering to prove its untruth. But the question is, whether this imputation is not only false but calumnious. It is not necessary, in order that the statement should be calumnious, that it should impute a crime; a statement may amount to a libel if it accuses a person of what is universally considered to be an immoral act, or if it imputes conduct which is contrary to the generally accepted standard of honour or propriety amongst gentlemen—amongst the class of persons to which the individual aggrieved belongs. But I cannot look at this statement as falling under either of these categories. No doubt the denunciation of a candidate on a charge of fishing on the Sunday was calculated to be prejudicial to his election prospects, but I cannot regard the statement as charging something contrary to the generally accepted standard of morality in the community. Many persons hold that fishing, playing cards, or engaging in lawful sports, are perfectly innocent when engaged in on Sunday, as much so as on any other day of the week. Others think quite the reverse. There is no statute against engaging in sport on Sunday; and the matter of Sabbath observance on the first day of the week is a matter on which there is a great difference of opinion in the community. Indeed, there are great differences even amongst theologians as to the degree in which the first day of the week may be lawfully devoted to recreation or amusement. That being the case, I think that however offensive this article may have been to Mr Macfarlane it does not accuse him of anything criminal or immoral; and I do not think the article bears the interpretation put upon it in the issue. The act is not charged in the article as a breach of Sabbath observance, or as having been done from irreligious motives. I think it is quite possible that the editor knew that Mr Macfarlane was a Roman Catholic, and that a person of his persuasion would not feel bound by the views that prevailed in Argyllshire as to Sabbath observance.

"On the whole, I think that this article is nothing more than an exhibition of the usual licence of election articles. It differs from the other article in so far that it represents Mr Macfarlane as having done something which he did not do. But it does not follow from this that it is actionable, and the remedy for verbal or written attacks of this sort is, that the gentleman may defend himself in the same way, which I have no doubt Mr Macfarlane is quite able to do. I shall therefore find that there is no issuable matter in the record, and dismiss the action, with expenses."

¹ *M'Laren v. Ritchie*, July 8, 1856, not reported, but the issue in which was as follows:—"Whether the said articles, passages, verses, and fictitious adver-

No. 164. mately the pursuer declined to take such an issue, maintaining that he ought to have issues such as he proposed before the Lord Ordinary.

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Argued for defenders ;—The action was not relevant. The words complained of were not *per se* libellous, and required an innuendo to be put on them. That sought to be put on them was much too wide. Further, much freedom was to be expected and allowed in criticism of a candidate for Parliament during an election.¹

At advising,—

LORD JUSTICE-CLERK.—In this case the Lord Ordinary has found that there is no issuable matter in the articles of which the pursuer complains. I have come to a different conclusion. I think that there is matter in these articles of which a jury may be reasonably asked to judge. The first issue is asked with reference to an article entitled “Macfarlane the Scoffer.” Whether the statements in that article are sufficient to shew that the pursuer deserves that designation is not the question now for consideration. I do not think that any man is entitled to apply that designation to another in a newspaper article without being liable to be called upon to justify before a jury his conduct in doing so. I think the phrase is *prima facie* defamatory, unless it be shewn that it has not such a meaning, or could not be supposed to have such a meaning as *prima facie* it bears. That is my opinion on the first issue proposed. I am for disallowing the second.

LORD YOUNG.—I agree that this action must go to trial, but I should have thought that the whole case ought to go to trial. It has, I think, got into some confusion by the way in which the issues proposed have been dealt with. The pursuer at first proposed two issues, which are printed in the print of 2d April, and one of which related to the article titled Macfarlane the Scoffer, while the other related to an article which stated that “it is alleged that a boat’s crew from his” (Mr Macfarlane’s) “yacht was captured while poaching for salmon,” and that it “is also affirmed that a boat from Mr Macfarlane’s yacht was observed fishing near the Lochy on Sunday.” It was suggested when these issues were discussed, as part of the general argument on the relevancy of the action, that possibly the case was one of another category, that in which a party complains of being injuriously held up in a series of attacks to public hatred, contempt, and ridicule, and in consequence of observations which were made on that subject an issue was proposed in the terms which are set forth in the print dated 20th May. At the last discussion before us Mr Comrie Thomson, on behalf of the pursuer, in answer to more than one appeal made to him as to the course which he had resolved to take, intimated, as I understood, that he meant to proceed to trial on the two issues originally lodged, and not on that of 20th May, which treats the case as one of holding up to public hate, ridicule, and contempt. I have no doubt he is quite entitled to take that course, though my own impression was that he was choosing what I should have thought the more difficult case for his client. But he has means of judging which I have not, and it is

tisement, or any parts thereof, are of and concerning the pursuer, and whether the pursuer is thereby calumniously and injuriously held up to public hatred, contempt, and ridicule, to his loss and damage?”; *Cunningham v. Phillips*, June 16, 1868, 6 Macph. 926, 40 Scot. Jur. 533.

¹ *Davis v. Duncan*, April 21, 1874, L. R., 9 C. P. 396.

his resolution to go to trial, if allowed, on the two issues as to the article on **No. 164.**
 Macfarlane the Scoffer, and as to Sunday fishing, and to maintain that both **July 6, 1887.**
 these charges are false and calumnious. My opinion is that he is entitled to do **Macfarlane v.**
 that, and that both issues ought to go to trial. The defender will then try to **Black & Co.**
 justify them as a fair or allowable criticism, even if a coarse one, on the language
 and conduct of a candidate for election to Parliament, but, in my opinion, they
 are such that the pursuer is entitled to submit them to a jury and to endeavour
 to persuade a jury to characterise them as false and calumnious. I am therefore
 disposed—and obviously, as the case is to go to trial, it is expedient to abstain
 from further observation on it—to think that the two issues ought to be
 allowed.

LORD CRAIGHILL.—I have no doubt as to the first issue. I think a jury
 ought to determine whether or not there is good ground for complaint of what
 is I think, on the face of the article, a libel. If its character is proved to be
 such as the pursuer alleges, then the jury will give such reparation as they see
 fit.

But as to the second issue, I think it ought not to be allowed. The article
 says that “it is alleged that a boat’s crew from Mr Macfarlane’s yacht was
 captured while poaching for salmon,” and that “it is also affirmed that a boat
 from Mr Macfarlane’s yacht was observed fishing near the Lochy on Sunday.”
 It is not said that the things were done with the knowledge or with the autho-
 rity of Mr Macfarlane. All that is said is that these things are said to have
 happened, and Mr Macfarlane may, for all that is stated in the article, have
 been perfectly innocent of them. There being no such allegation made against
 him in the article, I think that the second article ought not to be allowed.

LORD RUTHERFURD CLARK.—I am of the same opinion with all your Lord-
 ships as to the first issue.

As to the second, I agree with Lord Craighill that it should not be allowed.
 I do not think there is on record a sufficient statement to admit of it.

LORD JUSTICE-CLERK.—I also agree in the opinion of Lord Craighill as to the
 second issue.

THE COURT approved of the first issue, and disallowed the second issue.

CLARK & MACDONALD, S.S.C.—GILL & PRINGLE, W.S.—Agents.

SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY, LIMITED,
 AND OTHERS, Pursuers (Respondents).—

Murray—W. C. Smith—A. S. D. Thomson.

DUNCAN MACPHERSON, Defender (Reclaimer).—*Sol.-Gen. Robertson—*
Asher—Cosens.

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Road—Right of way—Evidence of public use.—In an action of declarator
 that there existed a public right of way for passengers on foot and on horseback,
 and for driving cattle and sheep through the Glen of the Doll in Forfarshire, it was
 proved that the pass formed the direct and natural access from Clova to Braemar,
 and that from time immemorial there had existed a well-known and well-de-
 fined track through the glen; that there had been a practice of drovers taking
 sheep by this track from the public market at Braemar in spring and autumn to
 a public market near Kirriemuir; that the track had been used by farmers in
 the district going to Clova or to Braemar, and occasionally by tourists going

No. 165. between these places ; that there had been a repute in the district, both among the public and the proprietors of the ground over which the track passed, that there was a public right of way. *Held*, on a consideration of the whole proof (*aff. judgment of Lord Kinnear, diss. Lord Young*), that the use proved was, having regard to the nature of the district, sufficient in amount, and that it was to be attributed not to tolerance, but to the assertion of a public right.

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2D DIVISION.
Lord Kinnear.
M.

THE SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY, LIMITED, incorporated under the Companies Acts, and Thomas Duncan and James Farquharson, two members of the public, residing in Clova and near Braemar respectively, raised this action against Duncan Macpherson of Glen Doll for declarator that "there exists a public road or right of way for passage on foot and horseback, and also for driving cattle and sheep, in or near the direction shewn by the red line A B C D E on the plan produced, leading the said road from the point A or a point near thereto on the public highway between Braemar and Blairgowrie, ascending Glen Callater and descending the Glen of the White Water and Glen Doll to the point E or a point near thereto on the public highway, proceeding down Glen Clova to Kirriemuir so far as the said road passes through the property of the defender," and that the public were entitled to the free enjoyment thereof for passage on foot and horseback, and driving cattle and sheep in the particular line mentioned, or such line as the Court should fix, and that the defender had no right to impede such free use. There were also conclusions to have him ordained to remove all gates and other obstructions from the road claimed, and for interdict against his interfering with the peaceable enjoyment of it by the public.

The line of road claimed began on the north at Auchallater, near Castleton of Braemar, on the property of Colonel Farquharson of Invercauld, and passed in a south-easterly direction through Glen Callater, part of Invercauld, till it entered the defender's property, where it marched with Invercauld near a hill called the Tolmount, marked C on the plan, whence it passed down the Glen of the White Water by a steep road or path called Jock's Road, and thence down the Glen of the Doll past the Glen Doll shooting lodge, which was, as pursuers alleged, at a farm-steading known as Acharn, to a farm-steading called Braedownie, marked D on the plan. It was between the points C and D, *i.e.*, Tolmount and Braedownie by way of Jock's Road, that the defender denied the existence of the right of way claimed. It was admitted that from D to E, *i.e.*, from Braedownie south-east to the village of Milton of Clova, there was a county road.

Colonel Farquharson, before the action was raised, intimated that so far as the right of way claimed passed through his lands of Invercauld, *i.e.*, from A to C—Auchallater to the Tolmount—he had never interfered, and had no intention of interfering, with the right of way.

The pursuers averred that from time immemorial the way in question had been used by the public on foot and on horseback, and for driving cattle and sheep; that it was extensively used by drovers going from Braemar Market to that at Cullow and other places in Forfarshire, and was the ordinary route by which cattle and sheep from Strathspey, Rhynie, and other districts, which had been brought to Braemar were taken south into Forfarshire.

The defender denied these averments.

It was admitted that the defender claimed right to plant trees on the *solum* of the right of way claimed, and to exercise all acts of ownership over it, and that he had placed a locked gate upon it and refused all access to it.

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A proof was led, from which the following facts appeared:—

There was a well-known and well-defined track in the direction claimed. The track after entering the defender's property at the Tolmount (where there was at one time a shieling, traces of which still remained), which was the highest part, descended somewhat to the west and passed a shieling, known as the Lunkard shieling, and then came to a very steep place, where it descended certain rocks into the Glen of the Doll. This steep and very rocky place was called "Jock's Road," and there were traces of a zigzag path on it. It was a place down which sheep could only pass very slowly, and when very carefully driven. After passing Jock's Road passage the track claimed passed down the howe of the Glen of the White Water and thence through the narrow glen of the Doll to Braedownie. During this portion the road was much easier, though still very rough. In order to reach Braedownie it passed Acharn, and the pursuers' evidence was that on reaching Acharn those who pursued this route sometimes kept the north and sometimes crossed to the south side of the White Water. At Braedownie there was formerly a ford, and more recently a bridge, to be hereafter noticed, across the river Esk, which at that point came down from the north-east, and one who had taken the south side could cross there and go down the county road to Milton of Clova, or keep on the south of the Esk and pass southwards by the farms of Whitehaugh and Clayleith.

It was not disputed that there were other routes from Braedownie into Aberdeenshire than that claimed, the dispute being whether the way claimed had not been used as of right and not of tolerance for the prescriptive period as the shortest way to Braemar. One of these roads, known as the Capel Road, led north from Braedownie by way of the Capel Burn, and passed near Loch Muick into Glen Muick and thence to the Ballater and Braemar Road, either by proceeding along Glen Muick to Ballater or over a track from Inchnabobart in Glen Muick to Crathie Church. Another passing north at first in the same direction as the Capel Road afterwards turned westwards, and passing the shooting lodge of Bachnagairn thence went on by a scarcely discernible track to the Tolmount, and so by that part of the right of way claimed which passed through Invercauld to Auchallater and Braemar. It was by this route, and not *via* Jock's Road, that the defender alleged that a considerable part of such traffic as there had been between Braedownie and Braemar had come.

The pursuers did not lead the evidence of any tourists who had passed through the way claimed, but there was evidence of the present and former innkeeper at Clova to the effect that there had been considerable traffic of that kind. There was also the evidence of the Invercauld gamekeeper at Glen Callater that he had directed tourists after reaching the Tolmount to go by Jock's Road and the White Water to Clova, and the evidence of a guide at Braemar that he had conducted such persons as far as the Tolmount, and thence directed them to go by that route. The defender's case with regard to such persons was that if they had really passed in that direction they had probably come by the easier, if slightly longer, route by Bachnagairn.

The main part of the pursuers' evidence was directed to shew that there had been always a practice, as matter of right, and because the way in question was a drove road, of driving sheep and cattle from Braemar to the Forfarshire markets. This, from the high ground over which the stock must come, was possible only in the season when snow was not lying on the hills, and the evidence pointed almost altogether to

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the traffic passing only from Braemar towards Forfarshire, and not *vice versa*. This the pursuers explained by shewing that the half-yearly Cullow market in Forfarshire followed that at Braemar at both seasons, April and October, and that in the former month the Cullow market was held only two days after the Braemar market, so that it was necessary to take stock which did not sell at the latter as quickly as possible southwards to be sold at Cullow. When time did not press, or the hills were impassable, stock from Braemar could be taken by the longer route of the Capel or by the high road from Braemar to Blairgowrie, passing by way of the Spittal of Glenshee. The evidence of shepherds and drovers, and persons who had been such, was to the effect that they had passed over the way claimed, that they had stopped a night at or near the keeper's house at the top of Glen Callater, where they were frequently entertained overnight by him, leaving the sheep to graze and rest outside, and that they passed the next day by the Tolmount and over Jock's Road, passing the night if necessary at Acharn or Braedownie, and going on early in the morning to Cullow market.* It was customary if they passed a night at Acharn or Braedownie that they were entertained by the tenants of these farms, and that their sheep rested close by, as was the case when they spent the previous night at Glen Callater. One witness, a man of sixty-eight, named Ogilvy, who had long known the district, and had been brought up in it, at the farm of Clayleith, in Glen Doll, where his father had been farmer, stated that he had known from boyhood of sheep being driven through Glen Doll by the way claimed, and that his father had been anxious, if it had been thought possible, to stop the use of it, as the animals passing through trampled on and dirtied the pasture. Another witness, who had been a keeper in Glen Doll at one time, spoke to the practice being thought prejudicial to the use of it as a deer forest, but to its being believed impossible to stop it.

Clergymen who had been ministers of the parish in which Glen Doll is situated spoke both to the fact of their having used the road as a public road and to their having been told that it was so by residents in the district who were now deceased. The defender attributed their use of the road to the fact that as the district clergymen they were well known to the people, and their office would prevent them from ever being interrupted in their use of it. A travelling tailor also gave evidence that for many years he had been in the habit of using the road in question in his journeys from Kirriemuir to the various farms and sheilings at which he worked, as a public road. The defender attributed this use to his being on journeys to various farms in the discharge of his business.

The defender's property at one time belonged to Donald Ogilvy of Clova, as did also Bachnagairn and other adjoining property. Between 1862 and 1870 Glen Doll and Bachnagairn were rented by Lord Southesk. He bought Glen Doll from Ogilvy of Clova in 1870, and at the same time Bachnagairn was acquired by Mackenzie of Kintail. Lord Southesk was a witness for the pursuers, and stated that he had always understood during his tenancy and ownership of the property that there was a right of way through Glen Doll in the direction claimed, his information as to it being derived from the late Mr Forrest, a solicitor in Kirriemuir, who was agent for Ogilvy of Clova. He (Lord Southesk) had never endeavoured to stop people passing through Glen Doll, but he

* It was shewn that Cullow market had, like similar markets, fallen in importance owing to the growth of large auction-marts at Perth and elsewhere, and none had been held for three years prior to this action.

had never used the road himself, or, with a single exception, seen others using it. The estate was sold by Lord Southesk to Mr John Gurney, the immediate author of the defender. Mr Gurney held it from 1877 to 1883. He also was called as a witness for the pursuers. He deponed that foot-passengers, sheep, and cattle, could pass through Glen Doll, that they did so on one or two occasions with his knowledge, but without asking his permission, and that in planting trees near Acharn he had ordered a space to be left so that if sheep or cattle were passing through the glen they would pass through the opening so left without coming too near the house, which was close to Acharn, and this with no special view to the benefit of his own tenants, but "in case a right of way through the glen should be sustained." Mr Gurney's keeper, who had formerly been keeper to a shooting tenant of Bachnagairn, gave evidence for the pursuers that sheep had been in use to be driven through the glen. He also deponed that the space left by Mr Gurney's instructions in the planting was so left to avoid shutting up the track. It was he who had the planting done for Mr Gurney.

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The pursuers also relied on the fact that there was close to Acharn, and therefore some distance up the disputed road, an old milestone, marked "18," meaning, it was believed, eighteen miles from Kirriemuir. They pointed to the fact that this stone was to the north and west of the point where the Capel Road went over to Glen Muick from Braedownie, and so seemed to indicate an old road in the direction claimed. They relied also on the evidence led with regard to the building of the bridge at Braedownie, as to which it appeared that it was first erected by the tenant of Braedownie, and that in order to its erection he had collected some subscriptions from people of the class who used the road in dispute.

The defender called a Mr Blackadder, C.E., who had been engaged in making and assisting to make certain plans of the Clova estate in 1852 with a view to the re-arranging of farms, and again in 1858 for the same purpose, and also with that of forming a deer-forest. In 1852 he was engaged at the lower end of the property, and in 1858 at the upper end. He deponed that in making these plans every road and right of way, whether a made road or path or mere track, was laid down carefully, that so far as could be done every information as to such was obtained from the people of the district, and that it was never suggested to him that any right of way through Glen Doll existed. He had had occasion to go to the west of Jock's Road, and had always gone by Bachnagairn, and thought that there was nothing like a road at Jock's Road, but only the termination of a very precipitous piece of the hillside. In any view, he thought the Bachnagairn path a far more easy one than Jock's Road. The defender also examined another engineer, Mr Blyth, C.E., who had inspected the ground, and who stated that the Bachnagairn road was infinitely superior to that by Jock's Road, and that the way by Jock's Road, though comparatively easy elsewhere, was at that point so steep that no one who could go another way would choose it, and that the way over it could not be called a drove road. Shortly before the raising of this action one of the individual pursuers, James Farquharson, while taking sheep through the disputed way from Braedownie to Auchallater, in the service of Mr Gordon, the tenant of the latter farm, had been stopped and turned back by the defender. The defender relied with regard to this incident on a letter relating to it written to him by Mr Gordon on 24th October 1885, and which contained an apology for "what had happened," and a statement that he, Gordon, did not know that Farquharson was going to Clova for sheep, and that what he had done was without his

No. 165. sanction and approval. The letter continued,—“I am sending a lot of sheep to turnips. They are leaving this (Auchallater) on Tuesday, weather permitting. It would be a very great favour if you will allow them to go down Glen Doll, and I will be very much obliged. It will save me a distance of twenty miles going the other way.”

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The Lord Ordinary (Kinnear) pronounced this interlocutor:—“Finds that there exists a public road or right of way for foot-passengers, and also for driving cattle and sheep, leading from the point A on the plan No. of process, or a point near thereto, on the public highway between Braemar and Blairgowrie, ascending Glen Callater and descending the Glen of the White Water and Glen Doll to the point E on the said plan, or a point near thereto on the public highway between Glen Clova and Kirriemuir, and that the pursuers, and all others, are entitled in time coming to the free use and possession of the said right of way, so far as it passes through the property of the defender: Continues the cause in order that the particular line and direction of the said road as it passes through the defender's property may be defined; and grants leave to reclaim.”*

* “**OPINION.**—The road in question is a natural hill pass between Aberdeenshire and Forfarshire. It traverses some very high ground, and is in some parts steep and rugged; but there is no doubt that it is a practicable way for foot-passengers and sheep. I do not think it proved that, in its present condition, it is a practicable road for cattle or horses. But for foot-passengers and sheep it is a practicable means of transit between Braemar and Glen Clova; and it has been used for these purposes for more than forty years.

“Much of the evidence is too general in its character, if it had stood alone, to establish a right of way. But when all necessary deductions upon this account have been made, there still remains a sufficient body of testimony to prove that the road has been used as of right by the inhabitants of the district and others, as a means of transit between Clova in Forfarshire and Braemar.

“It is true that the use which has been proved, taking all the evidence together, is by no means extensive. There could be little or no use made of such a pass during the winter months; and even during that part of the year when it was practicable and convenient to travel by it, there may have been weeks together without any stranger to the estate making any use of the road. The most important purpose for which it would appear to have been used by persons not resident on the estate was the driving of sheep from Braemar to Forfarshire; and this could not have occurred more than once or twice in any year. Nor does the use for any other purpose, which can be referred to as an assertion of right, appear to have been much more frequent. The uses which have been proved, therefore, would probably be altogether insufficient to establish a public right if the road in question had traversed a populous district, well provided with other means of communication. But the extent of the use which will indicate right must depend upon the nature of the country and the requirements of the inhabitants. It must be such a use as might reasonably be expected if the way were reputed to be public, and admitted to be so by the proprietors of the land; and I think the use which has been proved is just what might have been expected in such a district. The material point is, that the pass through Glen Doll is the natural and direct means of access to Braemar on the one side, and Clova on the other. The only road which can reasonably be brought into competition with it—that by Bachnagairn—does not seem to have been used to anything like the same extent; and it does not appear that anybody ever abstained from using it who might have been expected to do so if it had been admittedly public.

“It is said, however, that the evidence is not only scanty, but that, if uses which in no way indicate an assertion of right are disregarded, there has been

The defender reclaimed, and argued ;—There was not sufficient evidence either in point of quantity or of character to justify the Lord Ordinary's

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hardly any use, except on very rare occasions, which might easily escape the notice of a proprietor; and in the application of this argument it is said that the use of the path through Glen Doll by the tenants of that estate, and by the tenants on the neighbouring estates, ought not to be taken into consideration. In so far as regards the tenants in Glen Doll, this observation appears to me to be well founded. But it does not apply with the same force to the tenants of neighbouring proprietors, nor to persons living in Clova, who, although they might be tenants of the proprietor of Glen Doll, had no occasion to make use of a way through the glen for the enjoyment of their tenancy. It may be that a proprietor may be disposed to allow his own tenants, or those of his neighbours, to make use of roads on his estate which he does not throw open to the public. But it does not follow that the use by such persons of such a way as that in question is to be thrown altogether out of consideration. The greater part of the population in such a district must be tenants, either of the proprietor whose land is traversed by the alleged road, or of his neighbours. It is true that the use of a road by farmers or others living on the line of road exclusively will not prove a public right, because it does not prove that the road is used as a means of communication between two public places. But it may still be taken into account along with other evidence, although it is in itself the use of a part only, and not of the whole line of road, of which it is necessary that a public use should be proved. The question is, whether such use as has been proved, taking all the evidence together, is to be ascribed to tolerance or to the assertion of a right?

“But the most important evidence of any specific use of the road is that by drovers and cattle-dealers who were accustomed to take sheep which had not been sold at the Braemar market to the market at Cullow, in Forfarshire. This use alone would probably be sufficient to establish the pursuers' case, because it cannot be explained by tolerance. It is said to be obsolete, because the market at Cullow has been discontinued. But there is nothing to shew it may not be resumed; and if it were certain that this particular use was now at an end, that would not affect its value as a piece of evidence to shew that during the period of prescription the road had been resorted to by the public, and not merely by privileged persons.

“Taking the whole evidence together, I think there is enough to shew that there was such a use of the road by the inhabitants of the district generally, in the course of their ordinary avocations, as to infer a public right. I do not think it possible to ascribe this use to tolerance. There can be no question that the pass through Glen Doll was generally reputed to be a public right of way. Those who used it did so because they believed they had a right to use it. There is no evidence that anybody ever asked leave of the proprietor of Glen Doll to use it. And it is certain that there is no room for the suggestion of tolerance during the ownership of Mr Gurney and of Lord Southesk, because they, both of them, say that they believed that there was a public right of way through their property. It may be that they did not feel the public use to be at all burdensome, and they might have been willing to submit to it, irrespective of right. But their evidence shews that they did not understand that they were tolerating a use which they might put a stop to; but they, as well as the inhabitants of the district, believed they had no right to object. There is a material piece of evidence to the same effect, but of much earlier date than the ownership of Lord Southesk,—the evidence of a witness named Ogilvy, who was examined on commission, and who speaks to the objection entertained by his father, who was a tenant in Glen Doll, to the use by the public of the road through the glen, and says that his father was desirous to put a stop to it, but became satisfied that there was no use in attempting to do so, because there was a public right of way. There is some real evidence in the same direction, because the construction of the bridge at Braedownie by subscription indicates a belief on the part of the subscribers that the public had an interest in the access to Glen

No. 165. judgment. A right was claimed for foot-passengers, horses, and driving cattle and sheep. Not a single tourist was proved to have used the road, and there was almost no evidence of the passage of cattle. Such persons as had passed over the route claimed were in great part connected with adjoining farms, and the existence of neighbourly feeling or business dealings would account for their use. Of the existence of such neighbourly feeling and business dealings between those in the glen and the few people who passed through it, there was evidence in the proof. But what was required to establish a right of way was something very different. It must be evidence which would prove that the public asserted a right, and that the landowner submitted to it as such, or vainly attempted to interfere with it. Now, the allowing a few people, some of them neighbours, to pass through the glen at certain seasons when markets were about to be held was a good specimen of tolerance, not a case of submission to the assertion of a right. This was strengthened by the proof that persons so passing received hospitality from those on the route traversed. The shepherds and keepers gave them food and lodging, and let their sheep browse out of good neighbourhood, and because of their masters' tolerance of such a use, not burdensome in itself, and which in such a district would naturally be allowed, because the interest was rather to let people pass than to stop them. The issue in a right of way case was whether for forty years prior to the summons there had been a right of way. This case shewed no use as of right. Nor yet did it shew that there had been use, to whatever cause it might be ascribable, down to the date of the summons, for there was no proof of use after 1879, except the use in 1885, when the pursuer Farquharson was turned back and his master apologised for his intrusion and asked leave to send sheep that way. Cullow market had ceased for several years, and there was no traffic to it at all. It was said on the other side that there had long been a *consensus* of opinion in the district that there was a right of way in the direction claimed, and that the two predecessors of the defender believed that and acted on it. But that was because they believed in gossip about it which they never tested, because the use was so little burdensome that they had no occasion to dispute it, and were quite willing it should go on. It was different with the defender, because his deer forest was likely to be injured by the establishment of a right of way through it, and because it was now proposed to declare against him the existence of a road through his property at the instance of a society established for the very purpose of putting forward such claims. The use, previously little burdensome, would thus be much increased. It was truly in the public interest that such a right of way should not be held to be established because a proprietor had been good-natured with his property, and a decision against the defender would involve that the law leaned not to the simple and natural inference from the facts proved, that the use was

Doll. Although I do not think there is evidence of the use of the road by cattle to any material extent, it does not seem necessary to qualify the terms of the declarator on that account, because it would be within the public right to use it for cattle if it be a drove road for sheep.

"It does not appear to me to be material to the question of right that sheep-drovers in coming through Glen Doll were at one time in the habit of crossing the stream which runs through the glen, and taking the south side, and afterwards were more in the habit of keeping to the north. But there is a question as to which the parties are not agreed,—whether the line of road should now be laid down on the north or on the south? Both parties, however, agree that the question of right should be finally determined before the line is definitely fixed, and I have therefore granted leave to reclaim."

tolerated, but rather leaned so much towards attributing such use to assertion of right that it would become unsafe for a proprietor to give the public a small favour lest it should yet be turned to his disadvantage. No. 165.
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Argued for the pursuers;—The hospitality shewn to passing drovers, of which so much was made as shewing tolerance, was just as likely to have been shewn to people who were passing that way as a matter of right. Everybody attributed their so passing to their assertion and use of a right. Except the case of Mr Gordon in 1885, after the defender began to put forward his claim to interrupt the public, no leave had ever been asked, and all the people who knew the place thought it was a public right of way. This opinion and the conduct to be ascribed to it were traced to Mr Forrest, the agent for Ogilvy of Clova, and through him it descended to Lord Southesk and Mr Gurney. It was not matter of inference so much as of direct testimony that they viewed the use by drovers and other members of the public as matter of right. Scottish
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Now, that bore upon the true question in the case, was the usage to be ascribed to tolerance rather than right? It shewed that what in some circumstances might have been ascribed to tolerance was here to be ascribed to right. The foundation of the acquisition of a public right of way was the theory that there was a presumed grant of the right to pass through the landowner's property,¹ and the evidence was to be approached from the point of view of a desire to see not whether there was much traffic or little, but whether its character was that of tolerance or right. No doubt it was somewhat in favour of an ascription of the use to tolerance that there was not much interest on the landowner's part to object, but that did not go far. When there was little need to use the right, that could always be said, and indeed in the *Glen Tilt* case,² and in other cases of this class, the same element existed. The road claimed was proved to be the shortest and best of those leading in its direction, and that of itself, when coupled with the use made of it, aided the pursuers.

It was said that there was little or no recent use of the road, but that was because Cullow market was recently discontinued, and because the defender molested people who tried to pass. Besides one witness was brought who had resisted an attempt to turn him and had gone right on to Braemar. It was true that no tourist who had actually traversed the route was called as a witness, but many such had been seen going over it. There was real evidence for the pursuers' case. The obtaining of public subscriptions for the bridge at Braedownie could only have been because the public had an interest in the bridge to be built, and the existence of a mile-stone west of Acharn was more consistent with a public than a private and tolerated way.

At advising,—

LORD JUSTICE-CLERK.—In this case, which is one raising a question of some importance, the Lord Ordinary has sustained the right of way claimed by the pursuers, and given decree. I have come, though not without difficulty, for the case is narrow and exceptional, to agree with his Lordship, and on the grounds which are clearly expressed in his note. The right of way claimed, that is the territory through which it extends, is a stretch of some fourteen or sixteen miles in Aberdeenshire and Forfarshire, running from Castleton of Braemar on the

¹ *Napier's Trustees v. Morrison*, July 19, 1851, 13 D. 1404, 23 Scot. Jur. 656 (Lord Justice-Clerk Hope); *Mackintosh v. Moir*, Feb. 28, 1871, 9 Macph. 574, 43 Scot. Jur. 402.

² *Torrie v. Duke of Atholl*, Dec. 12, 1849, 12 D. 328, aff. June 4, 1852, 1 Macq. 65.

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north-west to the vicinity of Kirriemuir on the south-east. The nature of the ground through which the right of way is claimed to exist is rough and steep, rising at summit level, about the centre of the right of way claimed, to about 1000 feet above the level of the sea. It is an unformed road as far as metalling or any care of that kind is concerned, but it is a definite track, and perfectly well known. It is said by the pursuers to have been used without challenge for more than the prescriptive period, and it certainly has been used for more than that period, and without challenge. Whether the public have used it in the sense necessary to create a right in the public to a right of way is the question in the case. It must be conceded, as indeed it was both in argument and in the judgment of the Lord Ordinary, that the public use has been more slender than is generally found in these right of way cases. One reason for that is that the district is thinly populated, wild, and remote, and that the use is one adapted to and characteristic of a country of that kind—namely, the use of driving sheep from Castleton of Braemar, where a market is held, to a place in the vicinity of Kirriemuir where also there is, or rather was till recently, a market twice a-year. Without going into details, the nature of the use is that from time immemorial it has been the habit of persons in the district to use that way as a mode of transit from the one market to the other. These markets are public markets, and if the nature of the use has been sufficient and sufficiently long continued to amount to the assertion of a right, that is sufficient use to justify the decree which the Lord Ordinary has given, and whether it is so or not is the real question. I concur with the Lord Ordinary that a use such as I have described, uninterrupted and unchallenged, is sufficient use to found the right of way claimed. The Lord Ordinary has fully gone into the facts of the case. I entirely agree with him, and do not think it necessary to say more than that I concur in his opinion.

LORD CRAIGHILL.—I think the Lord Ordinary is right, and I concur with him in the result, as well as in the reasons which he has presented in support of his judgment. From time immemorial, there has been a road in the line of that which has been claimed by the pursuers. Nor was there ever opposition or obstruction till the defender, two or three years ago, blocked the way. That of itself is a strong consideration in favour of the view which the Lord Ordinary has adopted. But I do not rest my opinion upon presumption. I think the evidence has established certain facts which are conclusive of the question. In the first place, the use of the road has, I think, been established, and that use has not been confined to those who lived on the ground or near to the road, but has been taken by others who were strangers to the neighbourhood. It is said that many of those who used the road were farmers upon the lands over which the road was carried, and their servants and visitors, and that these witnesses should be put out of account in considering what is the use which has been taken of the road. If these witnesses had used only a part of the road, this consideration would have been material. It would undoubtedly have diminished the value of the testimony of those witnesses, but when we find that they used the road from end to end, one part in going one way, and the other part going in the opposite direction, thus traversing ground which in part was not the property of their landlord, I think the use had by them of the road as a whole is available to the pursuers in proving the right of way over it. For one thing, it shews

certainly the need for such a road, as well as that the road was used. Without this road the witnesses referred to might have travelled from their farms to Forfarshire on the one side, and to Aberdeenshire on the other, but they could not have gone from the one shire to the other without the road as a public road. In the second place, however, that by which I am most impressed in the use of the road is its use as a means of communication between Braemar market and the market at Cullow. These markets were separated in point of time only by two or three days, and the course followed by cattle-dealers was to take the stock which remained unsold at Braemar across the country to the coming market at Cullow. The defender treats this part of the evidence as if the use was only that of an individual. In my opinion it is the use, not of an individual, but of a class,—that is to say, of the public. Those who went to the first market arranged, if necessary, to go to the second, taking their unsold stock with them. What the number of men or animals might be depended on circumstances. Sometimes it would be comparatively large, at other times comparatively small, but all arranged for the use of this road were its use required. Now, this seems to me to be inconsistent with the notion that the road was used as if it were a matter of toleration. Such a use of the road is only to be explained by the repute of the road as a way open to the public. Much has been said by the defender as to the fewness of those by whom the road was used. Everything, of course, is relative, and it appears to me that, according to the evidence, as much use has been proved as could reasonably have been expected. No tourists who went by this road have been examined, but that there were tourists as well as others unconnected with neighbouring farms or with markets who used this road is, I think, amply proved. Guides went with them to a certain point, and shewed them the way beyond, and on all occasions the way by which they were taken was held out and was taken to be a road which was open to the public.

Over and above all this, there is the existence of a mile-stone on the side of this road not far from the place where it joins the county road leading to Mil-town of Clova and Kirriemuir. How came that there if the road was not a public road? Its presence was demonstrative of the character of the road. Mile-stones were never heard of except on public roads. They are placed there for the public on what must be taken to be a public place, and afford abundant evidence of public right.

I think it unnecessary to say more, because, as I regard the case, all that is necessary to support the judgment reclaimed against has been set forth by the Lord Ordinary in his note.

LORD RUTHERFURD CLARK concurred.

LORD YOUNG.—The question is one of fact, and as the Lord Ordinary has given a strong opinion on that question, and all your Lordships agree with him, I can have no confidence in my own, which is different. I think the right of way through the defender's property which is claimed has not been established. The conclusion of the action is for declarator of a right of way for foot-passengers, horses, and cattle, in a certain direction through the defender's property as part of the road between two admittedly public places. There is no ground for declaring that there is this right of public road which is alleged, unless we find it in the evidence of use. We know that there are many of

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our old well-recognised public roads of which we have no evidence that they are public except that they have been always used and regarded as such. That is the nature and character of all cases of this description where the party claiming the right of way on behalf of the public appeals to use. It may be appealed to, as I have said, with respect to the oldest and best-recognised public roads in the country. Now, here there has been some use no doubt; the line in question has been used for passage, particularly about twice a-year, which occasional use has now, however, ceased, because the occasions for it have ceased. The question, as the Lord Ordinary accurately puts it, is "whether such use as has been proved, taking all the evidence together, is to be ascribed to tolerance or to the assertion of a right?" Now, the only criticism which I would make on that language is that I would add to the words "assertion of right" the words "understood as such, and assented to by the owner of the soil." My opinion is that there has here been no use which, on the assumption of the total absence of right, I should have expected any reasonable proprietor to interfere with. It is a remote part of the country, where there is very little passage required. That is a consideration which tells both ways, being in one view of it favourable to the one side, and in the other view of it favourable to the other side. The Lord Ordinary says that "the uses which have been proved would probably be altogether insufficient to establish a public right if the road in question had traversed a populous district well provided with other means of communication." Well, twice a-year farmers occupying farms upon the property through which the line of road ran (and indeed it is not a defined line, but the case has been continued that it may be defined by the Lord Ordinary) seem to have used it in driving sheep to market. When they were not sold at one market, they were brought to another along this line as being the shortest way. The people who drove them on these rare occasions were hospitably entertained by the shepherds who had huts on the line of this road, being provided with lodging, and the sheep were allowed to pasture. This was nothing but good neighbourhood and what I should have expected on the assumption that there was no right of way existing, none asserted, and none recognised, nothing but ordinary good feeling and good neighbourhood appealed to. If that be the correct view, I cannot ascribe that to right which may be, and is reasonably to be, accounted for, not by any exceptional goodness, but by mere absence of any disposition to prevent others taking a use which could do no harm, and was so little burdensome as not to be required more than twice a-year. I think that it is far from the interest of those who wish to maintain public rights of way to proclaim to proprietors of hill sides and barren country,—“Now, remember that though people are doing you no harm by taking this occasional use of your property, really affording society to your people who live in this remote place, though it will certainly do you no harm if a tourist, wishing to enjoy a fine view, may climb up to a point on your property without you even knowing it—unless you get watchers—doing nothing with which a good-natured man would interfere, still, unless you prevent such use of your property, there will be established a public right which will be prejudicial to you.” That is an undesirable proclamation to make to proprietors. Besides, we ought to have regard to the consideration that to watch a road of fourteen miles in length over a barren country in order to turn back occasional trespassers—assuming them to be trespassers—is practically impossible. I proceed upon this, that there has been very occa-

sional, rare, and harmless use, such as no ordinary proprietor or tenant would dream of interfering with. If the character of the road, public road or not, depends upon usage—(assertion of right openly made and assented to)—we have no such case established here. The case is not only narrow in respect that there is little evidence of usage—or, I should rather say, evidence of very little usage—but there is no case, I think, established at all; and so far as my judgment goes, I think the conclusion that public rights of way may be established by such evidence is absolutely prejudicial to the public, because it will set all proprietors on their guard to stop innocent, and to them perfectly harmless, use as the only way in which they can prevent a public right being established. The Lord Ordinary says, in the passage I have already quoted, that the question is whether such use as has been proved is to be ascribed to tolerance and not to the assertion of right. Why, I venture to ask, is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it, or appealed to a Court of law to prevent it, on any of the occasions referred to in the evidence. He would have been thought very ill of by his neighbours if he had, and deservedly so. And why? Because he would be acting intolerantly. But if he is not intolerant and does not appeal to a Court of law to stop what he may think is affording convenience or innocent amusement to some, however rare and occasional—for it is according to the evidence that it was very rare and occasional—I say if he is not intolerant in a way to cause condemnation of his conduct, is it after a lapse of time to be said that he was not tolerant but yielding to a right all the while?

I have thought it right to make these observations, expressive of the views which press upon my mind in this case; although I repeat what I began by saying, that the question being one of fact, and your Lordships agreeing with the Lord Ordinary in the answer to it, I have no confidence in my own opinion to the contrary.

THE COURT adhered, and remitted the case to the Lord Ordinary.

TAIT & CRICHTON, W.S.—ANDREW NEWLANDS, S.S.C.—Agents.

AGNES WOOD OR HOGG, First Party.—*Pearson—C. J. Guthrie.* No. 166.
GRACE DICKSON OR BRUCE AND OTHERS, Second Parties.—*J. C. Thomson*
—*A. J. Young.*

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Succession—Mutual settlement by spouses—Destination to “nearest in kin of us equally.”—Two spouses by contract and mutual disposition disposed their whole estate to the survivor, and on the death of the survivor “to the nearest in kin of us, the said . . . equally.” In a question between the sole next of kin of the wife and three next of kin of the husband, *held*, on a construction of the whole deed, that the estate fell to be divided among the next of kin of both spouses as a single class *per capita*.

By contract and mutual disposition, dated 22d July 1835 and recorded 1st Division. 21st September 1855, executed by David Wilson, tenant of Greenlaw Castle Mill, and his wife, the spouses gave, granted, assigned, and disposed “to and in favour of the survivor of us, and after the decease of the longest liver of us, to the nearest in kin of us, the said David Wilson and Isabel Wood, equally, All and Sundry land and heritages,” &c., “and in general the whole estate and effects, heritable and moveable, real and

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personal, of whatever kind or wherever situated, at present belonging to us, or either of us, or that shall pertain and belong to the party predeceasing at the time of their death, . . . with all that has or may be competent to follow thereon, dispensing with the generality hereof, and declaring these presents to be equally valid and effectual to all intents and purposes as if each particular of our respective means and estate were herein expressly described: And we do hereby nominate and appoint the survivor of us, whom failing, the nearest in kin of us, the said David Wilson and Isabel Wood, to be the sole executor or executors of the party predeceasing: Declaring always that these presents are granted under burden of the payment of the respective debts and funeral charges of the party predeceasing, which the survivor shall be obliged to pay: . . . And we do hereby reserve our liferent of the whole estate and effects hereby conveyed, with full power to us, with consent of each other, to alter and revoke these presents in whole or in part. . . .”

Mr Wilson died on 4th September 1855, and Mrs Wilson on 27th March 1883. There were no children of the marriage. Mrs Wilson was her husband's executor. There was no real estate, and the whole personal estate of both spouses amounted to £3637, 16s. On Mrs Wilson's death, Mrs Agnes Wood or Hogg, as her only surviving sister and next of kin, was decerned executor-dative to her. The amount given up in the inventory was £3014, 14s.

A question having thereafter arisen between the next of kin of the two deceased spouses as to their rights to share in this estate, a special case was brought, to which the parties were (1) Mrs Hogg and (2) the three daughters of a sister of Mr Wilson. The first party maintained that she was entitled to one-half of the whole estate; the second parties, that the nearest in kin of both spouses were called as a class, that the estate should be divided among them *per capita*, and that the division should accordingly be into four equal parts.

The question put was,—“Whether the destination in the above-mentioned contract and mutual disposition ‘to the nearest in kin of us, the said David Wilson and Isabel Wood, equally,’ confers a right to one half of the succession on the nearest in kin of the husband, and to the other half to the nearest in kin of the wife; or whether the nearest in kin of both spouses are to be treated as a single class, and the succession divided equally among the individuals of that class?”

It was stated at the hearing that it was not known whether the estate had been contributed by the husband or the wife. It further appeared that at the date of the mutual deed Mrs Wilson had six next of kin in life, and that Mr Wilson had then only one next of kin.

Argued for the first party;—Both parties were agreed that the words “nearest in kin” here were not to be construed by a reference to the Intestate Moveable Succession Act of 1855. It could not be said that the clause was unambiguous. Had the word used been “among” or “between” instead of “to” the nearest in kin, it would have been different. In most cases it was the will of a single person which was in question, where he divided his estate among relations of different degrees. The division there was *per capita*. But there was no such presumption here. This was a mutual will by two spouses. The word “equally” implied a division into two parts. It was further to be observed that there was no propinquity between the nearest of kin of the husband and of the wife, and further the element of equal nearness was wanting.¹

¹ *Authorities cited.*—Young's Trustees v. Janes's Trustees, Dec. 10, 1880, 8 R

The second parties argued ;—The division ought to be *per capita*. That construction reasonably and plainly satisfied the intention of the makers of the deed. There was only one class, and no distinction was taken.¹

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LORD PRESIDENT.—The probability is that the estate left by these spouses was originally the husband's. At all events, there being no marriage-contract between the spouses, it must be assumed that the husband *jure mariti* was owner of the whole. But the present question falls to be decided on the footing that a share of the estate belonged to each spouse, and that may have been due to various causes—either that the wife succeeded to estate from which the *jus mariti* was excluded, or otherwise. At all events, the whole of it is dealt with in this deed, and it is provided that it is to go to the survivor of the spouses, and that in fee,—for there is no limitation and no minor right of any kind,—and failing the survivor there is a substitution in favour of the nearest in kin of the two spouses equally. That substitution is effectual, and could not be defeated by either of the two spouses after the death of the other, because it is matter of contract, and the reservation of a power to alter is to both spouses jointly.

The words which we have to construe are “to the next of kin of us, the said David Wilson and Isabel Wood, equally.” I cannot see that the mention of the names makes any difference, and therefore it appears to me to be upon the other words which are used that the whole question turns. I cannot help thinking that the spouses were dealing with the nearest of kin of both of them as constituting one class. I do not mean to say that they do not in fact constitute two classes, but rather that the spouses seem to deal with them here as if they were one. A very slight change of expression might have made all the difference in the matter—for instance, if the conveyance had been of one half to the nearest of kin of the husband, and of the other half to the nearest of kin of the wife. It is said to be very strange that persons not connected with one another should be so treated as to form one class in a deed of this kind. But I cannot say that I agree in that. It is not at all peculiar that a husband and wife living together and having no child should look upon their next of kin as having equal claims. Feelings of this nature frequently grow up in the minds of childless spouses, and this I think is the spirit in which the deed is framed. The spouses said to one another that they would leave their joint estate to all their next of kin, whether they were the husband's or the wife's. I cannot construe the deed in any other way than that the fund was to be divisible equally among the individuals of one class.

I cannot help thinking that this construction derives strength from the clause of nomination of executors, although one is obliged to confess that it is a very bungled clause. There was a confusion of ideas in framing it. But the intention is plain that on the death of one of the spouses the surviving spouse should be his or her executor, and that the nearest of kin of the two spouses should be executors of the surviving spouse after his or her death. The cause of the blunder is that an attempt was made to put two sentences into one. The result is that when the second of the two spouses dies, it is provided that “the nearest

242; *Allen v. Flint, &c.*, June 15, 1886, 13 R. 975 (Lord Ordinary's note); *Richardson and Others v. Macdougall and Others*, Feb. 6, 1866, 4 Macph. 372, revd. March 26, 1868, 6 Macph. (H. L.) 18; *Murray, &c. v. Gregory's Trustees*, Jan. 21, 1887, 14 R. 368.

¹ *Authority cited.*—*Williamson v. Gardiner*, Nov. 17, 1865, 4 Macph. 66, 38 Scot. Jur. 40.

No. 166. in kin of us" are to be the executors. That is not the nearest in kin of one of us, and it would be impossible to exclude any one of the next of kin of either spouse from being executor-nominate. And if all are thus to come in equally as executors-nominate, it affords a strong presumption that the words in the clause of bequest are to receive the same interpretation. It appears to me to be impossible to extract from the deed any idea that there is to be a division between the two sections or classes of next of kin.

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LORD MURE concurred.

LORD SHAND.—It is so natural and so common a settlement that two spouses making a joint deed should give the property of the husband to his relations and of the wife to hers' that terms which can fairly be read as indicating such an intention would be enough to support it. But this case is different, and must be solved by the rule that words used must receive their ordinary signification, unless there be something in the context to shew that a different meaning was intended. There is nothing of that kind here. There are next of kin of the husband and next of kin of the wife, and the testators have given their estate to the "nearest in kin of us, . . . equally." That being so, the nearest in kin of both spouses have been treated as one class, and I think the estate must be divided among that class *per capita*.

LORD ADAM.—No doubt the judgment proposed may produce capricious results. At the time when the deed was executed, Mrs Wilson had three brothers and three sisters alive, but now there is only one, Mrs Hogg, who claims to share in the succession. But suppose Mrs Hogg had happened to predecease the longest liver of the spouses, then that would have let in all Mrs Wilson's next of kin in the next degree, who are very numerous, some twelve or fourteen, and her next of kin would have carried off much the largest share of the estate in place of only one-fourth under the judgment proposed. But I cannot get over the words of the deed, which I think are capable of only one meaning.

THE COURT pronounced the following interlocutor:—"Find and declare that the destination in the contract and mutual disposition mentioned in the case, 'to the nearest in kin of us, the said David Wilson and Isabel Wood, equally,' confers a right to the nearest in kin of both spouses as a single class, and that the succession falls to be divided equally among the whole individuals of that class."

H. & H. TOD, W.S.—WELSH & FORBES, S.S.C.—Agents.

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LOWER WARD OF LANARKSHIRE ROAD TRUSTEES, First Parties.—
Jameson.

MAGISTRATES AND TOWN-COUNCIL OF GLASGOW, Second Parties.—
Balfour—Ure.

MIDDLE WARD OF LANARKSHIRE ROAD TRUSTEES, Third Parties.—
D.-F. Mackintosh—Dykes.

MAGISTRATES AND TOWN-COUNCIL OF RUTHERGLEN, Fourth Parties.—
Davidson.

Road—Bridge partly in burgh and partly in county, and accommodating traffic of other places—Apportionment of liability for maintenance—Management—Roads and Bridges Act, 1878 (41 and 42 Vict. cap. 51), sec. 37 and 88.—

Held (1) that while section 37 of the Roads and Bridges Act imposes the burden of maintaining a bridge, situate in more than one county, or burgh, on each equally, that provision does not apply in cases in which, under the 88th section, the Secretary of State determines that a bridge accommodates the traffic of a county or burgh in which it is not situate, and that in these cases the Secretary of State is empowered by section 88 to determine as he may see fit the proportions in which each county or burgh liable to contribute shall contribute to the expense of maintenance, &c.; and (2) that any county or burgh so contributing to the maintenance of a bridge beyond its limits is entitled to take part in the management of the bridge, and to appoint representatives on the Joint Bridge Committee, appointed under section 39 of the Roads and Bridges Act, 1878.

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On the line of the Dalmarnock Road, between Glasgow and Rutherglen, the River Clyde was crossed by a bridge called Dalmarnock Bridge. The northern half of the bridge was locally situate within the burgh of Glasgow, and the southern half in the Lower Ward of Lanarkshire.

Dalmarnock Bridge accommodated in the sense of the 88th section of the Roads and Bridges Act, 1878,* not only the traffic of the Lower

1st Division.
B.

* See *Magistrates of Glasgow v. Police Commissioners of Hillhead*, March 20, 1885, 12 R. 865, May 14, 1886, 13 R. (H. L.) 110.

Sec. 88 of the Roads and Bridges Act, 1878, enacts,—“Whereas there are or may be bridges in Scotland which accommodate, or may accommodate, the traffic not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county, or of other counties and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and, if need be, rebuilding such bridges, and of paying the debt affecting, or which may affect, the same, should be imposed upon the county or burgh within which they are so situated: Be it enacted that in respect of such bridges the following provisions shall have effect:—

“(1) The trustees of counties and burgh authorities may agree that any such bridge accommodates other traffic than that of the county or burgh in which it is situate, and may agree as to the proportions in which the debt (if any), and the cost of maintenance, and, if need be, of rebuilding such bridge, shall be borne and defrayed by the county or counties and burgh or burghs to which it is common; and such agreement, when confirmed by a resolution of the trustees in general meeting, and of the burgh authorities, shall have the same force and effect as an order by the Secretary of State, as provided hereinafter.

“(2) It shall be lawful for the county road clerk or clerk of supply of any county, or for the town-clerk or clerk of any burgh, to apply to the Secretary of State to determine that any bridge locally situated within a county or burgh in respect of its accommodating other traffic than that of such county or burgh only, shall be deemed to belong in common to the county or counties, and burgh or burghs, to be named in his determination.

“(3) Upon such application being presented to the Secretary of State, he may, if he shall think fit, by any writing under his hand, appoint any two persons, as commissioners, to institute a local inquiry as to the circumstances of the case, and, after hearing all parties interested, to report thereon to the Secretary of State,” &c.

“(4) If the commissioners are of opinion that the Secretary of State should determine that the burden of managing, maintaining, repairing, and, if need be, rebuilding the bridge mentioned in the application, and of paying the debt affecting or which may affect the same, should not be borne wholly by the county or burgh within which the same is locally situated, they shall prepare and transmit along with their report the draft of the determination which they

No. 167. Ward of Lanarkshire and of the city of Glasgow, but also that of the Middle Ward of Lanarkshire and of the burgh of Rutherglen. The city of Glasgow is situated on the north side of the river, and the three other districts on the south. The traffic coming from each district and accommodated by the bridge varied in amount.

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The bridge, which was of wood, was in a bad state of repair, and was not of such construction as to be capable of being repaired, but required to be rebuilt.

The Road Trustees of the Lower Ward applied to the Secretary for Scotland, under the 88th section of the Act, to determine that the bridge, in respect of its accommodating other traffic than that of the city of Glasgow and the Lower Ward should be deemed to belong in common to the county or counties and burgh or burghs named in his determination.

In terms of that section commissioners were appointed to institute the local inquiry, and to report.

In the course of the inquiry a difference arose between the parties as to the construction of the Roads and Bridges Act, 1878, and the commissioners, in respect the construction of the statute was a question which fell to be settled by a Court of law, stayed procedure to enable a special case to be submitted to the Court of Session.

A special case was thereafter submitted to the Court, to which the Road Trustees of the Lower Ward of Lanarkshire were the first parties, the Magistrates and Town-Council of Glasgow the second parties, the Road Trustees of the Middle Ward of Lanarkshire the third parties, and the Magistrates and Town-Council of Rutherglen the fourth parties.

In the case the facts above set forth were admitted, and the opinion and judgment of the Court on the following questions of law was requested :—“(1) Has the Secretary of State power under the Roads and Bridges (Scotland) Act, 1878, to determine, if he sees fit, that Dalmarnock Bridge shall be deemed to belong in common to the county of the Lower Ward of Lanark, the city of Glasgow, the county of the Middle Ward of Lanark, and the burgh of Rutherglen, and to apportion among them in his determination, in such way as he thinks right, the expense of managing, maintaining, repairing, and, if need be, rebuilding said bridge? or, Has the Secretary of State power to determine only the proportions of said expense to be borne by the third and fourth parties, and does the balance of said expense fall to be borne equally by the first and second parties? (2) In the event of it being determined by the Secretary of State that the county of the Middle Ward of Lanark and the burgh of Rutherglen are bound to contribute to the expense of rebuilding and maintaining Dalmarnock Bridge, are said county and burgh entitled to take part in the management of said bridge and to appoint representatives on the Joint Bridge Committee thereof?”

The contentions of parties were thus set forth,—“The second party maintains that the relative liabilities of the first and second parties for the expense of maintaining, managing, repairing, and, if need be, rebuild-

recommend that the Secretary of State should make, setting forth therein the proportions in which such burden should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs named in the determination.

“(5) The Secretary of State, after such further inquiry, if any, as he shall deem necessary, may approve of the draft submitted, with or without alterations, and any determination made by him under his hand and seal shall have the same effect as if it were contained in this Act: Provided,” &c.

ing the bridge, are settled by secs. 11 and 37 * of the Roads and Bridges No. 167. (Scotland) Act, 1878, and that such liabilities must remain equal to each other, and that sec. 88 of the said Act makes provision whereby 'the ad-
 joining county, or other counties or burgh or burghs' (other than those of Lanarkshire whose liability is fixed by the local situation of the bridge), whose traffic is accommodated by the bridge, may be called upon to contribute towards such expense. The second party further maintains that the duty of the said commissioners is confined, and the determination of the Secretary of State is accordingly limited to fixing the contributions to be made by the county of the Middle Ward of Lanark and the burgh of Rutherglen towards such expense, leaving the balance thereof to be defrayed by the first and second parties equally in terms of section 37. (5) On the other hand, the first party maintains that on a sound construction of the statute the Secretary of State falls to declare that Dalmarnock Bridge shall be deemed to belong in common to the whole parties hereto, and to apportion the expenses among them severally in such proportions as may be right, having regard to the extent of the use of said bridge by the respective localities and other similar considerations; and that the commissioners ought to submit a draft determination giving effect to this view. This contention is also maintained by the third and fourth parties hereto, assuming for the purposes of this case their liability to contribute towards its rebuilding and management. (7) A difference has also arisen between the second, third, and fourth parties as to the true construction of the statute with reference to the right of the third and fourth parties to share in the management of the bridge should they be found liable to contribute towards its rebuilding and maintenance. The second party contends that the third and fourth parties have no right to share in said management. The third and fourth parties contend that in such event they have a right to take part in said management, and to appoint representatives on the Joint Bridge Committee, which falls to manage said bridge."

At advising,—

LORD MURR.—In this special case a question is raised between four different parties or sets of trustees who are subject to the liability of maintaining a bridge over the Clyde at Dalmarnock under the provisions of the Roads and Bridges Act (Scotland), 1878, and those parties are the Road Trustees of the Lower Ward of the county of Lanark as the first party, the Town-Council of Glasgow as the second party, the bridge being situated partly on ground within the bounds of the town of Glasgow, and partly on ground within the bounds of the County Road Trustees of the Lower Ward of Lanarkshire, and the other parties to the case are the County Road Trustees of the Middle Ward of Lanarkshire and the Magistrates and Town-Council of the burgh of Ruth-

* Sec. 37 provides,—“Where any trust existing at the commencement of this Act embraces a turnpike road, which is not situated wholly within one county or burgh, the following provisions shall have effect: (that is to say)

“(1) Where this Act shall have been adopted or shall be in force of each of the counties in which such road is situated. . . . (d) Where a bridge is not situated wholly within one county or burgh the expense of maintaining, and, if need be, of rebuilding the same, shall, failing agreement, be a charge equally against the trustees of the county or counties and local authority or authorities of the burgh or burghs within which it is partly situated. The management of the bridge shall, failing agreement, be vested in a committee (hereinafter called a joint bridge committee), to be appointed by the trustees or local authorities chargeable with the cost of maintenance and rebuilding.”

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glen, as parties in the situation of being accommodated for their traffic by that bridge in passing and repassing the Clyde, although no portion of the bridge is built upon their property, and the question is as to the power of the Secretary of State to deal with the claims of those parties in the apportionment of their liability.

Now, there is no question raised here as to the circumstances of the case bringing these parties within the operation of the 88th section of the statute. They are agreed that in the circumstances their respective rights are to be regulated under the provisions of that section. But the town of Glasgow, the second party, maintain that although their liability is to be regulated by the provisions of that section, it is so subject to this qualification, that whatever portion of the expense of maintaining and rebuilding this bridge is laid upon the burgh of Rutherglen, and the trustees of the Middle Ward, the shares of the town of Glasgow and the Lower Ward respectively must be equal, because the 37th section expressly provides that where a bridge is locally situated in the same way as this bridge is, the town and the county respectively shall bear an equal share of the expense of maintaining or rebuilding it, and that that being so, the way in which the liability is to be dealt with under the 88th section is that the Secretary of State shall fix what in the circumstances of the case is a proper amount of contribution to be made by the town of Rutherglen and the Middle Ward of Lanarkshire for the accommodation which is afforded to them by this bridge, and having fixed that, shall then divide equally the balance which remains between the town of Glasgow and the Lower Ward. That is the contention of the town of Glasgow. The Lower Ward of the county and the third and fourth parties,—that is, Rutherglen and the Middle Ward,—maintain on the other hand that when a bridge comes within the operation of the 88th section of the statute, it is competent for the Secretary of State, in dealing with the application which may be made to him for the fixing of the expense, to fix those proportions in any way that to him may seem just.

Now, the case substantially must be ruled by the 88th section, because there is no provision under the 37th section for burghs in the position of Rutherglen here, or road trustees in the position of the Middle Ward Trustees, because having no property in the bridge, they are to be called upon to pay for the accommodation that it is supposed to afford to them, and the expense they thereby incur in the maintenance and keeping up of that bridge. But after reading this 88th section with careful consideration, although it is attended with some little dubiety, I have come to the conclusion that the contention of the town of Glasgow is not well founded. When a bridge is situated as this is, and there are only two parties interested in it and so liable for its maintenance, there is no doubt that their respective liability is fixed equally between them by the express provision of the 37th section. But where in addition to the parties upon whose property the bridge is built there are outlying portions of the county or separate burghs that are largely accommodated by the bridge, and it becomes necessary to have recourse to the 88th section of the statute, it appears to me that it is by the provisions of the 88th section that the responsibility of parties so situated is intended to be regulated, and that the words of the 88th section are sufficiently broad to entitle the Lower Ward of the county and burgh of Rutherglen, and the Middle Ward to maintain what they do maintain. Now, the section runs thus,—“Whereas there are or may be bridges

in Scotland which accommodate or may accommodate the traffic not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county or of other counties and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and, if need be, rebuilding such bridges, and of paying the debt affecting or which may affect the same, should be imposed upon the county or burgh within which they are so situated: Be it enacted that in respect of such bridges the following provisions shall have effect." And subsection 1 is as follows:—"The trustees of counties and burgh authorities may agree that any such bridge accommodates other traffic than that of the county or burgh in which it is situate, and may agree as to the proportions in which the debt, if any, and the cost of maintenance, and, if need be, of rebuilding such bridge, shall be borne and defrayed by the county or counties, and burgh or burghs, to which it is common; and such agreement, when confirmed by a resolution of the trustees in general meeting, and of the burgh authorities, shall have the same force and effect as an order by the Secretary of State." Power is given to the trustees there to agree as to the proportions in which the debt is to be regulated and the expense to be maintained. Then the section goes on to provide for the case where the trustees do not agree. Under the 1st subsection it is plain they may fix amongst themselves what proportions they like, but when they do not agree then they come under the operation of subsection 2, which provides that "it shall be lawful for the county road clerk or clerk of supply of any county, or for the town-clerk or clerk of any burgh, to apply to the Secretary of State to determine that any bridge locally situated within a county or burgh, in respect of its accommodating other traffic than that of such county or burgh only, shall be deemed to belong in common to the county or counties and burgh or burghs to be named in his determination." Now, the general power given to the Secretary of State by that second subsection is that he shall declare that each particular one of these burghs or portions of counties has a common property in the bridge—that it shall belong in common to the county and the burgh. That is what he has power to do. Then the machinery is provided by which that power is to be carried out; and that is done by the third and fourth subsections. Under the third, when an application is made to the Secretary of State, he is to appoint commissioners to report to him; and then the fourth subsection provides,—“If the commissioners are of opinion that the Secretary of State should determine that the burden of managing, maintaining, repairing, and, if need be, rebuilding the bridge mentioned in the application, and of paying the debt affecting or which may affect the same, should not be borne wholly by the county or burgh within which the same is locally situated, they shall prepare and transmit along with their report the draft of the determination which they recommended that the Home Secretary should make, setting forth therein the proportions in which such burden should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs, named in the determination.” Now, in the view I take of that fourth subsection, following upon the words in which the general nature of the inquiry is said to be to ascertain the rights of the respective parties, and the uses they are to make of the bridge,—its object being to enable the Secretary of State to decide upon the common property and use of the bridge,—it appears to me that the general words which are used in subsection 4 put it in the power of the Secretary of State, by the directions he gives to these commis-

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sioners, to decide what the proportions are that each party, however numerous they may be, who come before him, is to bear in the expenses and the burden of that bridge. I cannot read these general words in any other sense. The contention on the part of the town of Glasgow implies the writing into subsection 4 words which I do not find there, and for the use of which I think there is no authority, because what the town of Glasgow maintains is this, that the provision for adjoining counties and burghs in that section shall be read with these words introduced,—“other than those whose liability is fixed by the local situation of the bridge.” Now, there are no such words to be found in subsection 4 of section 88, but the contention of the town of Glasgow would involve the writing in of those words at the end of subsection 4, instead of its being in the general terms in which it now is. That is to say, taking the very words of their contention from the case, they would read in after the word “determination” the words “other than those whose liability is fixed by the local situation of the bridge.” That is just what the section does not contain, and it is the omission of any such special provision of that sort, keeping up what they maintain as the general provision of the 37th section, that makes me think that subsection 4 is conclusive against the claims of the town of Glasgow in this case.

We were referred to the decision of the House of Lords in *Magistrates of Glasgow v. Police Commissioners of Hillhead*, March 20, 1885, 12 R. 864; May 14, 1886, 13 R. (H. L.) 110; 11 App. Cas. 699, on this point, and though it was admitted that it did not rule this question, it was argued that some of the opinions of the Judges, particularly that of Lord Herschell, pointed at a construction favourable to the town of Glasgow. I have looked carefully into this question, and taking the expressions precisely as they are used, they are *obiter* of this question, but the expression of Lord Herschell founded on was where his Lordship dealt with the 37th section, dealing with those cases where there were only two parties,—when equal liability had to be fixed. But that leaves open the question where four sets of parties enter into the case. I agree with his Lordship in thinking that that section is conclusive on the kind of cases that alone are dealt with; but whenever that section does not rule,—and it does not rule here any more than it ruled in the case of *Hillhead*,—I do not think you can import into it a general provision of that sort, made to meet a set of circumstances very different from that for which the 88th section provides. On that ground I come to the conclusion that the contention of the town of Glasgow is not well founded, and that the first alternative of the first question should be answered in the affirmative.

There still remains the second question, as to the expenses of management. If I am right on the first question, the Secretary of State will hold that this bridge is the common property, not of the town of Glasgow and the Lower Ward, but of the town of Glasgow, the Lower Ward, the Middle Ward, and the burgh of Rutherglen; and that being so, it appears to me that if they are jointly responsible in certain proportions for the expense of maintaining or rebuilding that bridge, it seems to follow as a necessary consequence that these new proprietors who are brought in shall have a say in the management of the bridge that they are to pay for, and therefore the Magistrates of Rutherglen and the trustees of the Middle Ward are entitled to be represented on the board of management of this bridge which is provided for by the earlier sections of this statute. As they are to have a considerable burden laid upon them, they are

entitled to have a voice as to how those management expenses are to be applied, and I think we must answer the second question by saying that they are entitled to take part in the management, subject to the rules of the statute.

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LORD SHAND.—I think it is the result of the decision in the case of the *Hillhead Commissioners*—as I am of opinion that is also the effect of the statute—that section 37 applies only to a case where the liability for the maintenance and repair of a bridge rests on the authorities within whose localities or districts the bridge is situated, and does not apply to what in the former case was described as outside traffic, by which I mean a case in which the authorities who furnish outside traffic, and who have no property in the bridge, may be called upon to contribute to the maintenance of it. Where you have, as under section 37, the liability confined to the local authorities within whose districts the bridge is situated, the statute expressly provides for equal liability. I suppose that provision will have effect in almost every case in Scotland as directed against two parties, and two only, where outside traffic is not brought in; but there may be cases in which a bridge may be locally situated within three districts. There again section 37 applies, because the bridge is locally within these different localities, and again the provision of the statute applies that in that case there shall be equal liability, which in the case I have figured would be a tripartite liability. Again, in regard to the management of such bridges, you have also as part of section 37 a provision that the management, failing agreement, shall be vested in a committee (hereafter called the joint bridge committee) to be appointed by the trustees or local authorities chargeable with the cost of maintenance or rebuilding. The management is to be co-ordinate and commensurate with the liability, and if there be no outside traffic, then the liability being equal upon the part of those who are owners of the bridge, the management must be represented in the same way. And we find that by section 39 there are provisions for the appointment of a joint bridge committee to be appointed annually, in which it is provided that each road authority may appoint not more than five persons to be members of that committee, but further, that in the event of any question falling to be determined by votes, each road authority shall jointly have one vote, and one vote only on the board.

Now, that rule, which is limited to the case where the liability arises from the local situation of the bridge only, seems a very reasonable rule to be adopted in that general case. The statute might have provided that there should be commissioners in every case to determine whether there should be a measure of liability because one of these authorities took rather more use of the bridge than another; but one can very well see that it was a much more expedient and a much better plan in a case of that kind, where you had the marked feature of direct property in the bridge, that a somewhat rough-and-ready rule should be taken, and that the liability should be declared to be equal. When we come to the other set of provisions, which are intended to regulate not merely the case of traffic such as I have figured but the case of outside traffic—where counties that have no real property, or burghs that have no real property in a bridge are yet using it extensively, so extensively that it may be they are taking the chief use of it—when we come to deal with that, I think we have an entirely new set of provisions as to liability altogether; and there, I think, comes in the provision of the statute, that as there are different elements to be taken into view, the Secretary of State, with the benefit of a report by commissioners, shall settle the proportions

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in which the different contributors of traffic shall bear the expense of maintenance and management of the bridge. And the general view I take of section 88, which I think is entirely borne out by the decision in the case of the *Hillhead Commissioners*, is simply this, that while section 37 is intended for the class of bridges I have first referred to, so section 88 is intended to form in itself practically a code with reference to the bridges which are in this position, that outside counties or burghs are to be called upon to contribute.

Now, taking that to be so, I am entirely of the opinion which my brother Lord Mure has expressed, and I adopt entirely the observations which his Lordship has made. It appears to me that the contention of the parties to this case, other than the town of Glasgow, is sound, and that this is clear upon several grounds, which may be gathered from the provisions of section 88. In the first place, it is of importance to notice that under subsection 2 it becomes the duty of the Secretary of State, where there is an application made to him to determine that a bridge is accommodating other traffic than that of the county or burgh in which it is situated,—it is his duty, in the order which he makes, to name in his determination the whole of the bodies that are to contribute to the building and maintenance of the bridge. I say that is of importance, because it will be observed that the words with which subsection 2 concludes, “to be named in his determination,” are again to be found at the end of subsection 4, where their importance is great. The application having been presented to the Secretary of State, what he is called upon to determine is this, “to determine that any bridge locally situated within a county or burgh, in respect of its accommodating other traffic than that of such county or burgh only, shall be deemed to belong in common to the county or counties and burgh or burghs to be named in his determination.” The determination will not be complete by merely naming the two outside burghs or counties that contribute outside traffic. The clause is so framed that he must name all the parties in his determination to whom this bridge is to belong in common, because if he proceeded only to name two of these, he would not be stating the persons to whom the bridge is to belong in common. He requires to exhaust the whole of them. In the next place, you not only get the authorities within whose district the bridge is situated so named, and the authorities contributing traffic, but you get this further declaration by the Secretary of State, that the bridge shall be deemed to belong in common to these different parties. Of course that determination does not transfer the property of the bridge. The property remains as before; but for the purposes of this statute in reference to maintenance and contribution it shall be deemed to belong in common to these as well as to the bodies to whom it really does belong. But it seems to me to go a very long way in the determination of this case, upon the question of expense of building, maintenance, and management, if you find that there is a determination that the bridge belongs in common to these four different parties—is to be deemed to belong to them, so that they shall have at all events the responsibilities, if not the full rights, of proprietors of the bridge; so there again you have a second feature which is of importance here. But, of course, the question ultimately comes to turn upon subsection 4. Subsection 3 provides that the Secretary of State shall have the assistance of two persons as commissioners, who shall institute a local inquiry; and subsection 4 provides that “if the commissioners are of opinion that the Secretary of State should determine that the burden of managing, maintaining, repairing, and if need be rebuilding, the bridge man-

tioned in the application, and of paying the debt affecting or which may affect the same, should not be borne wholly by the county or burgh within which the same is locally situated, they shall prepare and transmit along with their report the draft of the determination which they recommend that the Secretary of State should make, setting forth therein the proportions in which such burden should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs, named in the determination." No. 167.
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Now, I have shewn that all of the parties must be named in the determination, and if the commissioners are to report to the Secretary of State, and the Secretary of State is to report to Parliament, the names of those who are to contribute, he is further to report the proportions in which such burden should be borne by those different bodies so named. How is it possible to read that in this way, that in regard to two of those—the two who are proprietors of the bridge on each side—the proportions are already fixed? That would be introducing into the statute an element for which there is no warrant. The Secretary of State, through those commissioners, is to fix the proportion of each of them, and as Lord Mure has observed, in order to give effect to the argument for the city of Glasgow, one would require to introduce limiting terms indicating that the proportions of two of them have already been fixed, and fixed irrevocably, by the statute. It think it is impossible to take, and so far as I am concerned I cannot take, that view. I think that in regard to the whole of this class of bridges the statute has introduced a new and different element—probably an element in which there is greater equity than that which applies to section 37, viz., the element of what is fair and reasonable in the circumstances, looking to the traffic which each of these four bodies contributes; and I think it is clear, on the grounds I have now stated, that the Secretary of State has the power to fix the proportions in which each of the different bodies shall contribute, upon principles which shall commend themselves to his mind as fair and reasonable. He may very well, so far as he thinks right, take into view the previous provision in section 37 as applicable to bridges in the position to which that section applies as an element in his mind in fixing what is reasonable as a proportion when he comes to deal with such a case as we have before us, but I hold that under this statute he is absolutely entitled and bound to exercise a reasonable discretion in fixing the fair burden as applicable to each of these bodies, and I think that is a very fair and reasonable thing to be done in such circumstances.

I have only to add upon this part of the case that I think the view which Lord Mure has stated of the statute, and with which I concur, is very much borne out by subsection 1, which gives the whole of the different bodies in such a position as the present the power of making agreements, and, instead of reporting to the Secretary of State, of arranging amongst themselves to avoid the expense and delay in bringing the machinery of the other subsections into operation, and of fixing the proportions. I can see nothing to prevent any of these bodies from entering into an arrangement by which they may fix the amounts at any proportion they think fit, or bind themselves down to this, that the contributions of two of them shall stand in a certain proportion.

The only other question in the case is that which relates to management, and here undoubtedly we are confronted with the difficulty—I do not think it a serious or important one—that in section 88 we have no direct provision for management. On the other hand, we start with this, from section 88, that if,

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as in the present case, four different bodies are deemed to hold this bridge in common, and, in the next place, are to be obliged to contribute in certain proportions, which may be fixed by the Secretary of State, to the building and maintaining of the bridge, each of these parties should have a voice in the management; and that being so, I do not think that there is much difficulty in finding that the previous provision in subsection 3 of section 37 may be held to be fairly applicable to this matter of management. The words that are used are these,—“The management of the bridge shall, failing agreement, be vested in a committee (hereafter called the joint bridge committee), to be appointed by the trustees or local authorities chargeable with the cost of maintenance and rebuilding.” If that had been in a substantive clause by itself instead of merely in a subsection of section 37, there would have been no difficulty about it. The very language of it applies to the case we have been dealing with,—the management of the bridge shall be vested in a committee to be appointed by the local authorities chargeable with the cost of maintenance and rebuilding. Well, the language being wide enough, I do not think it is controlled so as to be entirely applicable to what goes before. If we can fairly read that general language as applicable to the case of bridges which have to be maintained by more than one local authority, then it directly applies to this case, and my opinion is that it can be so read. It appears to me that each of these parties is entitled to have representation upon this bridge committee, practically as provided in section 39, which I think applies to the case. I have said that even in a case where the management is confined to those who really have the property you may have three different bodies, each represented by five commissioners, but each having only one vote when a question arises. In this case there is the addition of another party, because four of them have used the bridge, and four of them have to contribute to its maintenance, but I am of opinion that as the burden of rebuilding and maintenance will lie upon these four parties, so the right of management will be vested in them also.

LORD ADAM.—This Dalmarnock bridge is locally situated partly in the county of the Lower Ward of Lanarkshire and partly in the burgh of Glasgow, and therefore beyond all doubt it falls under section 37 of the Roads and Bridges Act. Now, so long as it is allowed to remain under that section there is no doubt whatever that the expenses of managing, maintaining, and rebuilding it must be borne equally by the county and burgh in which it is locally situated, and that irrespective altogether of the amount of traffic from the county or burgh respectively which the bridge accommodates. There is no doubt that is the provision of section 37. Now, I think the reason why that is left undisturbed by the Act is this, that before the Act the situation of matters was that half of that bridge belonged to the burgh and half of it belonged to the county, and the expense of maintaining and repairing that bridge must have been borne equally by them, because the expense would be presumably the same, and I take it that so long as matters remained in that position it was not the intention of the statute to interfere with the existing state of matters. These parties were equally liable before the passing of the Act, and I think the Act meant to leave them in that position so long as the bridge was left to be the property of these two owners. Therefore I think that was a sufficient reason why what may have been, as Lord Shand said, a more equitable charge and distribution of the expense was not made between the two bodies so long as it was left under section

37, and I think the only change which the 37th section operated upon the rights of the parties was this, that instead of leaving the half of the expense to be borne by each separately, it declared that the bridge should from that time thereafter be joint property and it provided for joint management, but presumably it did not interfere with the previous liability as to the expense, because, as I have said, presumably the expense was equal before.

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But then we have here an application, and what is admittedly a competent application, to bring this bridge under section 88 of the statute. It cannot be disputed, after the decision in the *Hillhead* case, that this bridge is one to which the provisions of section 88 apply, because it was held in that case that although a bridge may be locally situated in more than one county or burgh—in two, or it may be three—in such a case it nevertheless falls within the 88th section provided it accommodates what was called in the *Hillhead* case outside traffic. Now, it will be observed that section 88 for the first time introduced what I think was an entirely new element in the matter, because it introduced for the first time a liability on the part of other parties, burghs or counties, in which the bridge was not locally situated, to contribute to the expense of maintaining such a bridge; and that introduced an entirely new set of circumstances, as it appears to me, from any that existed before. Now, the Legislature has thought that in such circumstances, where in point of fact a bridge, although locally situated it might be in one district or it might be in two districts, did in point of fact afford accommodation to outside districts,—that is to say, to districts in which it was not locally situated—in such cases the outside authorities should contribute to the expense of the bridge. That might have been done very simply by leaving the property of the bridge in the single proprietor as it was before, or in the joint proprietors as it was before, and merely calling upon the outside parties to contribute by way of toll, or money, or otherwise, to the support of that bridge. That would have been a simple way, and if the Legislature had adopted that way, as the city of Glasgow thinks, then it would undoubtedly have left the mutual liabilities as between the first and second parties here undisturbed. But then it was liable to this objection, and we see from this case that it was a serious objection, that it would have left these outside parties to contribute, it might be, large sums of money over the expenditure of which they would in that view have no control, and that that might be a heavy burden we see from this case, because we are told in the case that this very bridge over the Clyde at Glasgow requires to be immediately rebuilt, and I suppose it will not be rebuilt for any small sum of money; and if, as the city of Glasgow maintain, all that the outside authorities have to do is to contribute to the expense, they would have been called upon to contribute large sums of money without having any control or say in the disposal of it. Now, that being so, it does not appear to me that that is the mode which the Act has adopted to meet the case. I think the mode which the Act has adopted to meet the case is this: Instead of leaving the bridge the property of the one or two proprietors as it was before, the Act has declared that this bridge shall be deemed common property to all those who are bound by the Act to contribute to its support. I think that is very clearly the mode which the Act has adopted to meet the circumstances. It has declared that the bridge in future shall belong in common to all the parties who contribute to it, and as the amount of traffic passing over that bridge might not be equal in all the four cases, it has been left to the Secretary of State in express

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words to determine the proportion in which each proprietor shall contribute to the expense of the bridge. Now, I think that depends, as Lord Mure has pointed out, upon the construction particularly of the 2d and 4th subsections of the 88th section. By the 2d subsection the clerk to the county or burgh authority is to apply to the Secretary of State to determine that any such bridge shall belong in common to the county or counties and burgh or burghs to be named in his determination. I think it is beyond doubt that if the Secretary of State is so to determine, he must name in his determination all the authorities of the county or counties and burgh or burghs who contribute to the maintenance of the bridge, or are to be liable for it. I cannot understand his omitting from the declaration as to the common proprietors the name of any one of the four. Well, if the Secretary of State on considering the matter thinks that outside counties or burghs are bound to contribute, what he is to do is set forth in subsection 4. He is to determine "the proportions in which such burden,"—that is, the burden of maintaining, repairing, and, if need be, rebuilding the bridge—"should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs named in the determination." Now, what are the county or counties, or burgh or burghs, named in the determination if they are not those, and those only, and all of those which the Secretary of State considers are bound to contribute? Then, if the effect of that section is to declare that the bridge which was previously the property of one burgh or county in which it might be locally situated, or of the burgh and county, as in this case, in which it might be locally situated, is to be no longer their property, but is to become the common property of all the contributors, then, if that be so—and I think it is so by the Act—I think that leads to the solution of the second question here, because if this bridge is to belong in future to all the four as their common property, it appears to me that there is no difference in the quality of the rights of these four. They are all proprietors. It is not that two of these are proprietors and two contributors. The Act does not point at that at all. I cannot see how, if it belongs in common property to them all, you can say they have not all equal rights over it, unless there shall be something in the statute saying they shall not have equal rights. But there is nothing to that effect in the statute. I think it is clear upon the statute that they are all four common owners, and not that two of them are owners and two of them merely contributors, as is the view of the City of Glasgow. Now, if that be the position of matters, and if they are all common owners, then I think it follows that no one of these common proprietors or common owners has more right than another to the exclusive management of the bridge. If they are all common owners, why should one or two have the exclusive management and the others not? I think that follows as a consequence if the first proposition be right—I mean always apart from something in the Act to the contrary, and I think there is nothing in the Act. Well, if they are all entitled, and as I think necessarily entitled, to the management of this bridge, I think it follows they are entitled to appoint representatives, and though it is quite true that in section 88 there are no special provisions as to a joint committee, you will observe that difficulty or presumed difficulty might have arisen quite as much if we had been dealing with a bridge situated only in one county or one burgh. I mean there is no special provision in section 37 itself as to the extent to which each of them shall send members to any joint com-

mittee of management. But I think that is a difficulty which, as Lord Shand No. 167. says, we ought to get over by going back to see what the rights of the joint committee are under this Act, where a joint committee is necessary and is provided for; and accordingly, on the whole matter, I agree with Lord Mure.

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LORD PRESIDENT.—The contention of the Magistrates of Glasgow is that the Secretary of State has only the function of determining in what proportions the county or burgh, or counties or burghs brought in for the first time to contribute under section 88, are to be burdened with the expense, and that as regards the two original owners of the bridge their liability is to be equal, as it was before the 88th section was applied, and that they are to bear equally the balance of the expense not provided by the other two districts. In the former case between *The Magistrates of Glasgow* and *The Police Commissioners of Hillhead*, I was of opinion that the 88th section of the statute did not apply to a bridge jointly owned and maintained by two bodies of road trustees, and one of the reasons which induced me to form that opinion, and to express it pretty strongly, was this—that if the 88th section was held to apply to bridges so owned and maintained, the Secretary of State would have power, if he thought it equitable and just, to disturb the equality of the burden which was established in such cases by the 37th section of the statute; and I understand that the foundation of your Lordships' opinion in this case is that it is quite open to the Secretary of State to apportion the liability among the four different bodies of road trustees that are here before us in a way that is just and equitable, without any reference whatever to the quality of liability established by section 37. Now, I am bound to give effect to that judgment here, and therefore to concur with your Lordships in that construction of the 88th section, it being now conclusively determined that the 88th section does apply not only to bridges owned by one party, but to bridges owned and administered and maintained by two bodies of road trustees jointly.

THE COURT pronounced this interlocutor:—"Find and declare that the Secretary of State has power under the Roads and Bridges (Scotland) Act, 1878, to determine, if he sees fit, that Dalmarnock Bridge shall be deemed to belong in common to the county of the Lower Ward of Lanark, the city of Glasgow, the county of the Middle Ward of Lanark, and the burgh of Rutherglen, and to apportion among them in his determination, in such way as he thinks right, the expense of managing, maintaining, repairing, and if need be rebuilding said bridge, and the county of the Middle Ward of Lanark and the burgh of Rutherglen are entitled to take part in the management of said bridge, and to appoint representatives on the joint bridge committee thereof, and decern: Find the second party liable in expenses to the first and third parties," &c.

MACKENZIE & BLACK, W.S.—CAMPBELL & SMITH, S.S.C.—BRUCE & KERR, W.S.—
MACKENZIE & BLACK, W.S.—Agents.

JOHN CARSWELL & SON, Pursuers (Appellants).—*Gloag—McKechnie.* No. 168.
ALEXANDER HENRY FINLAY, Defender (Respondent).—*D.-F. Mackintosh*
—*C. S. Dickson.*

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Ship—Sale—Purchaser's liability for furnishings prior to sale.—The owner of certain shares in a vessel sold them, and delivered a bill of sale to the pur-

No. 168. **July 8, 1887.** **Carswell & Son v. Finlay.** chaser. At the time the vessel was completely fitted and provisioned and laden with a cargo for a voyage under a charter-party. The ship was lost on the voyage. In an action subsequently brought by the managing owner against the purchaser for the proportion effeiring to his shares of the cost of repairs executed before the sale, and of provisions for the voyage, on the ground that he would have been entitled to a share of the freight if earned, *held* (1) that the purchaser was not liable for repairs executed prior to the sale, and (2) that although the cost of provisions for the voyage would have been a proper deduction from the gross freight if earned, yet as they had not been bought on the purchaser's credit he had incurred no liability.

1ST DIVISION. **Sheriff of Renfrew and Bute.** **M.** THE registered owners of the barque "Arran" of Greenock were John Carswell & Son, who held 42/64th shares, and were managing owners, and Duncan Stewart Hendry of Greenock, who held the remaining 22/64ths.

On 11th November 1885, John Carswell & Son, as managing owners, entered into a charter-party, whereby she was chartered to sail to Mobile and bring home a cargo of timber to this country.

In order to prepare her for the voyage she was repaired at considerable expense, a crew engaged, and various furnishings made, all which was managed by John Carswell & Son as managing owners. She was ready for sea by 5th December 1885, and sailed on her voyage. John Carswell & Son made certain disbursements after that date, also on account of the ship.

On 5th December 1885, Hendry executed a bill of sale in favour of A. H. Finlay of Greenock, of his 22/64th shares in the ship. This bill of sale was not intimated to Carswell & Son, nor was it ever registered. The transaction was truly a security to Finlay for certain obligations by Hendry to him. After it Hendry left Greenock and went to reside in London. The "Arran" was lost on the homeward voyage from Mobile, and no freight was earned.

Carswell & Son brought this action in the Sheriff Court of Renfrewshire against Finlay, to recover from him £243, 1s. 7d. They stated that, as managing owners, they had disbursed for the vessel for repairs, outfit, wages, and provisions, £707, 2s. 11d., of which the proportion falling to the defender's 22/64th shares was £243, 1s. 7d. The defender admitted liability for disbursements subsequent to 5th December 1885, the date of the bill of sale, but disputed liability for the expenditure prior to that date.

He pleaded, *inter alia*;—(3) In any case the items contained in the account sued for not having been incurred on the instructions, or on the credit, or by the authority of the defender, he is not responsible therefor, and ought to be assoilzied with expenses.

The parties arranged to divide the accounts into three heads A, B, C. Account A was a "List of debts incurred and paid for wages and other disbursements of ship after the date of the bill of sale." The defender admitted liability for his proportion of these debts, amounting to £54 6s. 4d., and on 30th July 1886 interim decree was granted by the Sheriff-substitute for that sum.

Account B was a "List of debts incurred and paid for wages and other disbursements of ship before date of bill of sale." It contained items for labour and for stores, coal, and the like put on board the ship with a view to the voyage to Mobile and back, on which the ship was lost.

Account C was a "List of debts incurred and paid for repairs, all incurred prior to the date of the bill of sale." It represented the cost of repairs made to prepare her for the same voyage.

It was admitted in a joint minute of admissions put in as the proof in

the cause that the disbursements were all made by Carswell & Son, and it was also admitted that the defender "became owner, and assumed the rights of ownership of 22/64ths of the barque 'Arran,' on the 5th day of December 1885, the date of the bill of sale."

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The Sheriff-substitute (Nicolson) pronounced this interlocutor (after findings of fact to the effect above narrated):—"Finds that the defender is not liable for any part of the expenses stated in the accounts marked B and C in the minute of admissions, in respect that they were incurred before he became a part owner of the ship; that he admits liability for his proportion of the list marked A, amounting to £54, 6s. 4d.; that interim decree for that sum was granted on 30th July last: *Quoad ultra* assolizies the defender from the conclusions of the action."*

On appeal the Sheriff (Moncreiff) affirmed the judgment.†

* "NOTE.—This case raises an interesting question in maritime law, which was argued with force and ingenuity on both sides. The accounts B and C are not exactly in the same position, but the pursuers hold that the defender is equally liable for his share of both. The account B is for expenses connected with the outfit and victualling of the ship before she sailed on 5th December 1885, and it was contended for the pursuers that the defender became a partner in the adventure on which she was then under charter by becoming an owner in the month of December, and that he is liable for his share of the preparatory expenses. I am unable to come to that conclusion. The charter-party is between John Carswell of Greenock and James Hunter of Mobile, Carswell being the managing owner of the ship. Hendry was a party to that contract, and responsible for his share of all the debts of the ship at the time it was entered into, and up to the date of his ceasing to be an owner. The defender was no party to the contract, and his purchase of Hendry's shares did not operate as a transfer to him of the debts then due by Hendry as an owner. He was entitled to believe that he was acquiring a property unburdened by debt, and if the pursuer's argument be well founded he would have been equally liable for his share of these debts if they had been thousands instead of hundreds of pounds. That he should incur such a responsibility for shares for which he paid £180 is extravagant. 'It would be difficult,' said Sir Robert Phillimore, in the case of the 'Aneroid' (April 17, 1877, 2 Law Rep. Prob. Div. 189), 'to see what principle of equity could render the purchaser, who, it must be presumed, had paid the full value of the repaired ship, liable for the debt of the vendee to the repairing tradesmen, with whom the purchaser had no contract at all.' A great many authorities were quoted on both sides, but the law of the case seems to be briefly summed up in one sentence of Lord Tenterden's opinion in the case of *Jennings v. Griffiths* (1 Ryan and Moodie, 42),—'The true question in matters of this description is, upon whose credit was the work done?' The work here was done on the credit of the owners of the ship at the time, and before the defender had anything to do with her. He had no more to do with the ordering of these repairs or the paying for them than he had to do with the building of the ship. Hendry had, and I notice that the greater part of the repairs account, to the amount of £205, 9s., has been paid to him and his firm."

† "NOTE.—It is admitted in the able argument for the pursuers that there is no express decision in favour of the claim now made. The novelty of the claim throws a heavy burden on the pursuers. Parties have renounced probation on a very meagre and somewhat ambiguous minute of admissions, and therefore the grounds of the pursuers' case must be found within the four corners of the record and minute. The pursuers' contention practically comes to this, that a purchaser's liability for repairs and furnishings made to a vessel before the date of purchase is to be inferred from the bare fact of the purchase of a share of the vessel, although the bill of sale is not registered or intimated to other owners, and although no freight is earned, and no claim for freight is made by the purchaser. Now, the general rule undoubtedly is that the purchaser of a share of a vessel is not liable for repairs and furnishings made to it

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The pursuers appealed, and argued;—The question was whether the owner who purchased a vessel while on a charter-party for a voyage was not liable for disbursements made by the managing owner to fit her for it. Now, *prima facie*, such a purchaser by becoming owner acquired the right to freight,¹ and it followed that such a purchaser must be liable, whether freight was earned or not, for the advances

before the date of the purchase, for the simple reason that such repairs and furnishings are not made upon his credit. The cases quoted in the Sheriff-substitute's note are illustrations of this rule, and it is recognised by the writers on maritime law—See MacLachlan and Abbot on Shipping, Bell's Pr., section 448, and Bell's Comm. (7th ed.) 568-9. It therefore lies upon the pursuers to shew why the general rule should not receive effect in this case, and they profess to do so in this way. They say that in virtue of the purchase of Hendry's 22/64th parts of the vessel the defender became entitled to the freight to be earned under the current charter-party as an incident of ownership; and that as he could not have claimed a share of freight except after deduction of the expenses necessary to earn it he is liable to bear his share of those expenses, although no freight has in point of fact been earned. I am of opinion that this ingenious argument fails, because it is not proved that the defender was a party to the joint adventure. Participation in a joint adventure is not to be inferred from the bare fact of part ownership in the vessel, although ownership is an important element in the question—(Bell's Pr., section 392). In the present case there are no facts and circumstances, apart from the undisclosed purchase, to instruct participation, because I cannot read the somewhat unfortunate expression in the minute of admissions, that the defender assumed the rights of ownership, as meaning that he interfered in the equipment or management of the 'Arran.' It is not alleged that he did so, and in their reclaiming petition the pursuers fairly rest their case on the admitted part ownership (the only fact alleged in the condescendence), and not upon a judaical construction of that expression. It is quite clear that the repairs and furnishings made before the vessel sailed were not made or paid for upon the defender's credit; because the 'Arran' sailed before or just at the date of the purchase. It is not even alleged that the defender knew of the charter-party; and he seems to have been content to keep the bill of sale unregistered in security for the sum which he had paid for Hendry. Much stress is laid by the pursuers upon the following passage in MacLachlan on Shipping (3d ed. p. 106):—'On the other hand, it is the recognised rule of the law to charge the assignee or purchaser with the outfit and other expenses incurred, in respect of the voyage of which he is entitled by his purchase to share the profits; and as that can only be the voyage in prosecution at the time of the purchase, he is under no liability for the expense of an antecedent adventure, in respect of which he has no claim.'

"Now it appears to me that this passage, when examined in the light of the authorities referred to, means no more than this, that when an assignee or purchaser either claims freight, or is proved to have otherwise actively participated in or adopted the joint adventure or charter-party current at the date of his purchase, he is liable in an accounting with his co-owners to be charged with his proportion of the outfit and expenses referable to the voyage in question. If it had been proved in the present case that the defender knew of, and adopted the current charter-party, I should probably have held that he was liable for the antecedent expenses. It may be that comparatively slight evidence would have been sufficient in addition to the evidence of ownership. But without such proof, I am not prepared, in the absence of express authority, to subject the defender to liability for expenses which undoubtedly were not incurred on his credit or responsibility."

¹ Abbot on Shipping, 12th ed., p. 350; MacLachlan on Shipping, p. 105; Maude and Pollock on Shipping, i. 54; Stewart v. Greenock Marine Assurance Co., Jan. 13, 1846, 8 D. 323, 18 Scot. Jur. 151, aff. Sept. 1, 1848, 2 Clark (H. L.) 159; Green v. Briggs, April 12, 1847, 6 Hare's Chancery Reports, 395.

necessary to prepare the vessel for earning that in which, if earned, No. 168. the purchaser would share, and the pursuers as managing owners, who could have deducted the defender's share of them from freight, were entitled to sue him for it. The opinions of the text writers did not appear to depend on the actual earning of freight. The case of the "Aneroid" quoted by the Sheriff-substitute was not one between the managing owners and the purchaser of a share during the voyage. The cases quoted by the Sheriff were cases in which tradesmen sued for goods furnished to the ship; they had recourse only against those who had contracted with them. The present case also was different from *Logan v. Brown*,¹ because that was a case of joint adventure, and there was a like answer to the case of *Nelmes*.² The bill of sale as soon as it was executed and delivered on 5th December 1885 made the defender proprietor of shares in the ship with all the liabilities and rights belonging to that position, without need of intimation or possession.³ Possession was not an essential element in the judgment in *Watson's* case.⁴

Argued for the defender;—The defender did not employ the persons who executed the repairs and made the furnishings before he bought his interest in the ship. He bought a share in a ship ready fitted for sea. He knew nothing of the charter-party, if that was material. It was true that freight—that was, nett freight—belonged to the owner, including an owner who bought during the voyage, and the pursuer could deduct all expenses in fitting the ship to earn it. But it was another thing to say he had an action against the co-owner when no freight had been earned. Here no freight had been earned, and therefore no right to it could have been transferred.⁵ In all the cases cited on the other side there had been freight to be divided. If a ship's-husband was dismissed during the voyage his assignee had no claim to freight, because it was not earned till the voyage was completed.⁶ In a partnership, as the case of *Nelmes*⁷ shewed, an incoming partner was not liable for debts incurred before he became such.

At advising,—

LORD PRESIDENT.—This case was decided in the Sheriff Court of Renfrewshire on the pleadings and on a minute of admissions which I agree with the Sheriff is not very satisfactory in its language.

The vessel "Arran" was, prior to 5th December 1885, owned by two joint owners, Carswell, who had 42/64th shares, and Hendry, who had the remaining 22/64th shares. That was the state of the title to the vessel at that date. On 5th December 1885 a bill of sale was executed by Hendry, selling his 22/64th shares to Finlay the defender, and it is stated in the minute of admissions that "the defender admits that he became owner and assumed the rights of ownership on the 5th day of December 1885, the date of the bill of sale." It is not explained what is meant by the expression "assumed the rights of ownership,"

¹ May 15, 1824, 3 Shaw, 15.

² June 15, 1883, 10 R. 974.

³ *Watson v. Duncan*, July 12, 1879, 6 R. 1247.

⁴ The "Spirit of the Ocean," 34 L. J. Adm. 74.

⁵ *Sea Insurance Co. v. Hadden & Wainwright*, March 13, 1884, L. R., 13 Q. B. Div. 706; *Splidt v. Bowlls*, Nov. 11, 1808, 10 East, 279; *Watson v. Duncan*, 34 L. J. Adm. 74; *Hickie v. Rodocanachi*, May 11, 1859, 28 L. J. Ex. 273; *Thomson v. Rowcroft*, June 14, 1804, 4 East, 34.

⁶ *MacLachlan on Shipping*, p. 184.

⁷ June 15, 1883, 10 R. 974.

No. 168. and in that state of matters I take it that it means nothing and adds nothing to the statement that the defender "became owner."

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The bill of sale remained undisclosed and unintimated in the defender's hands, nor was any alteration made in the register, and though, being a bill of sale in the statutory form, it transferred the right of the seller to the purchaser, it does not appear that anything followed upon it. It is not proved, or even alleged, that it was intimated to the co-owner, or that the defender concerned himself with the condition of the vessel or her engagements. In short, it is plain on the state of the averments that the bill of sale was in reality nothing but a security for debt.

It so happened that the vessel was at the date of the bill of sale on the point of proceeding to Mobile under a charter-party, by which she was to proceed to that port and ship a cargo of timber for a home port. She sailed on that voyage on the same day as the bill of sale was made and delivered. She was lost on the homeward voyage, and in consequence earned no freight.

In these circumstances the defender's co-owner, Carswell, who was also the managing owner of the vessel, brings this action to recover the expenses of repairing and fitting out the vessel for that last voyage, on which she was lost. The accounts are divided into three parts, one part, A, being "a list of debts incurred and paid for wages and other disbursements of ship after the date of the bill of sale." To that part of the account the defender states no objection. He is willing to bear his share of that expenditure as expenditure falling upon him as a co-owner of the vessel after he became such. The other two branches of the accounts (B and C) are both accounts of expenditure made before the date of the bill of sale, B being an account for wages and disbursements before that date, and C being for repairs before that date. It is said that the defender is liable for these accounts as the cost of fitting out and furnishing the vessel for the voyage on which she was lost. The defender resists that demand, because these debts were incurred by the owners of the vessel before he became an owner, and he was not the employer of the persons who furnished the labour, materials, and stores to the vessel, the cost of which it is claimed that he must share. The pursuers' argument seems to resolve itself into this. If this vessel had under the charter-party earned freight, the defender would have been entitled to share as a joint owner therein, and therefore he must be liable in all expenses necessary to fit out the vessel to earn that freight. That seems plausible, but when the argument is examined it will be found to be unsound. It is no doubt quite true that if the ship had earned freight and returned safely to this country the defender, as a co-owner, would have been entitled to his share of the nett freight. The expenditure which he is now sued for would have been deducted from the gross freight earned, and the defender, as a co-owner, would have been entitled to a share of the nett freight on the ground that when it was earned he was one of the co-owners of the vessel.

But when he purchased the shares of the vessel on 5th December 1885 she was fitted out and already in a condition to go on the voyage by which freight was to be earned. What, therefore, he acquired was a right to 22/64th shares in a vessel which was prepared to start on a voyage, manned, equipped, and fully provisioned, and in good repair. What was sold to him was not a vessel which was going to be put into repair and fitted for a voyage, but a vessel already in that condition. After he became owner there was no occasion to employ anyone to repair or fit it out, that being already done by the seller and

he pursuers as co-owners. The defender therefore got all the advantage of what had already been done. I think the managing owner or ship's-husband has no action against him for the cost of these repairs and fittings, on the simple ground that he was not the employer. The employment in respect of which the managing owner or ship's-husband must sue was that of the co-owners as they stood before the bill of sale. They were the only employers.

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LORD MURK.—I am of the same opinion. For it appears to me that upon the facts, which have been clearly explained by your Lordship, no claim can be made good against the defender except as to that part of the expenditure which was incurred subsequent to the date of the bill of sale. That view is clearly indicated as the rule of law applicable to such a case in the passage from the opinion of Sir Robert Phillimore which is quoted in the note of the Sheriff-substitute. The ship was here repaired and fitted out for the voyage before the sale, and it must be presumed that the defender gave full value for his shares in the ship as so fitted and repaired. The pursuer's claim therefore, as made, must, I think, be rejected. At first I had a little difficulty as to some of the larger items in account B, because they are items for expenditure made on the very eve of the sale for stores and provisions to be used during the voyage, and I thought it might be equitable that the defender should pay a share of these expenses. But on further consideration I am satisfied that they must follow the same rule as the other expenditure prior to the date of the bill of sale.

LORD SHAND.—The advances in question were not made on the credit of the defender, nor were they made, nor was the obligation to pay them incurred, at any time during the period when he was a part owner. In that state of the fact it is plain, that unless special grounds are shewn to establish the supervening liability said to have been undertaken by him for payment, he cannot be made liable. Now, on the record and the minute of admissions one fact, and one only, is relied upon,—that is, that the defender became owner of 22/64th shares in the vessel on 5th December 1885, just at the time when she sailed; or was about to sail, under the charter-party of 11th November previous. The minute of admissions goes further in expression than a mere statement that the defender became a co-owner, for it goes on to say that he “assumed the rights of ownership” on that date, but after pressing counsel on both sides as to whether any additional meaning was to be derived from this expression, I was left in the same state of mind which your Lordship has expressed—that of thinking that the expression has no substantial meaning beyond the statement that the defender became a co-owner.

In that state of matters there are, I think, no sufficient general grounds for holding that there was any liability undertaken by the defender for the expenditure sued for. He did not authorise it or become responsible, unless the mere fact of his becoming a co-owner made him so. Now, so far as can be seen, this bill of sale was kept entirely latent. It was a transaction between the defender and Hendry, the person who executed it, but it was not intimated and not registered, and the parties who entered into it might have put it into the fire a week or a month afterwards if they had chosen. It was never acted on, and no one else had any right under it. I see no ground on which we can hold that the defender became responsible by merely taking the bill of sale.

No. 168. I further agree that even if intimation of the bill of sale had been made to the ship's-husband and the co-owners, the result of the facts and the admissions would have been the same. When the defender acquired his shares it was not specially stipulated that he should undertake liability for furnishings and repairs already made, and so he bought a share in a ship which was victualled, provisioned, and ready for sea as between him and the person who sold to him, and in that state of fact there is no ground for holding that he became responsible to the ship's-husband. It is quite true that if freight had been earned the ship's-husband would have been entitled to retain even against the defender the advances he had made to enable it to be earned. That follows from the relation of the ship's-husband to the ship, and those on whose credit he made the advances, and the right arises from the doctrine of retention. He would retain against the ship what he had paid out for the ship. But that is a different thing from the assertion of an active right to sue the defender personally, and recover from him as personally responsible for them, advances made before he had anything to do with the ship. In the state of matters which has actually occurred there is no freight. What remedy, then, has the ship's-husband? Plainly his remedy is to have recourse against the former proprietor of the defender's shares for the proportion due in respect of these shares, and that because it was on his credit and employment that the liability was undertaken. But has he also a remedy against the person who became a co-owner? There is no averment as to a custom of trade to the effect that in such a case as the present the liability of the person to whom the ship, or part of it, belonged when the repairs were made attaches also to the person who buys his shares after the work is done; and even if there were, I should question much whether any effect could be given to such a custom. But there is no such averment, and I see no ground for imposing such a liability. Even if the pursuers had recovered or retained such sums as are here sued for from the defender out of freight received, the latter would have been entitled to recover what he so paid from the vendor of the shares to him. But this is not a case in which there is responsibility and a right of relief only. I think the case fails at the outset. There is no legal ground for making the defender responsible at all. I therefore agree with your Lordship.

LORD ADAM was absent on Circuit.

THE COURT pronounced this interlocutor:—"Refuse the appeal, adhere to the interlocutors of the Sheriffs complained of, and decern: Find the appellants (pursuers) liable to the respondent (defender) in expenses in this Court: Allow an account thereof to be lodged, and remit the same to the Auditor to tax, and also the expenses found due in the Sheriff Court, and to report."

W. B. RAINNIE, S.S.C.—J. SMITH CLARK, S.S.C.—Agents.

No. 169. TRADES' HOUSE OF GLASGOW AND OTHERS, Pursuers (Reclaimers).—

Gloag—Murray.

July 8, 1887. HERITORS OF GOVAN PARISH, Defenders (Respondents).—*D.-F. Mackintosh*
—J. M. Black.

Church—Heritors—Liability for repairs—Cess-roll of valued rent—Ecclesiastical Buildings (Scotland) Act, 1868 (31 and 32 Vict. c. 96), sec. 23.—The 23d section of the Ecclesiastical Buildings (Scotland) Act, 1868, enacts that

"when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents, all assessments for the repair thereof shall be imposed on such heritors according to such valued rent." No. 169.
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In 1826 the seats in a parish church were allocated among the heritors according to their valued rents. In 1857 one of the heritors had become divested of the *dominium utile* of his whole lands in the parish (with the exception of the minerals), but his name remained as before on the Cess-roll of valued rent. The heritors having on various occasions after that date imposed assessments upon him for repairs of the church, in 1886 he raised an action against the heritors for declarator that he was not liable for any assessments imposed after 1857, on the ground that after that date he was no longer a heritor in the parish. *Held* that the heritors were bound to assess according to the Cess-roll, and had no power to alter it.

Observed that the pursuer's remedy was to apply to the Commissioners of Supply to have the roll altered, and the names of the feuars, with the proportionate part of the rent allocated upon each, entered.

Church—Heritors—Objections to validity of assessments.—When a heritor has objections to the legality of an assessment imposed on him by the heritors of his parish they must be stated *tempestive*, and not after the lapse of years.

THE TRADES' HOUSE OF GLASGOW were proprietors of certain sub-1st Division.
Ld. M'Laren.
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jects in Gorbals and Bridgend, Glasgow, which came to be known as "Tradeston," in the parish of Govan. In 1791 they began to feu out these subjects for building purposes, and they continued to do so till the year 1856, when the last remaining plot of ground was feued, and they became entirely divested of the *dominium utile* of the subjects. Under the feu-rights thus granted the feuars were taken bound, *inter alia*, to free the Trades' House of a proportional part of all public and parish burdens payable out of the lands. The Trades' House reserved the coal, metals, and minerals in the lands.

The name of the Trades' House had long been, and still was at the date of this action, upon the Cess-roll of the county of Lanark, and that being so, the heritors of Govan parish had levied upon them, as one of the heritors of the parish, certain assessments in respect of repairs effected on the parish church, manse, and churchyard. These assessments had all been paid down to June 1873.

In 1886 the Trades' House brought this action of declarator against the heritors of the parish, and their clerk and collector as representing them, to have it found that they were not liable to pay any assessments imposed subsequently to 1st January 1857 and still remaining unpaid, and in particular those imposed on and after 9th June 1873. They further called upon the defenders to rectify their rolls and books accordingly.

Their contention was that these assessments were leviable only from those who owned the *dominium utile* in lands within the parish, and that their rights had, in the knowledge of the defenders, been limited to the *dominium directum* since 1856. Since that date, or at least since June 1873, they stated that they had exercised none of the rights attaching to heritors.

The defenders stated that the assessments in question had all been evied according to the valued rent, as appearing on the Cess-roll, and that the pursuers had allowed them to be made without challenge, although they had due notice of all the meetings of the heritors. They further explained that it was outwith their power to alter their roll so long as the pursuers' name was entered on the Cess-roll, and that the pursuers' remedy was to apply to the Commissioners of Supply to have their name removed from the roll.

The pursuers pleaded, *inter alia*;—(1) The pursuers' rights, as proprietors in trust foresaid, in the subjects described in the summons being

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limited to the *dominium directum* or superiority thereof, and having been so limited since the 1st day of January 1857, they are entitled to decree of declarator as concluded for. (3) In any view, the assessments in question were illegally imposed according to the valued rent, and ought to have been imposed according to the real rent, as set forth in the valuation-rolls, and the pursuers, not being entered in said valuation-rolls, are not liable for any assessment.

The defenders pleaded, *inter alia*;—(2) The pursuers being heritors in the parish of Govan, and appearing as such in the old valuation or Cess-roll of the county of Lanark, are liable for all assessments leviable upon the heritors, according to the valued rent. (4) In any event, the said assessments having been imposed and levied after due notice, and the pursuers having taken no steps to bring the said assessments under review, they are now barred from challenging the said assessments.

A joint minute of admissions was put in for the parties in which the pursuers admitted,—“(1) That the ecclesiastical buildings of Govan were built by the valued rent heritors of the parish, and that the seats in the parish church (demolished in 1884) were, in 1826, allocated according to the valued rent, and that the pursuers, as such heritors, had certain seats in the church allotted to them, for which they received rent down to the year 1857, and one single payment in the year 1869 . . . (3) That the pursuers have long been, and still are, entered on the Cess-roll of the county of Lanark, that they have regularly paid and still continue to pay, cess or land-tax, and that they, on two occasions, applied by petition to the Commissioners of Supply of said county in order to have their name removed from said roll, and that, in each case, their application was refused. (4) That the method of assessment for repairs on church, manse, &c., in the parish of Govan has, from time immemorial, been according to the valued rent, and that at no time was an assessment ever levied according to the real rent. (5) That the various meetings of heritors held between 1872 and 1886 were duly convened by notice read in the parish church and advertisements in a public newspaper. That in the year 1870, the pursuers, in a letter to the defenders, denied their liability for assessments for repairs on church, manse, &c., but that in an action raised in 1871 . . . by the present defenders, decree was granted by the Sheriff against the present pursuers in respect of such assessments, which were thereupon paid. That, since the date of said decree, the pursuers have taken no steps to have their immunity from assessment established, further than asserting that they were not liable, . . . and also refusing payment of their share of the assessments, referred to in the summons, when the same was demanded. (6) That the assessments mentioned in the summons were none of them applicable to the building of the new parish church, which was erected subsequent to the year 1884, by subscription, under arrangement with the heritors.”

Proof was also led, the result of which was that the Trades' House officials denied that they had ever received notice of assessments, while on the other hand there was evidence that the notices had been sent out by the defenders. It was however admitted that since 1869 the pursuers had not attended any meeting of heritors.

The Lord Ordinary (M'Laren), on 16th February 1887, assolizied the defenders.*

* “OPINION.—The question in this case is whether the Trades' House of Glasgow are liable, in the capacity of heritors or otherwise, for a proportion of the assessments levied since the year 1872 for repairing the parish church, manse,

The pursuers reclaimed, and argued;—1. The Lord Ordinary had to some extent been influenced by the argument which was based upon *mora*, No. 169.

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churchyard, and walls. The pursuers were formerly proprietors of the estate described in the summons, but before the period embraced by this action they had feued out everything they possessed in the parish, excepting their seat in the parish church. This also they have eventually got out of, but only through the demolition of the building of which it formed a part. It is stated in a joint minute for the parties that the old ecclesiastical buildings of Govan were built at the cost of the valued rent heritors, and it is further stated that the seats in the parish church (demolished in 1884) were in 1826 allocated according to the valued rent, and that the pursuers, as heritors of lands having a valued rental, had certain seats allotted to those which they had a right to occupy.

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"It is admitted, or is in any case a necessary inference from the admitted facts, that the Trades Corporation, before they feued their lands, were rightly placed on the roll of valued rental, by the Commissioners of Supply for the county of Lanark. It may be taken for granted that the pursuers are entitled to have their names taken off the roll of valued rent, by going through certain forms involving the consent of the feuars, amongst whom the land-tax is to be divided, or an adjudication against them. In the meantime the pursuers as a corporation are on the roll, and they have regularly paid their land-tax, for which they have a claim of rateable relief against their tenants in the various feu-holdings.

"With respect to so much of the assessments in dispute as applies to repairs on the fabric of the church, I have to consider the effect of the 33d section of 17 and 18 Vict. cap. 91, and of the 23d section of 31 and 32 Vict. cap. 96 (The Ecclesiastical Buildings Act), which provide that where the area of a church heretofore erected has been allocated amongst the heritors according to their respective valued rents, all assessments for repairs shall be imposed according to the valued rents.

"These enactments would, on a first impression, appear to be decisive of the question, so far at least as relates to the repair of the church. But they are not necessarily so; because the pursuers, while admitting the applicability of the statutes, contend that they themselves are not, in a legal sense, the true valued rent heritors; and that it is the business of the body of heritors to find out who the feuars are, and to make a division of the valued rent affecting their properties, for the purposes of the several assessments which they have laid on.

"This appears to me to be one of those propositions which contains in itself the elements of its own dissolution. How, or by what authority, are the heritors of Govan to divide the valued rent amongst the feuars? Where an assessment is laid on real rental, or on any fixed proportion of real rental, the extent of the liability is a mere question of fact, and can be ascertained like any other fact. Accordingly in the cases of disputed liability to assessment for the poor, which occurred before the passing of the General Lands Valuation Act, the Court had no difficulty in inquiring into the question of value for the purposes of the particular assessment.

"But, as it appears to me, valued rental is not a thing which can be ascertained or divided except by the Commissioners of Supply, or in an action to which they and the feuars are parties. It is not a valuation at all (except in a historical sense), but is a fixed and constant scale according to which the land-tax is to be levied from the persons whose names are on the roll as representing certain ancient estates. Where superior and feuar are agreed, the Commissioners have authority to substitute the feuar for the superior. Where they are not agreed resort must be had to a Court of law, by whose order the necessary substitution made be made. Until the proper correction is applied to the roll of valued rent, or county Cess-roll, as it is termed, it appears to me that the heritors have no other person liable to them for such ecclesiastical expenses as are burdens on the valued rent than the person or corporation whose name appears in the roll. Valued rent being a thing wholly factitious as a criterion of liability, it can neither be made nor unmade except in the regular legal manner. The pursuers have been unable (as appears from the papers) to obtain

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but the pursuers had always maintained the ground that they were not liable and could not now be held to be barred merely because they had not previously brought a declarator.

2. It was true the pursuers were mineral owners, but it was settled law that mineral owners were not "heritors" so as to be liable for parochial assessments.¹ The reasons for the decision in the case of *Bell* would have been the same whether the Act 1681, cap. 108 (Thomson's Acts, viii., p. 363), declaring that coal and salt should not bear any part of the supply, had passed or not. Therefore the pursuers were not liable as mineral owners, and they were not liable as superiors.² But it was said that they must pay because they were entered as proprietors on the Cess-roll. That was a question of law. The assessment was imposed under the 23d section of the Ecclesiastical Buildings Act, 1868. But that Act imposed no assessment which was not imposed before. Heritors were a quasi-corporation and a majority bound them.³ But they could only assess themselves and no one else. The question, therefore, was what was the test of being

the consent of their feuars to the substitution of their names in the county Cess-roll; and as they have not brought an action to have the roll amended, I am of opinion that they are liable to be assessed just as if they were the true heritors. If they have relief under their feu-contracts, this of course can be enforced in another way.

"There remains the question of liability for the repair of the manse and the churchyard walls. There can be no separate question of general importance with reference to repayment of expenditure for keeping this property in order. If the assessment was rightly imposed on the valued rent, then the decision of this question and that of the repairs to the church is one and the same. But if the assessment was wrongly imposed on the valued rent, then I am of opinion that the Trades' House of Glasgow has not taken the proper and necessary proceedings for correcting the illegality. A ratepayer who intends to challenge an assessment upon objections, which, if sustained, would nullify the whole assessment, must meet his antagonists fairly, and promptly. If the objection had been taken immediately on the imposition of any of the rates in dispute, and had been confined to that particular rate, we should have considered it. But it appears to me that I should be taking a departure in a direction opposed to the equitable considerations which have guided the practice of this Court were I to give any countenance to an objection which would invalidate all the payments that have been made within the last fourteen years, and would impose upon trustees, and other representative persons, the obligation of suing for repayment of local taxation, contributed and expended in good faith during all that time by a body of persons who believed that they were liable to contribute to these public objects. It is right to say that the officers of the Trades' House deny the receipt of the notices of assessment, and they may therefore conceive that they were not called on to take proceedings for the suspension of the assessment. But they do not deny that they were in the knowledge that the assessments were being laid on; and it is quite competent to suspend upon the apprehension of a threatened charge. The posting of the notices of assessment was proved in the usual way, and I must hold that notice was duly given.

"In all the circumstances, I am not able to give effect to any of the conclusions of the summons; and I shall find that the condescendence is not proved, and assolvie the defenders from the conclusions of the summons, finding them also entitled to their expenses."

¹ *Bell v. Lord Wemyss*, Feb. 16, 1805, M. App. *voce* Kirk, 3; Connell's Parochial Law Supplement, pp. 28 and 29; Dunlop's Parochial Law, 9; Duncan's Parochial Ecclesiastical Law, 168; Bell's Principles, 1164 (note).

² Bell's Principles, 1171; Dundas, 1778, M. 8551; *Robertson v. Murdoch*, Feb. 23, 1830, 8 S. 587; *Traquair's Trustees v. Heritors of Innerleithen*, Dec. 9, 1870, 9 Macph. 234, 43 Scot. Jur. 121.

³ *Boswell v. Duke of Portland*, Dec. 9, 1834, 13 S. 148.

heritor. It was not the fact of being on a particular roll. The case of *No. 169.*
the *Commissioners of Edinburghshire*,¹ cited on the other side, shewed
that the Cess-roll was not conclusive upon the question of who were
heritors. Nor was the Valuation-roll conclusive,²—much less the valued
rent roll, which might even bear less relationship to the actual ownership
than the Valuation-roll. Besides, unworked mines, which was the only
subject now belonging to the reclaimers, might not competently be entered
in the Valuation-roll unless worked to profit during the year of assess-
ment (Valuation Act, 1854, sec. 42). By the interpretation clause (sec.
1) of the Ecclesiastical Buildings (Scotland) Act, 1868, heritor was defined
as meaning “any proprietor of lands and heritages at present liable in the
assessments which may be imposed according to the real or valued rents
thereof.” The heritors might assess themselves on the real or valued rent,
but there was no such thing as a simply “valued rent heritor.” They
might assess for church repairs on the valued rent, and for the manse on
the real rent. No decision conflicted with that argument. The case of
the *Duke of Abercorn*³ was not an assessment by heritors, but by the
presbytery, who left the heritors to divide the assessment as they chose.
The judgment would have been different if the assessment had been by
the heritors.

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3. Assuming that the reclaimers were wrong in the proposition that,
not being heritors, they were not liable, the assessment for all parochial
purposes, with the exception of church repairs (which were regulated by
the 23d section of the Ecclesiastical Buildings Act, 1868), was upon the
real rent. When the Act of 1663, cap. 21, dealing with the building and
repairing of churches, manses, &c., was passed, the Valuation-roll did not
exist. It only came into existence in 1667. It was suggested in the *Kin-
claven* case⁴ that the assessment was optional, but that was only in landward
cases.⁵ Accordingly, the Court ought to sustain the third plea for the
reclaimers, except as regards the church repairs:

4. Application had been made to the Commissioners of Supply to have
the roll rectified, and the feuars placed upon it, but the difficulty was that
the feuars—being very numerous—did not appear, and the Commis-
sioners had no power to cite them.

The respondents argued;—1. They were valued rent heritors, because
they were on the Cess-roll, and the feuars were not. The question was
whether the pursuers could get behind that roll. It was immaterial to
what extent the land had been feued out, so long as they remained on the
roll.⁶ There was no injustice in holding that the roll ruled so long as
those complaining of the assessment did not go to the Commissioners of
Supply to have it altered. If the Commissioners refused to alter, a remedy
was open by appeal to the Court of Session.⁷ The collector to the heri-
tors had no title to go to the Commissioners.¹ There were no doubt cases
where the Cess-roll was not conclusive for all purposes, *e.g.*, voting, but it

¹ Lord Advocate v. Commissioners of Supply of Edinburghshire, 23 D. 933; Erskine's Inst. ii. 10, 63.

² M'Laren v. Clyde Trustees, and M'Laren v. Harvey, Nov. 17, 1865, 4 Macph. 58, affd. 6 Macph. (H. of L.) 81; Toshack v. Smart, July 18, 1771, M. 13,134.

³ 8 Macph. 733.

⁴ Highland Railway Company v. Heritors of Kinclaven, June 15, 1870, 8 Macph. 858, 42 Scot. Jur. 487; Downie v. M'Lean, Oct. 26, 1883, 11 R. 47.

⁵ The Feuars of Peterhead, June 24, 1802, 4 Pat. Appa. 356.

⁶ Feuars of Peterhead, 4 Pat. Appa. 356; Duke of Abercorn, &c. v. Presbytery of Edinburgh, March 17, 1870, 8 Macph. 733, 42 Scot. Jur. 377.

⁷ Wight's Treatise, p. 148, *et seq.*; Wight's Inquiry, p. 159, *et seq.*

No. 169. was always conclusive as to who the heritors were. 2. In addition to the fact that the pursuers were on the roll here there were the two facts (1) that they were superiors, and it had never been decided that where they remained on the roll as such their position as heritors changed, and (2) they were mineral proprietors. It was said that the case of *Bell*¹ was an authority to the effect that mineral proprietors fell to be exempted from parochial assessments. The decision in that case did not appear to proceed altogether upon the Statute of 1681, but on the fact that mineral estate was of a very casual and varying value. If it proceeded on the statute the case was not in point, because coal and salt works alone were exempted. Further, the Valuation Act, 1854, contemplated the continued liability of mine-owners,—if on the latter ground, it did not apply to a question of repairs, which this was. The pursuers here were in the same position as the Duke of Abercorn² in his case, where it was held that valued rent heritors using the church or retaining seats were liable for rebuilding and repair assessment. Further, so long as the pursuers held seats in the church they retained their character of heritors, although they might have disposed of the *dominium utile* of the subjects belonging to them. 3. The assessments for repairs on the church were rightly imposed according to the valued rent in terms of the 23d section of the Ecclesiastical Buildings Act. It was said that in 1663, when the Act dealing with the building of churches, manse, &c., was enacted, the Valuation-roll did not exist. But it had been originally introduced in 1643, and although it was in abeyance for a time, it was revived in 1667.³ 4. The assessments for repairs on the manse and churchyard were on the same footing as repairs on the church. The terms of the 23d section of the Ecclesiastical Buildings Act, 1868, were not against this view, and the considerations applicable to the two cases of the church and manse could not be distinguished from one another.⁴ The churchyard must be regarded as an accessory to the church (Duncan, 247). Further, it would be absurd to have two different rolls. 5. The delay in raising this question was very material. It was conclusive in poor-law cases, where the ratepayers changed, and injustice could not be redressed.

At advising,—

LORD PRESIDENT.—The Trades' House of Glasgow have been for a long time the proprietors of an extensive piece of ground which now constitutes the Tradeston district of Glasgow. The district is now entirely covered with buildings. They were formerly the sole owners, but the ground was feued out in different portions throughout a long course of years until in the year 1856 the last feu in their hands was given out. In the interval their name has remained upon the Cess-roll of the county of Lanark, and they have continued to pay land-tax for the whole ground which has been feued off. They are still the sole representatives upon the Cess-roll of what may be called the valued rent of this portion of the county of Lanark.

The object of the present action is to have it found that in consequence of the fact that the Trades' House have ceased to be proprietors of the *dominium utile*, or of any part of it, they are no longer liable to pay any part of the

¹ M. Appendix, *voce* Kirk, 3.

² Duke of Abercorn, &c. v. Presbytery of Edinburgh, March 17, 1870, 8 Macph. 733, 42 Scot. Jur. 377.

³ Rankine on Landownership, 192.

⁴ Duncan's Parochial Law, p. 466; Heritors of Olrig v. Phin, July 10, 1851. 13 D. 1335; Highland Railway Co. v. Heritors of Kinclaven, June 15, 1870. 8 Macph. 858.

assessments for ecclesiastical buildings in the parish of Govan. The argument is that they have ceased to be heritors, and, as heritors only are liable for such assessments, that they cannot be liable. That is a very plausible argument, but I am afraid there are many difficulties in the way of its being accepted.

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In the first place, it is to be observed that one of the taxes to which exception is taken is the assessment for the purpose of repairing the parish church—not the existing church, which was erected in 1884,—but the old parish church, which was in existence previously. There is no doubt, as regards it, that it was maintained throughout by assessments on the valued rent, and that the division of the area was made according to the valued rent of the different heritors in the parish, and accordingly the Trades' House had sittings allotted to them according to their proportion of the valued rent. In this state of the facts the provision in the 23d section of the Ecclesiastical Buildings Act seems to me directly to apply. It provides that “when the area of any parish church heretofore erected has been allocated among the heritors according to their respective valued rents, all assessments for the repairs thereof shall be imposed on such heritors according to such valued rent.” If the Trades' House are still heritors of the parish, that section is conclusive of the whole question, but the contention is that they have ceased to be heritors, and only hold now a bare right of superiority.

But this practical difficulty at once arises. We are bound to see that this assessment is raised and allocated according to the respective valued rents. And the clerk to the heritors is also similarly bound. And there is no one who has any valued rent on the Cess-roll in respect of this property except the Trades' House of Glasgow. The *cumulo* valuation of the Trades' House has never been divided, and accordingly they stand upon the Cess-roll as representing the whole of the valued rent of the property which has been feued out. They say they have ceased to be heritors, but they ought to have taken care that others were put in their place. Their remedy was a very simple one. They had only to apply to the Commissioners of Supply to divide and allocate among their feuars that portion of the valued rent for which they were entered on the Cess-roll. If they have failed to do this, or have attempted it so imperfectly that it has not been done, it is their own fault. Neither the collector nor anyone else can do this for them, and no means exist whereby it can be done except those I have pointed out. If they have any difficulty in carrying this matter through, and the Commissioners of Supply do not fulfil their duty, then it can be brought up here, and by that simple process they can relieve themselves of liability. But so long as they remain upon the Cess-roll and pay the whole of the land-tax I do not see how they can claim to be relieved. So far, therefore, as regards the question relating to the repairs upon the church, I agree with the Lord Ordinary.

As regards the other assessments, I also adopt the reasoning of the Lord Ordinary. His Lordship says that if there be a question whether the assessment ought to have been laid upon real or upon valued rent, it ought to have been raised at once when the assessment was made; that it will not do to lie by and allow the assessments to accumulate, and then to bring an action for declarator that they never ought to have been demanded, and that they were not justly due. If an objection is to be taken, it must be taken at the time, otherwise it would involve a readjustment of the whole accounts of the heritors for years gone by.

On the whole matter I am for adhering to the Lord Ordinary's interlocutor.

No. 169. LORD MURE.—I am of the same opinion. The valued rent of the heritors whose names appear upon the Cess-roll is the fund upon which, in the ordinary case, the liability for assessment for the erection and upholding of ecclesiastical buildings falls. The assessment is made upon the persons whose names appear on that roll, and they pay that assessment as well as some other taxes in respect of their names being there. They, however, say that their names ought not to be there, because they have parted with the *dominium utile* of the property. That may be so, but then it rests with them to see that proper steps are taken to have their names removed. Because, so long as their names remain upon the roll, they cannot disclaim responsibility for assessment. Upon that ground I concur with your Lordship in holding that the Lord Ordinary has come to a right conclusion.

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LORD SHAND.—I am quite of the same opinion, and while I concur with your Lordship in the chair in what you have said, I may add that I adopt the whole grounds of judgment which have been stated by the Lord Ordinary. The argument which was presented for the reclaimers, if applied to the case of a superior who was gradually giving off a number of feus, would amount to this, that the collector of assessments for the heritors would have to proceed by dividing the amount of the valued rent, year after year, between the superior and, it might be, a large number of feuars, and thereafter levy the assessment. I can only say that if any assessor were to attempt anything of the kind he would at once find himself involved in very serious difficulty, and the heritors would be exposed to serious litigations as to each feu's share of the burdens, with no certain test to which an appeal could be made. That serious practical difficulty seems to me to go a long way towards the solution of the question before us.

In regard to the liability for repairs on the manse and churchyard walls, it appears to me that this branch of the question must follow the other. The heritors have made their assessment upon the valued rent, as they were entitled to do, and the decision of the first branch of the case applies also to this. But I further agree with the Lord Ordinary in the alternative view which he has taken, and I think that it is now too late to raise the question of liability for these repairs.

LORD ADAM was absent on Circuit.

THE COURT adhered.

J. & A. HASTIE, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 170.

ROBERT M'WHIRTER, Complainer (Reclaimer).—*M'Kechnie—Forsyth*
REVEREND JAMES RANKIN AND OTHERS (M'Culloch's Trustees),
Respondents.—*Murray—M'Clure.*

July 9, 1887.
M'Whirter v.
M'Culloch's
Trustees.

Right in security—Bond and disposition in security—Personal obligation—Sale.—The creditor in a bond and disposition in security in the form prescribed by the Titles to Land Consolidation Act, 1868, and containing the usual clause consenting to registration for execution, gave notice requiring payment of his loan along with the usual three months' premonition that failing payment he might proceed to sell. Immediately thereafter the creditor charged the debtor on the personal obligation contained in the bond. The debtor having brought a suspension of the charge, *held* that the creditor was entitled to both remedies, and note refused accordingly.

By bond and disposition in security dated 16th, and recorded 17th No. 170. February 1881, Robert M'Whirter borrowed £1000 from the Rev. J. M. M'Culloch, D.D., over certain subjects in Greenock. The bond was in terms of the form prescribed by "The Titles to Land Consolidation Act, 1868," and contained the usual clause consenting to registration for execution.

July 9, 1887.

M'Whirter v. M'Culloch's Trustees.

On 27th May 1887, Dr M'Culloch having died in the interval, his trustees gave notice requiring payment of the £1000 within the three months provided by the 119th section of the Titles to Land Act, 1868.

Bill-Chamber. 1st Division. Lord Trayner. M.

On 16th June following, and prior to the expiry of the three months, the trustees charged M'Whirter to pay the £1000 upon the personal obligation contained in the bond.

M'Whirter suspended, pleading, *inter alia*,—(3) The said charge is at variance with the terms of the schedule previously served on the complainer by the respondents in virtue of the statute, and also at variance with the provisions of the statute itself.

The respondents stated that there had been delay in paying the interest on the bond, and that they had learned that the value of the security had seriously depreciated, and that it would not be prudent to allow the loan to continue.

The Lord Ordinary (Trayner), on 15th June 1887, refused the note.*

The complainer reclaimed.

The respondents' counsel were not called on.

LORD PRESIDENT.—This case is too clear for argument. Section 119 of the Titles to Land Consolidation Act, 1868, which has been appealed to, has really nothing to do with the question. Where the subject of the security is to be realised, the provisions of that section are to be followed, and the sale may take place upon three months' premonition. But there is no proposal to sell in the present case. The only matter before us is the ordinary charge upon a personal bond, which the suspender says should not be allowed to proceed, because the three months have not expired. But the bond gives two remedies,—the first, that of charging upon the personal obligation; the second, that of calling up the bond, and failing payment within three months, of proceeding to a sale of the security subjects. It cannot be doubted that the respondents were entitled to both remedies.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT adhered.

ROBERT EMSLIE, S.S.C.—SMITH & MASON, S.S.C.—Agents.

* "OPINION.—This suspension proceeds upon two grounds—(1) That the charge complained of is at variance with the provisions of the Titles to Land Consolidation Act, 1868; and (2) that the charge is oppressive.

"(1) The clauses of the Act referred to make provision for the proceedings which must be taken before the creditor in a heritable security takes steps to realise the subject of the security. But these clauses have no application in the present case, because the creditor is not proposing to sell the security subjects; but is proceeding only to recover his debt by diligence on the personal obligation of the suspender. This appears to me to be within the right of the respondent, and is a right, in my opinion, distinctly recognised by the effect given by statute to the clause in the bond consenting to registration for execution."

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July 14, 1887.
Houldsworth
v. Burgh of
Wishaw.

JAMES HOULDSWORTH, Pursuer (Respondent).—*Murray—Ure.*
COMMISSIONERS OF POLICE FOR THE BURGH OF WISHAW AND JOHN LOGAN
(their Clerk), Defenders (Reclaimers).—*Balfour—Darling—McKinn.*

Property—Nuisance—Implied contract—Acquiescence.—The proprietor of an estate adjoining a town, part of which was built on land feued from him, constructed sewers so as to carry to his lands, for the purpose of irrigation, the sewage of that part of the town, and he made settling-ponds and other works on his estate for that purpose. In 1868 the Commissioners of Police of the town, which had adopted the General Police Act of 1862, executed drainage works, in doing which they took advantage of the proprietor's system of drainage, with his knowledge, connecting some of their drains with his sewers and settling-ponds. Thereafter the town increased, and the quantity of sewage drained towards the proprietor's lands was thus greatly augmented. The sewage irrigation became unsatisfactory and was abandoned. In 1886 the proprietor, in consequence of the nuisance caused by the quantity of sewage sent upon his lands, raised an action against the Commissioners, concluding for declarator that the town was not entitled to send sewage upon the pursuer's lands, and for interdict. *Held* (1) that no contract by which the proprietor was bound to receive the town sewage upon his lands could be implied from the actings of parties; and (2) that he could not, by having allowed the drainage system of the town to be made so as to join his own, without objection, be held to have acquiesced in their sending sewage upon his lands in time coming, and therefore that he was entitled to decree of declarator and interdict as craved.

2D DIVISION.
Lord Kinnear.
R.

BETWEEN 1856 and 1864 the late Henry Houldsworth of Coltness, who had feued part of that estate within the burgh of Wishaw, constructed sewers from these feus to discharge sewage for irrigation purposes upon his farms. In January 1868 Mr Houldsworth died, and was succeeded by his son, Mr James Houldsworth. In April 1868 the Commissioners of Police of the burgh, with Mr Houldsworth's knowledge, connected drains which they had formed with these sewers. The irrigation works were abandoned in 1874.

In November 1886 Mr Houldsworth raised an action against the Commissioners of Police for the burgh, acting under the General Police Act, 1862, and being the Local Authority under the Public Health Act, 1867, for declarator that the defenders were not entitled to emit or discharge from the sewers or pipes under their control any sewage or drainage matter on to or upon the pursuer's lands, and for interdict against their doing so.

The defenders, after setting forth the construction of sewers by the pursuer's predecessor and subsequently by themselves, averred,—“The Commissioners understood and believed, and the fact is, that the pursuer's predecessor had, by what he had done with respect to the drainage arrangements aforesaid, a vested interest in the sewage in the streets referred to, and as at the time when the Commissioners' sewers were being constructed, he was anxious to obtain the sewage for irrigation, they were not entitled to divert it from the destinations to which he had provided as aforesaid for its being conducted.” (Stat. 10) “The pursuer did not object to the discharge of the sewage until recently, and not until he thought that the irrigation of his lands by sewage did not benefit him. The only objection, however, which he stated prior to the raising of the present action was to the sewage which is discharged into Templehill Burn. The sewage in the districts which drain on to his lands has probably increased, but the increase, if any, has been caused wholly, or almost

wholly, by the pursuer feuing or letting on long leases for building purposes his lands of Coltness in those parts of the burgh. If the sewage is now creating a nuisance, it was and is by the actings of the pursuer and his predecessor above-mentioned that the sewage has been, and is being, conducted on to his lands; and he and not the Commissioners are bound to remove any nuisance which may be thereby caused upon his lands. The whole system of draining under the control of the defenders was formed, and the necessary funds were borrowed, and the assessment imposed under the 'General Police and Improvement (Scotland) Act, 1862,' and not under 30 and 31 Vict. cap. 101."

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The defenders pleaded;—(3) The defenders having a right to discharge the sewage of the burgh on to the pursuer's lands as set out in the defenders' statement, they ought to be assoilzied, with expenses. (4) The drainage arrangements whereby it is alleged that a nuisance is caused, having been made by the pursuer or his predecessor in the said lands and estate, or being in partial substitution for those made by him and them, as alleged in the defenders' statement, the action cannot be maintained.

At the close of the proof a new plea was added,—“The pursuer is barred from maintaining the present action, because (1) he and his predecessor in the lands of Coltness took part in setting up the sewage system of which he complains, acquiesced therein, and took benefit therefrom, and (2) the alleged nuisance is due to his own actings in disusing his irrigation works, and feuing or leasing his lands within the burgh.”

The facts of the case upon which this defence was founded are narrated in the following extract from the opinion of the Lord Ordinary, which was admitted at the debate to be a correct account thereof:—“It appears that before the passing of the Public Health Act, 1867, and before the adoption [in 1862] of the Police Act of 1862 by the burgh of Wishaw, the late Mr Henry Houldsworth, the father of the pursuer, had constructed sewers for carrying off the drainage of houses built on his property within the present boundaries of the burgh, and held on feu-rights or long leases under him. The sewage of these houses was discharged by the drains so constructed upon Mr Houldsworth's lands of Coltness, and many, although not all, of the leases contained clauses by which the tenant was taken bound to drain his lands and houses into the main sewer, if any, in the street or roadway in front, or to discharge his sewage at any point the proprietor might direct, and by which the proprietor, if he constructed the main drain, became entitled to the whole sewage thereby discharged. The defenders took advantage to a certain extent of the sewers constructed by Mr Houldsworth when they executed their own works in 1868. They connected new drains with certain of Mr Houldsworth's existing drains, they lifted and relaid others, and they cut off the drainage from a third class and conveyed it in a different direction. The result of their operations is, that they now discharge a much greater quantity of sewage upon the pursuer's lands than was conveyed to these lands by Mr Houldsworth's drains in 1868. The list No. 95 of process shews the number of houses draining into Coltness before the drainage scheme of 1868, immediately after the execution of the scheme, and at the present time. It shews a great increase of drainage at all the outlets, and particularly at the outlets Nos. 1 and 2 on the pursuer's plan, which afford the most serious ground of complaint; and it appears that the total number of houses draining on to the lands of Coltness, which before 1868 was 324, is now 57. I did not understand it to be maintained in argument, although it appears to be suggested on record, that the construction of Mr Houldsworth's drains implied a right to the defenders to make use of them as

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parts of a larger system of drainage than Mr Houldsworth had contemplated, and for the purpose of discharging upon the lands a greater quantity of sewage than they were originally intended to carry. But it is said that the pursuer and his predecessor not only allowed this use to be made of their drains without objection, but took part in setting up the system of which he now complains. It is to be kept in view, in considering the facts on which this plea is founded, that the pursuer succeeded to the estate of Coltness on his father's death in January 1868, and that the defenders' operations were not begun till sometime after the 27th of April in that year. The conduct, therefore, upon which the defenders found their plea of acquiescence, must be the conduct of the pursuer himself, since he was proprietor of the estate at the date of the construction of the works, to the use of which it is said that he is barred from objecting. But still it may be necessary to consider what was done before his succession, since the defenders' case is that he adopted and carried on a system which had been begun by his father. The facts which are said to be material in this point of view are, that before the defenders had undertaken the duty of draining the burgh Mr Houldsworth and his tenants had made some use of the sewage, which was discharged into open ditches on his property, from the drains he had himself constructed, for the purpose of manuring their land, and that in 1867, and presumably in anticipation of the defenders' operations, he had constructed a settling-pond for the purpose of collecting the sewage on his farm of Thrashbush. This appears to have been all that was done in the late Mr Houldsworth's lifetime. When the defenders' works were executed in 1868 this settling-pond was connected with one of their sewers by a continuation of the sewers, extending for about sixty yards into Mr Houldsworth's lands, beyond the burgh boundary, and leading into an open ditch. Another settling-pond was made in the summer of 1868, at a place called Murray's Acre, for collecting the sewage discharged at another outlet of the defenders' system. And both these ponds were used for some years for the purpose of irrigating the pursuer's lands, the solid matter being allowed to settle in the ponds, and the liquid manure being carried partly by open cuts and partly by pipes through the fields. This system was pursued, and apparently with some success, for two or three years, when it was found to be mischievous, and in 1873 or 1874 it was discontinued. The settling-ponds, however, were not destroyed, but they were no longer allowed to act as receptacles of solid matter; and the sewage from the burgh now passes through them in the same way as through any other channel, no part of it being interrupted for the purpose of manuring the land."

The Lord Ordinary (Kinnear), on 28th March 1887, pronounced this interlocutor:—"Finds that the defenders, as the Local Authority of the burgh of Wishaw, have provided a system of drains and sewers for the said burgh, by the use of which, in accordance with the purpose and design of the works, sewage or drainage of a grossly polluting kind has been discharged upon the lands of Coltness, belonging to the pursuer, and into the streams called the Templegill Burn and the Whinnie Burn, running through the said lands, to the injury of the pursuer, and in violation of his legal rights: Finds that the pursuer is entitled to interdict against the continuance of the nuisance caused by the said discharge of sewage: but supersedes consideration of the cause for two months, to allow the defenders an opportunity of stating what means, if any, they are prepared to adopt for the abatement of the said nuisance," &c.*

* "OPINION.—The pursuer has proved that, by a system of drains and sewers

The defenders reclaimed, and argued ;—(1) The pursuer was not entitled to sue this action, because of the contract implied from his being in 1868

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provided for that purpose, the defenders have for many years discharged, and are still discharging, a considerable portion of the sewage of the town of Wishaw upon his property of Coltness, and have thereby created a nuisance of a very injurious character. I do not think it is seriously disputed, and, at all events, it is very clearly proved, that this discharge of sewage is in fact a nuisance. It is suggested, indeed, that the injury to the pursuer might be materially diminished if the whole of the water of a burn, called the Meadow Burn, which is now impounded for the use of a distillery, were allowed to flow in its natural course into the Templegill Burn, the pollution of which forms the chief ground of complaint. But if the pursuer is responsible, which is not proved, for the impounding of the Meadow Burn, it must be assumed that he has a right to divert the water, or to sanction its being diverted, for the benefit of the distillery, and he cannot be restricted in the exercise of his proprietary rights in order to diminish the nuisance created by a discharge of drainage which he complains of as a wrong. It is equally clear that, but for the special defence relied upon by the defenders, the discharge of sewage upon the pursuer's property would be in violation of his legal right. It makes no difference that the defenders are a body of magistrates charged with a public duty, because the Act of Parliament gives them no right which the common law refuses to throw the sewage of the town upon the pursuer's property.

"The only question of difficulty, therefore, is whether the defenders have acquired from the pursuer or his predecessors a right, which they would not have otherwise, to make this use of his property? The ground in law on which they maintain their right is not very clearly set forth in their pleas as originally stated. They do not allege any antecedent agreement, by virtue of which they became entitled to discharge sewage on the pursuer's lands, or to execute the drainage works which they use for that purpose. But by a plea which was added after the close of the proof, they plead that the pursuer is barred from maintaining the action (1) Because he and his predecessors in the lands of Coltness took part in setting up the sewage system of which he complains, acquiesced therein, and took benefit therefrom; (2) Because the alleged nuisance is due to his own actings in disusing his irrigation works, and feuing or leasing his lands within the burgh.

"The question therefore is, whether the facts which have been proved are sufficient to support this plea in either of its branches?"

(His Lordship then stated the facts as above narrated, and proceeded)—"These are the material facts; and they appear to me to be insufficient of themselves to establish either a grant of servitude, or any binding contract between the pursuer and the defenders. The operations, so far as they were conducted on the pursuer's land, are said to have been executed by the late land-steward Mr Fair, who had no authority to make any agreement for subjecting his employer's land to a permanent burden; and the pursuer himself does not appear to have been consulted as to any arrangement for taking sewage from the burgh. The defenders, indeed, as already observed, do not allege that there was any actual agreement, either with the pursuer himself or with any person authorised to bind him. But they say that, independently of any antecedent bargain, the facts imply an agreement for the mutual advantage of the parties, by which the defenders are allowed to get rid of their sewage, and the pursuer is allowed to utilise it for the benefit of his land. But an agreement for mutual advantage must be binding on both parties; and it is not suggested that the defenders are under obligation to the pursuer to give him the sewage of the burgh in perpetuity, even although they should be able hereafter to dispose of it otherwise to greater advantage. The pursuer must, no doubt, be held to have accepted the sewage which he tried to make use of for his own benefit. But the question is, whether he has bound himself to submit to the continuance of the nuisance in perpetuity; it is not alleged that he has agreed to do so, and I am unable to

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a party to the making of the works now complained of. The pursuer had an interest in getting the sewage for use in the irrigation works he made, and the defenders were under an obligation to him to give it. The Lord Ordinary was in error in thinking that the defenders did not maintain that they were under an obligation to the pursuer. There was nothing improbable in the agreement said to be implied, as the pursuer was interested in the prosperity of Wishaw. (2) In any view, the pursuer was barred by acquiescence for nearly twenty years in the present system of drainage. The argument from acquiescence was quite independent of any alleged

see anything in his conduct which should bar him from denying that he has so agreed.

"But it is said that, apart from any agreement, express or implied, he is barred by acquiescence from complaining of a nuisance which he ought to have prevented before any cost had been incurred, if he did not intend to submit to it. The pursuer himself was not much at Coltness during the year 1868; and no communication was made to him on the part of the burgh, either verbally or by letter, as to their drainage scheme. Nor does he appear to have been fully informed as to the operations which were going on, either within the burgh boundaries or on his own estate. But he knew, on the one hand, that the Local Authority was executing works for the drainage of the burgh, and, on the other, that his land-steward was executing works for the irrigation of his land. He must be held, in a question with the burgh, to have assented to what was done by the persons to whom he left the management of his property; and acquiescence will therefore be pleadable against him to the same effect as if the operations upon his estate had been executed by his direct instructions. But assuming that to be so, all that is proved is, that he allowed the burgh to discharge a quantity of sewage upon his land, endeavoured to make use of it for his own benefit, and made no complaint until it turned out to be a nuisance. It appears from the evidence of Mr Bain, the factor, that the nuisance first began to be seriously offensive in 1877. The attention of the Local Authority was called to it in that year, and it has been growing worse and worse every year since then. Acquiescence in a nuisance, so long as it is not serious, will not deprive a proprietor of his right to object to it when it is materially increased. Nor does it appear to me to make any difference that he has endeavoured, in the meantime, to neutralise it by operations upon his own land, or even to turn it to advantage. Assuming that the pursuer must be held to have assented to the discharge of sewage, to which he submitted in 1868, or even until 1877, it does not follow that he has also assented to the greatly increased discharge of which he now complains. It is said that he has permitted a drainage system to be carried out, which cannot now be altered without great cost. But there is no evidence that the system was carried out in reliance on any conduct on the pursuer's part, from which the Local Authority was entitled to infer that he was willing to accept the sewage of the whole drainage district which they now discharged upon his lands. The evidence of Mr Reid shews that the system which they adopted in 1868 was the cheapest and most convenient for the burgh at the time, and that there will be no difficulty in sending the sewage in a different direction now, if it should be found that the pursuer is not bound to submit to the nuisance. It is true that about £78 of the original cost of constructing the present drains will be lost to the burgh if their drains are made useless. But, on the other hand, the burgh saved £105 by adopting the drains which had been already constructed by the late Mr Houldsworth; and, in the meantime, they have had the benefit of the cheaper system for upwards of eighteen years.

"The second branch of the defenders' plea cannot be sustained, if the plea is not well founded in its first branch. If the pursuer is not bound to accept whatever amount of sewage the defenders may think fit to discharge upon his estate, he is under no obligation to them to continue his irrigation works, when irrigation by sewage has proved to be injurious to the land. That he has fenced or leased his land within the burgh, can give no right to the burgh authorities to discharge sewage upon his estate beyond the burgh to his nuisance."

difficulty as to contract. The principle which applied was contained in the judgment of Lord Campbell in *Cairncross v. Lorimer*¹—viz., “if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained—he cannot question the legality of the act he has so sanctioned to the prejudice of those who have given faith to his words, or to the fair inference to be drawn from his conduct. The same principle was applied in *Aytoun’s case*.²”

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The pursuer’s counsel was not called on.

At advising,—

LORD JUSTICE-CLERK.—In this case we had a very able speech from Mr Balfour against the interlocutor of the Lord Ordinary; but we do not think it necessary to call for any reply, because it appears to us that that interlocutor is founded on sound principles, and ought to be adhered to.

I need not resume at any length the nature of the contention, because, notwithstanding the very voluminous print which we have here, the case lies within a very narrow compass indeed.

The action is an action for interdict against the Police Commissioners of the burgh of Wishaw, and it seeks to interdict them from discharging the sewage of the burgh upon the lands of the pursuer, Mr Houldsworth. A variety of questions are raised, but the substantial defence—that to which counsel for the Commissioners in the end came in opening his case—is this. It is summed up in the third plea in law, which is to the effect that the defenders having a right to discharge the sewage of the burgh on the pursuer’s land, as set forth in the defenders’ statement of facts, they ought to be assoilzied.

On that question I have come to the clearest opinion that the Commissioners have no right whatever to discharge the sewage of the burgh upon the lands of the pursuer without his consent. Another question, which is a somewhat subordinate but relative question, which has had to be considered is this, whether Mr Houldsworth had bound himself to permit this use of his land, and in what manner that agreement or undertaking on his part had been expressed.

An outline of the facts may shortly be given. Prior to 1868 the late Mr Houldsworth had strong faith in sewage irrigation, and to a certain extent had practised it in concert with the burgh of Wishaw. In 1868 the burgh of Wishaw entered upon a new scheme for the sanitary purposes of the burgh. There was, in particular, a new plan made out for the disposition of the sewage. Undoubtedly in the knowledge of Mr Houldsworth they went to considerable expense in the construction of drains which communicated with other drains already constructed. Many of these drains communicated with sewers that were constructed on Mr Houldsworth’s land. The result was that the drainage of the burgh was carried off from the burgh to the lands of Mr Houldsworth, and that in a manner—for that was the purpose in view—which gave facilities for using it for sewage irrigation. Now, the sewage was used for that purpose pretty extensively. There were works on Mr Houldsworth’s own land which he had constructed himself for the purpose of disposing of the sewage when it

¹ August 9, 1860, 3 Macq. 827.

² *Aytoun v. Melville*, M. App. voce Property, No. 6, May 19, 1801.

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was taken to his lands. There were also works within the burgh which were constructed certainly in the knowledge of Mr Houldsworth, and to a certain extent constructed at his own expense. From 1868 to 1874 that system was continued by the present Mr Houldsworth, who succeeded his father in 1868. But after the time I have mentioned the whole scheme fell through as far as it was a beneficial operation for the agricultural value of the lands of Mr Houldsworth. Any benefit the lands derived is said to have come to an end. The drainage system, however, remained in the same position, and the drainage has gone on in the same way ever since, flowing to a certain extent, at all events, through the lands of Mr Houldsworth. The question now is, the present Mr Houldsworth being entirely dissatisfied with the state of matters now existing, and not in the least inclined or prepared to continue the present system, is he under any obligation to do so? Now, Mr Balfour maintained quite unreservedly that not only was he bound to submit to this discharge of sewage on his own land, but that what was effected by the late Mr Houldsworth and the burgh amounted to a perpetual contract between the owner of the lower land,—that is, Mr Houldsworth on the one hand, and the authorities of the burgh of Wishaw on the other hand; that the burgh authorities were bound to Mr Houldsworth to continue to discharge the sewage on the lands of Coltness, and that in like manner Mr Houldsworth was bound to continue to allow the drainage to be received upon his lands. There is nothing in the shape of writing that could by possibility be construed to amount to a contract or agreement of that kind. Mr Houldsworth, who, as I have mentioned, succeeded his father in 1868, positively denies that he ever made, or dreamed of making, an agreement of that kind, and the mode in which the agreement was supposed to be constituted, according to counsel for the burgh, was by permission, or rather a tacit encouragement or inducement, to expend money in structural works, which could only have been done on the footing of such an agreement having been entered into. Now, I have no doubt at all that the commissioners for the burgh of Wishaw did spend their money on those structural works, and that they hoped and believed that the proprietor of Coltness would remain of the same opinion in regard to his own interest as that which induced them to commence these operations. But the proprietor was not under any manner of obligation to do so. It was a matter of mutual convenience during the pleasure of both parties, and either the one or the other could have determined the arrangement at any period they might choose.

That is the general conclusion which I have come to, and that is what the Lord Ordinary has found. Indeed the nature of the thing necessarily implies that either party could terminate the arrangement at any period which might be chosen by the particular party wishing to bring it to an end. The Commissioners could have stopped sending the sewage on to these lands at any time. They might have disposed of the sewage otherwise. There was nothing to prevent them adopting another mode. Nothing took place in the course of their proceedings to prevent them making use of the best mode for the burgh which they could find. And indeed, suppose that had not been the case, but that they had entered into a perpetual agreement of the nature contended for, I doubt very greatly if they would have had power to bind their successors in such an arrangement. The ground of my opinion, therefore, in conformity with the opinion of the Lord Ordinary, is that there is no such agreement as that founded on, and that the burgh did not acquire any right to continue the

transmission of sewage through the lands of Coltness contrary to the will of the proprietor. It has now become nothing but a nuisance as far as the estate of Coltness is concerned. That is plain enough, and I do not think the proprietor of the lands is bound to submit to it.

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LORD YOUNG.—I am of the same opinion, and I own without any difficulty. The conclusion of the summons is for declarator that the defenders are not entitled to emit or discharge from the sewers or pipes under their control sewage and drainage matter upon the lands of the pursuer. I repeat that that is simply a declaratory conclusion. The only other conclusion is for interdict conform to that declaratory conclusion. The Lord Ordinary has pronounced decree in terms of the declaratory conclusion, superseding the case with respect to the interdict upon very intelligible and, I think, proper grounds. Now, it is admitted in the able and exhaustive opening speech of the counsel for the Commissioners that the defenders were not entitled to discharge their sewage on the pursuer's lands unless they could shew a contract with him to that effect—that what they were doing could not be defended, and therefore could not be continued against objections on the part of the proprietor, unless a contract with the pursuer as the proprietor of the lands could be shewn. There was indeed an alternative plea of acquiescence,—that is, that the pursuer saw, and indeed must have seen, when the drains were constructed, that the Commissioners intended to discharge the sewage upon his land, and that if he did not object then, he is barred by acquiescence from objecting now to the discharge of that sewage by means of the system which he allowed to be established with that end in view. Now, in these sentences I think I have stated the whole case.

I do not think I should have allowed a proof upon such a plea as that upon the present record. I should have thought it clear that the pursuer had stated a relevant case to which there was no relevant defence. That would have been my opinion, and I should therefore not have been disposed to permit any evidence to be led at all. But taking the evidence which we have here, I am clearly of opinion with the Lord Ordinary and with your Lordship that no such contract has been established as that which alone could be a defence to the action. It would be a very anomalous contract—though intelligible enough and stateable enough—that the burgh of Wishaw shall, on the one hand, be entitled and bound to discharge their sewage upon the pursuer's land, and that the pursuer, on the other hand, shall be entitled and bound to receive it, these being the obligations and rights *hinc inde*, the one party entitled and bound to send the sewage, and the other party bound and at the same time entitled to receive it. But I think a contract of that kind would require to be put into writing, or at least into very distinct expression. One would not readily imply it from facts and circumstances. It is such an out-of-the-way thing that one could not readily infer it from any facts and circumstances without there being writing upon it. Now, of such a contract I here find no relevant allegation. There is nothing in the record of that nature, and I find no support for it in the evidence at all. And as to acquiescence, it is said that the time for the pursuer to object was when the Commissioners were forming their drains, and that, if he did not object then, he must take the consequence in all time coming, and must receive the sewage which the inhabitants of Wishaw discharge through these pipes. I think that proposition is simply extravagant. I

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should not upon any statement in the record have allowed any evidence upon that point, but as far as the evidence goes, I think there is no evidence in support of that proposition.

LORD CRAIGHILL.—I am entirely of the same opinion. I think the case is a very clear one as presented by the Lord Ordinary in his note. In regard to what Lord Young has said, I do not think it necessary to enlarge upon the question of contract or acquiescence. I am clear that neither contract nor acquiescence has been established.

LORD RUTHERFURD CLARK.—I agree.

THE COURT adhered, with this variation, made of consent, that the time allowed to the defenders was extended to the first sederunt-day in October.

MURRAY, BEITH, & MURRAY, W.S.—D. HILL MURRAY, Solicitor—Agents.

No. 172.

July 15, 1887.
Dow v. Imrie.

REVEREND PETER DOW, First Party.—*Ure*.
REVEREND D. N. IMRIE, Second Party.—*Pearson*.

Church—Stipend—Assistant and Successor—Annat.—It was provided in an agreement between a parish minister and his assistant and successor that the former should "surrender" to the latter £165 "of the annual income derivable from the benefice of said parish, payable half-yearly at Martinmas and Whitsunday." The minister having died on 29th April, held that under the agreement his executor was not bound to pay the assistant for his services between the previous Martinmas and that day, the stipend for that period being payable to the minister's next of kin as annat, and there having been no personal obligation upon him and his representatives to make any payment.

1ST DIVISION.
M.

THE REVEREND W. M. IMRIE, minister of the parish of Penicuik, having fallen into ill-health in 1886, an assistant and successor was appointed to him in the usual way.

On 30th July and 3d August of that year a minute of agreement was executed between Mr Imrie and the Rev. Peter Dow, his assistant and successor. The agreement bore,—“The parties hereto considering that on or about the 26th of December 1885, the said party of the first part, in consequence of ill-health, found it necessary to retire from the active duties of minister of the parish of Penicuik, and that he had agreed to surrender to an assistant and successor a certain sum of money per annum, as after specified, which said agreement was thereafter sanctioned and approved of by the Presbytery of Dalkeith,—therefore the parties have agreed, and hereby agree as follows, videlicet:—First, the said first party agrees (1) to surrender to the said second party the sum of £8, 6s. 8d. sterling, being the allowance for communion elements, and the sum of £165 sterling of the annual income derivable from the benefice of said parish, payable half-yearly at the terms of Martinmas and Whitsunday from and after the 3d day of August 1886, being the date at which the said second party is to enter upon the duties of assistant and successor, beginning the first term's payment thereof at Martinmas next for the proportion to fall due from the said 3d day of August 1886 to that term, and the next term's payment thereof at Whitsunday thereafter for the half year immediately preceding, and so forth half-yearly, termly, and continually thereafter during the lifetime of the said Peter Dow, so long as he shall be the said first party's assistant; and (2) to give up the manse and offices for the use and behoof of the said second party, on con-

dition that he, the said second party, shall pay all taxes and other assessments exigible in respect of the manse and offices.” No. 172.

Mr Imrie died unmarried on 29th April 1887. The stipend of the parish, which amounted to £314, 16s. 10d., exclusive of manse and offices, was due at Whitsunday and Michaelmas, but was, as matter of practice, collected half-yearly at Whitsunday and Martinmas. At Martinmas 1886, Mr Dow was paid the proportion of £165 effeiring to the period from the date of his induction to Martinmas 1886. July 15, 1887.
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Mr Dow having claimed a proportion of the sum of £165 corresponding to the period from 11th November 1886 to 29th April 1887—being £76, 8s. under deduction of income-tax,—a question arose between him and Mr Imrie’s executor as to whether it was due under the agreement, and a special case was arranged between them in which this question was put to the Court:—“Is the late Mr Imrie’s executor bound to pay out of the executry estate the foresaid sum of £76, 8s. to Mr Dow for services as Mr Imrie’s assistant and successor between the term of Martinmas 1886 and the 29th April 1887, the date of Mr Imrie’s death?”

Mr Dow, the first party, maintained that under the agreement he was entitled to a fixed sum of money from Mr Imrie during “the lifetime of the said Peter Dow so long as he shall be the said first party’s” (Mr Imrie’s) “assistant”; that on a sound construction of the minute of agreement, what Mr Imrie agreed to “surrender” was “a certain sum of money per annum,” and not the stipend of the parish, and that the word “surrender” in the first article of the said minute of agreement imported an obligation upon Mr Imrie to pay; that the sum to be paid to Mr Dow was not to be so paid when the stipend became due, but at the terms of Whitsunday and Martinmas; that Mr Imrie paid to Mr Dow the proportion of the sum due to him up till Martinmas 1886 from the 3d August preceding, whilst Mr Imrie had only in point of fact received stipend up till Michaelmas 1886; that no part of the stipend of the parish was ever conveyed by Mr Imrie to Mr Dow; that Mr Dow did not draw from the heritors any part of it, but Mr Imrie during his lifetime drew the whole of it without asking or obtaining the consent of Mr Dow; and that as a condition of Mr Imrie drawing the whole of the said stipend, he was bound either to discharge the duties of parish minister himself, or to provide and pay a substitute, if he were not able; and that Mr Dow having been the substitute appointed, he was entitled to be paid out of Mr Imrie’s estate the sum stipulated in the said minute of agreement.

Mr Imrie’s executor maintained that on a sound construction of the agreement, and as in a question between Mr Dow and Mr Imrie, the former took the place of the latter as regarded the manse and offices, the communion element money, and the stipend so far as surrendered; that in consequence of Mr Imrie’s death in April, the stipend which would otherwise have been payable at Whitsunday 1887 having passed to Mr Imrie’s next of kin as annat, there was no stipend to surrender for the period in question; and that, there being no personal obligation on Mr Imrie, independently of the agreement, to surrender part of the stipend, Mr Dow was not entitled to more than had been already paid to him.

It was explained that the income of the benefice consisted to a large extent of feu-duties payable out of the glebe.¹

At advising,—

LORD PRESIDENT.—In the course of last year, Mr Imrie, minister of the parish

¹ *Authorities cited.*—*Latta v. Edinburgh Ecclesiastical Commissioners*, Nov. 10, 1877, 5 R. 266; *Glebe Lands (Scotland) Act, 1866* (29 and 30 Vict. cap. 11), sec. 15.

No. 172. of Penicuik, became incapable of continuing the duties of his office, and in consequence Mr Dow, the first party to this special case, was appointed Mr Imrie's assistant and successor with the approval of the Presbytery. It became necessary that an arrangement should be made between the minister and his assistant and successor as to the remuneration of the latter, and the substance of the arrangement which was come to may be very simply stated. Mr Dow was to have possession of the manse and offices, and was to get a certain proportion of the stipend amounting to £165, leaving £149 with the minister. This arrangement was reduced to writing, and it is as to the construction of it that our opinion is asked.

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The first payment under the agreement fell due at Martinmas last, and was duly made. Mr Dow received the allowance due to him for the period from 3d August besides the stipulated allowance for communion elements, and he had also possession of the manse. Before the next term of Whitsunday—viz., the 29th of April last—Mr Imrie died. The effect of that was that no stipend was to be paid to him after Martinmas 1886, as for the half year from Michaelmas or Martinmas 1886 to Whitsunday 1887 it belonged to his next of kin, and that not in the character of his representatives or executors, but in their own right. That half year's stipend never belonged to Mr Imrie at all, because he died before the Whitsunday term arrived. The contention of Mr Dow is that, notwithstanding that that stipend never belonged to Mr Imrie, that gentleman and his personal representatives are liable to him in payment of a sum of £76, 8s. being the proportion of stipend due to him for that period as stipulated in the agreement.

I can quite see that there is a great deal of hardship in Mr Dow's case, because he performed the work of the parish for nearly half a year, and yet is to receive no remuneration, if Mr Imrie's executor's contention be sound. Nevertheless, looking to the terms of the agreement, I do not think it is possible to say that Mr Dow is entitled to anything except what comes to Mr Imrie in the shape of stipend. I cannot get over the words contained in the first paragraph of the minute. The first party agrees to "surrender" a certain sum per annum. That provision seems to assume that Mr Imrie must draw the stipend before he can pay Mr Dow a share of it. Mr Dow would have no title to operate upon the stipend at his own instance. The heritors would not pay it to him, and he had no assignation to it. It is clear that it must be uplifted by the minister before any of it can be paid to Mr Dow, and that then, and then only, the minister is under an obligation to pay to him. The obligation cannot arise until the stipend has been actually uplifted.

It appears to me therefore that the terms of the agreement preclude the possibility of our acceding to Mr Dow's contention that the executor shall pay the £76, 8s., which is said to be due for the term of service after Martinmas 1886. According to that contention the agreement must be construed as imposing a personal obligation on Mr Imrie to pay certain money to Mr Dow, whether it was received in the form of stipend or not. I have therefore come to the conclusion that the question must be answered in the negative.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT accordingly answered the question in the negative.

LINDSAY MACKERSY, W.S.—H. W. CORNILLON, S.S.C.—Agents.

JOSEPH SMITH, Pursuer (Respondent).—*Shaw—Wilson.*
LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defenders
(Reclaimers).—*Darling—G. R. Gillespie.*

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July 15, 1887.
Smith v.
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ance Co.

Arbitration—Appointment of oversman—Casting lots.—Two arbiters, who had power to appoint an oversman, differed as to which of two persons should be nominated. Both were agreed that the two were equally eligible, and eventually they selected one by lot. *Held* that the appointment was valid.

Arbitration—Oversman—Disqualification.—*Held* that two arbiters, who had power to appoint an oversman, were not entitled to appoint a person who was a shareholder in an unincorporated company—one of the parties to the reference.

IN May 1885, a fire occurred in the shop of Mr Joseph Smith, shoemaker, Stenton, East Lothian. Smith's stock, &c., was insured against fire to the extent of £300 with the Liverpool and London and Globe Insurance Company.

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Lord Lee.
M.

Smith's claims under the insurance policy were by a deed of submission referred by him and the Company to the decision of Messrs James Brand, auctioneer, Dunbar, and J. S. Mair, merchant, Glasgow, arbiters mutually chosen, and in case of their differing, to the decision of an oversman to be chosen by the arbiters before entering on the business of the submission.

By deed of nomination, executed by Messrs Brand and Mair, who had accepted office, Mr William Lyon, auctioneer, was on 25th February 1886, appointed oversman, and he subsequently agreed to act. Mr Lyon heard the proof in the arbitration, along with the arbiters, and the arguments of parties upon it, which occupied two days. The arbiters having differed in opinion as to the amount to which the pursuer was entitled, it was arranged that they should meet with the oversman in Edinburgh, and give in written reasons in support of their respective opinions. The oversman first issued notes of his proposed award, and thereafter on 7th June following pronounced a decret-arbitral, which was signed on 1st July, awarding Smith £70 in full of his claims, and giving no expenses to either party.

Immediately thereafter Smith brought an action of reduction of the deed of nomination of 25th February, and of the decret-arbitral. He called the Insurance Company, the arbiters, and the oversman as defenders.

He stated,—(Cond. 7) "The said William Lyon was not fairly, properly, or legally chosen to be oversman. The said arbiters did not *bona fide* concur in the choice of the said William Lyon, or exercise their judgment as to his appointment, but tossed or cast lots for the oversman to be appointed, or for the exclusive right to name an oversman; and it was the result of such tossing or casting of lots that the said William Lyon was appointed as oversman. . . . The said arbiters, in appointing the said William Lyon in the manner mentioned, acted in violation of their trust-duty." (Cond. 8) "The said William Lyon was personally disqualified from acting as oversman in the said submission by reason of his interest in, and connection with, the said Insurance Company. Besides being a shareholder in the Company to the extent of £800, he was regularly employed by them professionally; and in consequence, his mind was biassed in favour of the Company, and his impartiality was destroyed. . . ." (Cond. 9) "Immediately upon the pursuer becoming aware of the improper way in which Mr Lyon had been appointed, and of his said disqualification for the post, the pursuer formally intimated that he declined the jurisdiction of the said William Lyon as oversman,

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ance Co.

The defenders generally denied the pursuer's averments in conds. 7 and 8, and stated in regard to Mr Lyon's appointment as oversman,—"The arbiters met in Edinburgh on 23d February 1886, when Mr Mair suggested Mr Lyon, and Mr Brand suggested Mr Dowell, auctioneer, Edinburgh, as oversman. Both arbiters having stated that they had no objection to either of these gentlemen, but each preferring his own nominee, they agreed to draw lots to determine which of these gentlemen should be appointed, and the lot fell upon Mr Lyon. Both arbiters, in the exercise of their judgment, agreed to approve of either of the gentlemen named; and after drawing lots, both approved of Mr Lyon's nomination." They further stated that the pursuer's agent had made no protest against Mr Lyon's acting until he had issued notes of his proposed award, which the pursuer considered unfavourable.

The pursuer pleaded, *inter alia*;—(1) The nomination of the said William Lyon as oversman in the said submission having been determined by chance, and not by the mutual choice of the said arbiters, the said deed of nomination, and all that has followed on it, ought to be set aside. (4) The said William Lyon having been personally disqualified from acting as oversman, his nomination and the said decree-arbitral ought to be reduced.

The defenders pleaded, *inter alia*;—(2) The statements of the pursuer being unfounded in fact, the defenders are entitled to be assoilized. (4) The pursuer having homologated the nomination of the oversman, he is barred from suing this action.

The following summary of the evidence in the case is taken from the Lord Ordinary's note:—

"1. The oversman was selected by casting lots. After some discussion as to the propriety of appointing a practical shoemaker, each arbiter proposed an auctioneer. The arbiter appointed by the Company proposed Mr Lyon, and the arbiter appointed by the pursuer proposed Mr Dowell. As neither would agree to the oversman proposed by the other, the arbiters agreed to cast lots, and the lot fell upon Mr Lyon.*

"2. Mr Lyon was at this time, and still is, a holder of capital stock of the defenders' Company to the extent of £50, and the present value of which is about £830, being twenty-five shares, each of the value of £33, 10s. The total stock of the Company is £245,000. Mr Lyon had also been employed by the Company occasionally as a valuator.

"3. At the time when he was so selected, Mr Lyon was unknown to both arbiters excepting by repute as an auctioneer of experience. Neither

* Mr Brand deposed as to this:—"We could not agree then about an oversman. I said to Mr Mair that I thought it was a pity he had not accepted of a practical man for oversman, but he deprecated having anyone apparently but Mr Lyon. I proposed Mr Dowell. I said I did not know Mr Lyon unless by repute, and that I had no acquaintance with him, but that Mr Dowell I knew well and intimately. Mr Mair, however, would not agree to Mr Dowell. I said, so far as I recollect, that I had no objection to Mr Lyon, and that I supposed he would be a man capable of filling the position of oversman, although I did not know him. That was to say that if Mr Mair did not want a practical man, but an auctioneer, I proposed Mr Dowell. When I found that he would not agree to Mr Dowell, I then said we had better draw lots; but I am not very sure whether it was Mr Mair or myself who proposed that; at all events it was proposed, and we proceeded to put the two names into a hat. I drew the lot out, and it happened to be Mr Lyon." This evidence was corroborated by Mr Mair.

arbiters had made any inquiries as to his fitness, and neither was aware that he was a shareholder in the defenders' Company. It is now stated by each of them that had this been known he would not have been proposed or appointed; but it was stated by the pursuer's arbiter at the time when this mode of selection was agreed to, that he had no objection to Mr Lyon, and supposed that he would be capable of filling the position, although he did not know him.

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"4. When the result of the arbiters' meeting to select an oversman was communicated to the parties and to Mr Lyon, neither he nor the defenders noticed or adverted to the fact that he was a shareholder. The fact appears to have been overlooked by them, and was not mentioned even when the formal nomination and acceptance were executed.* It was not within the knowledge of the pursuer or his agents. It was first mentioned after the proof had been concluded, and at the meeting of arbiters and oversman for consideration of the award, when Mr Lyon stated that it had come to his recollection.† At this meeting the agents of the parties were not present. But the arbiters, considering that the proceedings were so far advanced, concurred in asking Mr Lyon to proceed. The clerk suggested no difficulty, and Mr Lyon appears to have agreed to do so, without any communication with the parties or their agents. A minute of devolution was accordingly executed at this meeting.

"5. As soon as the fact came to the knowledge of the pursuer's agents, they lodged a minute declining the oversman's jurisdiction, and requesting the arbiters to name a new oversman. Notwithstanding of this Mr Lyon proceeded to issue his notes of the proposed award (against which the pursuer's agents represented under protest), and he subsequently, on 1st July 1886, issued the award now under reduction. The pursuer's agents appear also to have protested against the mode in which the oversman was selected when it came to their knowledge."

The Lord Ordinary (Lee), on 23d March 1887, after proof (the substance of which so far as material is given above), sustained the reasons of reduc-

* Mr Lyon deponed as to this:—"It was a few days before the 26th April that it had been recalled to me that I was a shareholder. I was walking along George Street, when a gentleman stopped me and said, 'Lyon, have you still your shares in the Liverpool, London, and Globe, because we are going to get a big dividend?' I said I was very glad to hear it. (Q.) Do you recollect what happened at that meeting after you had announced that you were a shareholder? (A.) Mr Brand and Mr Mair talked together with reference to the amount that they thought it should be settled for, and I said to them not to let £10 stand between them in the matter, but to get it adjusted and divide the difference, or something like that. (Q.) Did you suggest that there might be a difficulty about your being a shareholder? (A.) Yes, certainly. I said I considered it to be my duty to tell them that I was a shareholder before they devolved the reference upon me. They considered the matter and consulted together, and said they were satisfied that I would do what was right, and were quite satisfied that I should act in the matter, and they requested me to proceed, which I did."

† Mr Lyon deponed as to this:—"Further than the communication to the arbiters on 26th April, I did not make any communication to the parties or their agents at any time; I understood that that was entirely in the hands of Mr Kirk Mackie, S.S.C., the clerk to the reference. I issued notes of my award on 29th April. In the notes of my proposed findings there was intimation given to the parties that I was a shareholder. Shortly thereafter I found that the subject had been tabled of my acting as oversman. That was by minute lodged by the claimant on 10th May. That was the next step in the proceedings after I issued my notes of my proposed findings."

No. 173. tion set forth in the first and fourth pleas for the pursuer, and gave decree of reduction accordingly.*

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* "NOTE.— . . . I. As to the question of casting lots, the law stands upon a clear principle. It requires that both arbiters shall exercise a judgment upon the fitness of the person selected (*In re Cassel*, 9 B. and C., 624; *Hodson v. Drenry*, 7 Dowling, P. C. Reps. 569; *The European and American S.S. Company v. Crosskey*, 8 Scott's C. B. Reps. N. S. 397, and 29 L. J., Com. Pl., 155; *Bell on Arb.*, 188; *Russell on Arb.*, 226). A bare selection by lot cannot therefore be supported. If, however, each arbiter exercises his judgment as to the fitness of two persons, and both agree that both of these are fit and proper for the office, it is no objection that lots have been cast as to which of them shall be appointed. In such a case, however, it is essential, and it is implied in the decisions overruling the objection, that both of the persons for whom lots have been cast must have been selected by each of the arbiters as fit for the appointment (*Neale v. Ledger*, 16 East, 51; *re Hopper*, L. R., Q. B. 367).

"In the present case, I am of opinion that there was no agreement as to the fitness of Mr Lyon, such as existed with reference to the oversman appointed in the case of *Hopper*. A material fact, which was within the knowledge both of Mr Lyon and of the defenders at the time when the nomination was signed and accepted, was from inadvertence uncommunicated to the arbiters or to the other party. According to well-established practice, it was the duty of the oversman to intimate that he was a shareholder of the defenders' Company when he was informed of the appointment, or at least before proceeding to exercise his functions; and Mr Lyon recognised this duty by mentioning the matter to the arbiters as soon as it came to his recollection. The nomination was intimated to him about 24th February. It was accepted by him on 2d March. But the fact that he was a shareholder was not mentioned to the arbiters until 26th April; and it did not reach the pursuer's agents until some days after he had agreed, at the request of the arbiters, to continue to act. Whether it was an absolute disqualification or not, I think that the parties interested should have been informed of it. They might have waived the objection, but the arbiters could not do so; nor did they, until the 26th April, when they did so on account of the advanced stage of the proceedings, and without the concurrence of the parties. Both arbiters state that at the time of the appointment they would have recognised the fact as an objection, and would not have made the appointment had they known of it.

"I am, therefore, of opinion that the appointment in this case must be regarded as a bare appointment by lot, and that it cannot be supported.

"I think that the case is ruled by that of *Crosskey*, and is not in the same class as the cases of *Neale v. Ledger* and of *Hopper*.

"II. With regard to the other objection, my opinion is that it is also well founded. No doubt the interest of Mr Lyon was extremely small; so small, that in no event could the arbitration affect him to the extent of more than a few shillings. But I cannot say that his interest was so remote or shadowy as to raise no duty of disclosure.

"I think that there was a duty of disclosure incumbent both upon him and upon the defenders. It cannot be said that it was immaterial whether that duty was discharged or not; for it is impossible now to say that the objection would have been waived.

"The question, therefore, is, whether it is a good ground of declinature that an oversman is a shareholder of the company which is concerned as one of the parties to the arbitration; and I think it is.

"Although it does not stand upon the same ground as the objection of relationship to one of the parties, which is statutory, it is clearly implied in recent enactments that at common law there is no answer to it (see Court of Session Act, 1868, sec. 103, and Act of Sederunt, February 1, 1820). And there are many cases in which the objection has been given effect to (see *Aberdeen Bank*

The defenders reclaimed, and argued;—(1) Upon the first point the case differed from those in which it had been held that the appointment had been made by chance, and was therefore bad. Upon the evidence, both arbiters were agreed that either Mr Lyon or Mr Dowell would be a satisfactory choice,—and that being so, it was quite legitimate to draw lots as between them. There was thus selection, and not a bare appointment by lot. Personal knowledge was not necessary. The circumstances of this case were on all-fours with those of *In re Hopper*,¹ in which the authority of *Neale v. Ledger*¹ had been reaffirmed. (2) The appointment of an oversman by the arbiters was no doubt a trust power, but the fact of that power being delegated to the arbiters by the parties deprived the latter of the right to take any but the most substantial objections to any appointment they might make. The real inquiry here was whether Mr Lyon had sufficient interest in the defenders' Company to create a bias in his mind. On a calculation the whole temptation which he had to decide in favour of the Company amounted to two shillings. Cases dealing with the statutory objection (Acts 1594, cap. 216, and 1681, cap. 13), founded on relationship were not in point. They rendered the proceedings null at any time.² In the cases of the *Lord Advocate v. The Commissioners of Supply of Edinburgh*,³ and *Sibbald's Trustees v. Greig, &c.*,⁴ it was impossible to say that the Judges whose declinatures were repelled by the Court had not an interest or were not parties to the cause. What the Court inquired into was the question whether they had such an interest as would disqualify them,—“whether the interest was such as would have a palpable tendency to create a bias in the mind of an ordinary man.”⁵ Any interest would not disqualify them.⁶ The 103d section of the Court

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r. Scottish Equitable Insurance Co., 22 D. 162; *Blaikie's Trustees v. Scottish Widows' Fund*, 2 M. 595, in which six Judges were allowed to decline).

“It was argued that the case of a Judge of the Supreme Court is different, and that his declinature rests entirely upon privilege. I cannot assent to this view. I think that the right to decline arises out of the existence of a ground of objection. In so far as it can be called a privilege, it is possessed, even in a more unqualified way, by arbiters and oversmen. For a Judge is under obligation to exercise his office, and cannot refuse to do his duty towards any of the public except upon a sufficient ground. The situation of an arbiter or oversman is not less delicate than that of a Judge, and he can always decline. The only peculiarity in the case of a Judge arises from the limited number. For it was held in two cases that where the duty of deciding a cause could not be done if a declinator was sustained, it must be repelled (*Douglas, Heron, & Co.*, 1774, *Hailes' Decns.* 563; and *Friendly Insurance Co.*, *Elch. Jurisdiction*, 50).

“III. It was contended that, even if these objections were well founded, they were not a sufficient ground for reducing the nomination and decreet-arbital after so much procedure. I think that the case of *Ommaney v. Smith*, 13 D. 578, and the two cases in 5 Brown's Supplement there mentioned, are decisive against this contention. It cannot be said that in this case there was any delay in taking the objection.”

¹ *In re Hopper*, Jan. 17, 1867, L. R. 2 Q. B. 367; *Neale v. Ledger*, 1812, 16 East's Reps. 51.

² *Highland Roads Commissioners v. Machray, Croall & Co.*, June 25, 1858, 20 D. 1165, 29 Scot. Jur. 663; *Duke of Athole v. Robertson*, Dec. 15, 1869, 8 Macph. 299, 42 Scot. Jur. 135; *Ommaney v. Smith*, Feb. 13, 1861, 13 D. 578, 23 Scot. Jur. 303.

³ June 5, 1861, 23 D. 933, 33 Scot. Jur. 484.

⁴ June 13, 1871, 9 Macph. 399, 43 Scot. Jur. 150; see also *Gray v. Fowlie*, March 5, 1847, 9 D. 811, 19 Scot. Jur. 363.

⁵ Bell on Arbitration, secs. 234 and 240.

⁶ *Elliot v. The South Devon Railway Co.*, Jan. 31, 1848, 2 De Gex and Smale's Reps. 17; *Drew v. Drew and Leburn*, March 1855, 2 Macq. (H. L.) 1.

No. 173. of Session Act, 1868, provided that it was not in future to be a ground of declinature that a Judge was a partner in any joint stock company carrying on the business of fire or life assurance, or held stock as trustee in any incorporated company where either company was a party to a cause before him.¹ That section applied to Judges whether in the Court of Session or in any of the inferior Courts. Arbiters occupied in the eye of the law the same position as inferior Judges.² If the words of that section did not apply to them, at anyrate its spirit did.

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Argued for the respondent;—(1) The arbiters by drawing lots in appointing an oversman had acted *ultra fines mandati*, so that the nomination and all that followed ought to be set aside.³ The parties were entitled to have the concurrent judgment of the two arbiters. The arbiters must have knowledge of the business capacities of the oversman, although they need not be personally acquainted with him. The appointment must depend not on chance but on choice,⁴ and there must be an exercise of judgment and will on the part of the arbiters. Mr Brand knew nothing of Mr Lyon, beyond the fact that he was the member of a firm of auctioneers in Edinburgh. He said he would not have chosen Mr Lyon had he been acting alone. That was not enough to satisfy the requirements of the law as laid down in the above cited cases. (2) Mr Lyon had a clear interest in the defenders' Company, sufficient to disqualify him. He was a partner in an unincorporated company, and thus a party to the cause. (3) It was not in the power of the arbiters to waive such a disqualification, and they were bound to come back to the parties before they did so. What was committed to them was to appoint a proper person,—not one who was legally objectionable. (4) Arbiters were not included in the provisions of the 103d section of the Court of Session Act. They were not Judges in any Court in the Kingdom. The disqualification having been removed in the case of Judges, it was thereby impliedly retained in the case of arbiters.

It was stated at the bar that the defenders' Company was not incorporated.

LORD PRESIDENT.—In this case the Lord Ordinary has reduced the award of the oversman on two separate grounds.

The first is that the nomination of the oversman was illegal, in respect that the arbiters, who had the power of nomination, settled the matter by drawing lots and not by exercising their judgment in the selection of the most suitable person. If that were a correct representation of the facts of the case, I should have been of the same opinion with the Lord Ordinary. But it is necessary to look at the precise state of the facts as shewn by the evidence, and I think we have these brought out very clearly in the examination of both arbiters.

Mr Brand, who was the arbiter nominated by the pursuer, states what passed between Mr Mair, who was nominated by the Insurance Company, and himself, and that his own proposal was that a practical man should be made oversman. He did not however stand upon that, but went on further to discuss who would be a

¹ Borthwick v. Scottish Widows' Fund, Feb. 4, 1864, 2 Macph. 595, 36 Scot. Jur. 290; cf. also London and North-Western Railway Co. v. Lindsey, 1858, 3 Macq. 114; Proprietors of Grand Junction Canal v. Dimes, 1852, 3 Clark & H. L. Cases, 759.

² Forbes v. Underwood, Jan. 22, 1886, 13 R. 465.

³ Bell on Arbitration, sec. 347; Russell on the Power and Duty of an Arbitrator (5th edit.), p. 226.

⁴ *In re Cassel*, 1829, 9 B. & C. 624; Greenwood and Titterington, 1839, 9 Ad. & Ellis' Reps. 699; Ford v. Jones, 1832, 3 B. & Ad. Reps. 248; European & American S.S. Company v. Crosskey, Jan. 27, 1860, 29 L. J. C. P. 155.

proper person to appoint. He says,—“(A.) When I proposed Mr Dowell I said No. 173. that he was a man of long experience, and if he was not able to tell the price of a pair of shoes of a different size, he was clever enough, and had experience enough to get some person in his employment that would be able to do so. I knew what Mr Lyon’s profession was, and what firm he belonged to. I had no objection to him on account of his being an auctioneer. I knew Mr Lyon’s firm by repute, and I knew his son very well. There is no doubt his firm has a good reputation. I said to Mr Mair that I had no objection to Mr Lyon. I said that to him before the names were put into the hat. (Q.) Did you say something of this kind, ‘I suppose he will be all right’? (A.) I don’t think I made such a remark.” On the other hand, Mr Mair says,—“I said, ‘What do you say to Mr William Lyon?’ He said he preferred Mr Dowell. We then had some little talk in regard to that. I said I did not care much whether it was Mr Dowell or Mr Lyon that was appointed, but still after having nominated Mr Lyon, I preferred him. He said the same thing—that having nominated Mr Dowell, he preferred him. After some little talk, I said, ‘Well, seeing that neither of us seem to care which gentleman is appointed, let us put the names into a hat, write two slips of paper, each containing the name of one gentleman, put them into the hat and draw, and whichever of the gentlemen is drawn let him be nominated as oversman.’ That was done, and Mr Lyon was drawn.”

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ance Co.

It was represented to us by counsel for the pursuer that by the method thus pursued there was a substitution of chance for choice, and that is a very terse and emphatic way of characterising the objection, provided there are facts to support it. But I do not think it can be said there was no choice. There was in point of fact a *delectus*, not of one person but of two. Both arbiters were agreed that both the persons suggested by them were equally eligible as oversmen, but Mr Brand having originally selected and named the one, and Mr Mair the other, there was a little obstinacy on the part of each as to who should yield. In that condition of matters, the element of chance does come in, but to a very limited extent. What was submitted to chance was the choice between two persons acknowledged to be both equally suitable. That is not a good objection to a nomination. What appears to me to be the common sense view of the case is adopted in two very important cases in the English Courts. They are not binding upon us as precedents, but they commend themselves very thoroughly to my judgment, and I think we should follow them (*Neale v. Ledger*, 16 East’s Reps. 51, and *In re Hopper*, L. R., 2 Q. B. 367). It was held in these cases that there was just such an amount of choice and selection as would justify what was done. The result was that a perfectly eligible person, in the opinion of both arbiters, was secured. I cannot, therefore, agree with the Lord Ordinary that this is a good objection.

But there is another objection of a different character, which is very formidable, and indeed conclusive. It turns out that Mr Lyon is a shareholder in the defenders’ Company. It is represented that this gave him a very small interest in the Company—a point which I shall consider immediately. But I should like to say, in the first place, that no moral blame of any kind whatever attaches to Mr Lyon in connection with this matter. He had altogether forgotten the fact of his being a shareholder when he accepted the position of oversman, and when ever it was brought to his recollection he at once communicated it to the arbiters. It is said further that the interest which Mr Lyon had in the Company was so infinitesimally small that it is impossible it could affect his judgment. It was

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argued to us that it could not be suggested that his mind could be corrupted for the few shillings difference which a decision in the Company's favour would involve. To say this is, I think, wholly to misapprehend the case. In the position of oversman Mr Lyon became Judge in his own cause. No one is entitled to be that, and if he happens to act in such circumstances, then his judgment is bad. This is quite well settled. The cases of the *Aberdeen Bank*, 22 D. 162, and of *Blaikie's Trustees*, 2 Macph. 595, which are cited by the Lord Ordinary, are strong examples, and are precisely in point. The declinatures in these cases were due to the fact that the Judges so declining were members or partners of the society which was one of the litigant parties. In practice, I need hardly say that it has never been doubted that a Judge should not sit in such circumstances. No Judge has ever questioned the binding character of this disqualification. It can of course be obviated by a minute of parties. But this only confirms the view that the disqualification, supported by the decisions to which I have alluded, is in force, and that everyday practice is in conformity with them.

I have had occasion to say that I regretted that these objections have not been removed by statute, and to some extent this has been done by the Court of Session Act of 1868, sec. 103. But this does not apply to the case of oversmen, and, accordingly, so far as regards them, we are just where we were in the case of *Blaikie's Trustees*. I may add that a very important case occurred in the English Courts where a judgment of Lord Cottenham was called in question (*Dimes v. Grand Junction Canal Proprietors*, June 29, 1852, 3 Clarke, H. L. Cases, 759), on the ground that one of the litigants in the cause in which he was judging was a company of which he was a member. The question was thought so important that not only was it very fully argued in Court but it was referred to the whole of the English Judges, who returned very elaborate opinions, in accordance with which Lord Cottenham's judgment was set aside. It is contended that the laws of England and Scotland are not the same upon this point. I think they are the same in regard to an objection like the present, where the Judge is a shareholder of a litigant company. The laws of England and Scotland appear to me to be identical as regards this particular objection.

I was very anxious to know whether the Liverpool and London and Globe Insurance Company was incorporated or not. The Act of Sederunt of 1st February 1820 empowers a Judge to act although he may be a member or shareholder of any of the chartered banks who may be a litigant in the process before them. The ground of removal of disqualification in that case is that the litigant party is the corporation, and the corporation is the party to the suit. Where the company is not incorporated, then all the shareholders are parties to the suit, there being no one other than they to represent the company. So that the Act of Sederunt can have no application to an unincorporated company. I am therefore for repelling the first plea in law for the pursuer and sustaining the fourth, and giving decree as craved.

LORD MURE.—On the first point, I am unable to agree with the Lord Ordinary. The position in which, according to the evidence, Messrs Brand and Mair were placed was this, that they both thought either Mr Lyon or Mr Dowell quite well fitted for the duties of oversman, but that each preferred the one he had himself suggested. In these circumstances the English cases which have been cited shew conclusively that it was not illegal for them to cast lots between the two.

On the second point, I have come to the same conclusion as the Lord Ordinary.

It is settled by the cases of the *Aberdeen Bank*, 22 D. 162, and of *Blaikie's* No. 173. *Trustees*, 2 Macph. 595, that anyone holding shares in a public company cannot competently act as Judge in a cause in which that company is concerned. This is a fixed rule, I think, both in England and in Scotland, and must be applied here.

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ance Co.

LORD SHAND.—I concur with your Lordships upon both points. In regard to the first, I think that a choice was exercised by the arbiters. Both were agreed that either Mr Dowell or Mr Lyon would be a satisfactory selection, and the fact that they settled the matter by casting lots between them to settle which of two eligible men should be oversman cannot affect the validity of the appointment.

As regards the second point, neither of the arbiters was aware when the choice was made that Mr Lyon was a shareholder in the defenders' Company. When this fact was realised, it was at once brought under notice and made the ground of objection. It appears to me that Mr Lyon, as a shareholder, was really engaged in deciding a cause to which he was a party. It is not possible for us to weigh the extent of his interest in the Company. The Court cannot affirm the proposition that if that interest is large he may not act, but if small he may. That might lead to numerous disputes with no standard to which an appeal could be made as to what was or was not a sufficient interest to disqualify. I am of opinion that upon this ground the appointment of Mr Lyon as oversman was bad, and cannot stand.

LORD ADAM.—I am of the same opinion. Both persons for whom the lots were cast were selected as fit for the appointment of oversman. The only question was which of them should be first.

As to the second point, it is of supreme importance that the administration of the law should be pure and unsuspect. Any temporary inconvenience which may arise from the fact that anyone is disqualified by interest from acting as Judge in a particular cause is a minor consideration. I think the circumstance that Mr Lyon was a shareholder in the Insurance Company is conclusive.

THE COURT accordingly recalled the Lord Ordinary's interlocutor of 23d March 1887, in so far as it sustained the reasons of reduction set forth in the first plea in law for the pursuer; *quoad ultra* refused the reclaiming note, and adhered to said interlocutor in so far as it sustained the reasons of reduction set forth in the fourth plea in law for the pursuer, and reduced, decerned, and declared in terms of the conclusions of the summons, &c.

J. J. DYER, S.S.C.—A. P. PURVES, W.S.—Agents.

REVEREND JAMES BAIN AND OTHERS (Kirk-Session of Duthil, &c.),

Pursuers (Reclaimers).—*J. C. Thomson—A. J. Young.*

No. 174.

COUNTESS-DOWAGER OF SEAFIELD AND ANOTHER, Defenders (Respondents).

—*D.-F. Mackintosh—Darling—Maconochie.*

PRESBYTERY OF ABERNETHY, Defenders (Respondents).—*A. S. D. Thomson.*

July 15, 1887.
Bain v. Lady
Seafield.

Church—Excambion of glebe and churchyard—Consent of heritors.—Partial reduction of a deed.—The consent of heritors is not necessary to a contract of excambion of glebe lands.

The minister of a parish, with consent of the Presbytery, excambied the site of the church, the churchyard, and part of the glebe, for other lands belonging to a heritor in the parish.

In an action of reduction subsequently brought by the minister and the kirk-

No. 174. session for reduction of the deed as being null without consent of the heritors, held (1) that in so far as regarded the site of the church and the churchyard, the deed was invalid as granted without the consent of the heritors; (2) that *quoad ultra* the deed was valid—the pursuer and his successors in the benefice not being prejudiced by its partial reduction, or by the failure of the transaction with regard to the site of the church and the churchyard.

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1ST DIVISION.
Lord Kinnear.
B.

BY deed of excambion, dated 3d, 5th, and 6th May 1882, following upon and embodying the terms of a draft minute of agreement, entered into between the Earl of Seafield and the Presbytery of Abernethy, with consent and concurrence of the Rev. James Bain, minister of Duthil, on the narrative “that the said Earl of Seafield sometime ago signified to the said Rev. James Bain his desire to acquire part of the lands forming the glebe of Duthil, lying to the east and north of the churchyard, and extending to about one acre and one-half of an acre, with a view to plant and improve the said ground, which is in the immediate vicinity of the burying-ground of the family of Grant, and the said Rev. James Bain had expressed his readiness, subject to the sanction of the Presbytery of the bounds, and on receiving an equivalent therefor, to concede for the object in view the said parcels of ground, and also that the said Earl should at the same time acquire right to the ground occupied by the church and churchyard of the said parish to the exclusion of the right of the said Rev. James Bain and his successors in the said cure to graze with cattle or sheep the said churchyard,” the Presbytery, with consent of Mr Bain, disposed to Lord Seafield three parcels of the glebe lands of Duthil, as also the ground forming the churchyard of Duthil, and the site of the parish church, &c., together with all right, title, and interest which the Presbytery or Mr Bain or his successors in the said cure had or might claim thereto in all time coming. Lord Seafield, on his part, disposed to the Presbytery three acres of ground.

The excambion originated in a desire on the part of Lord Seafield to have the churchyard and the burying-place of the family improved.

Mr Bain and the kirk-session of the parish now sought to have the minute of agreement and the deed of excambion reduced. They called as defenders the Countess-Dowager of Seafield, who succeeded to the family estates on the death of her son, Lord Seafield, in 1884, the Presbytery of Abernethy, and Sir John P. Grant of Rothiemurchus and Lady Seafield as the two heritors of the parish.

The pursuers pleaded;—(1) The said agreement and contract of excambion fall to be reduced, in respect it was *ultra vires* of the parties thereto to have entered into the same. (2) In respect the said contract of excambion conveyed to the said Earl of Seafield the site of the church and churchyard of the parish of Duthil, the same falls to be reduced.

In answer to the first and second pleas Lady Seafield stated,—“In accepting a conveyance of the site of the church and churchyard Lord Seafield distinctly understood that it conveyed no right of property therein, but merely imposed upon him the responsibility of keeping the churchyard in order; and he never made, nor does the defender make, any claim under the conveyance. In estimating the land to be given in exchange to the minister, the extent of the church and churchyard, and also of the site of the public road, was included in the amount conveyed to Lord Seafield, and land of an equal amount was conveyed to the minister, Lord Seafield’s desire being that the minister should get full value for the ground taken from the glebe. The minister thus profited by the extent of the churchyard and site of the church being included. Neither the site of the church nor the churchyard has ever in any way been interfered with by the defender, except that she has assumed the

burden of keeping the churchyard in order; but she has never claimed or exercised any right of property over either the one or the other. She is quite willing and hereby offers to renounce any right purporting to be conveyed by the contract in or to the site of the church and churchyard, and to execute any deed which may be necessary to give effect thereto."

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Lady Seafield pleaded that the pursuers' statements were irrelevant.

The Presbytery of Abernethy pleaded;—The present defenders assuming, but not admitting, the relevancy of the averments of the pursuers and their title and interest to sue, and that the pursuer the Rev. James Bain is not barred *personali exceptione* from challenging the deeds sought to be reduced, plead that, as the arrangement contained in the said deeds has been and will be beneficial to the minister and his successors in office, and to the benefice generally, the decree of reduction concluded for should not be pronounced.

The heritors did not appear.

The Lord Ordinary (Kinnear), on 29th March 1887, pronounced this interlocutor:—"Finds that the contract and deed of excambion libelled, in so far as it purports to convey to the late Earl of Seafield the ground forming the churchyard of Duthil, and the site of the parish church thereof, or any right, title, or interest which the Presbytery of Abernethy or the minister of the parish of Duthil have in the said church or churchyard, was *ultra vires* of the said minister and Presbytery, and was and is invalid and ineffectual; and to this extent and effect finds, declares, and reduces in terms of the conclusions of the summons: Finds that, in other respects, the said excambion is valid and effectual to the parties; and, except to the extent and effect aforesaid, assoilzies the defenders, and decerns: Finds the defenders entitled to expenses."*

* "OPINION.—There can be no doubt that the excambion in question is invalid and ineffectual in so far as it purports to convey the churchyard and the site of the church to the late Earl of Seafield. But the defender avers that it never was intended to give the Earl a right of property in these subjects, but merely to subject him to the burden of keeping the churchyard in order; that she has neither exercised nor asserted any right of property in either the church or churchyard, and that she is ready to renounce any right in either which may be conveyed to her by the deed of excambion, and to execute any deed which may be necessary for that purpose.

"The only question, therefore, is whether the conveyance of the church and churchyard is to be considered as a mere error in conveyancing, which may be set right without affecting the subsistence or validity of the excambion in any essential respect, or whether the contract must be reduced *in toto* as being altogether illegal and ineffectual.

"The pursuer maintains that the excambion must be reduced *in toto*, on two grounds—first, because, independently of the attempted conveyance of the churchyard, the sanction of the body of heritors, as well as of the Presbytery, is essential to the validity of an excambion of a glebe in whole or in part; and secondly, because, if the conveyance of the churchyard is illegal, the entire conveyance and the contract upon which it proceeds must be set aside.

"There is no authority, so far as I know, in support of the first of these propositions. The heritors are the proper administrators of the churchyard, and there can be no effectual excambion of any part of it to which they are not parties. But they have no similar title or interest in the glebe. They are not the guardians of the benefice, and if the interests of the benefice are adequately represented by the minister in the cure and the Presbytery of the bounds, there appears to me to be no ground in law for setting aside an excambion of the glebe, otherwise unobjectionable, merely because the heritors as a body have not been parties to the transaction. Such excambions have not been uncommon,

No. 174. The pursuers reclaimed, and argued;—(1) The sanction of the heritors was as necessary to the excambion of the glebe as it was to that of the church and churchyard.¹ (2) The contract of excambion must stand or fall as a whole. It was admittedly invalid in regard to the church and churchyard. It could not therefore stand *quoad* the glebe. (3) The averments of essential error and misrepresentation were relevant to send to proof.

July 15, 1887.
Bain v. Lady
Seafield.

The respondents argued (1) that the sanction of the heritors was not necessary to an excambion of the glebe; it was sufficient if the minister and the Presbytery, whose duty it was to guard the interests of the benefice, were consenting parties to the deed. There was no authority to a contrary effect, and excambions entered into by those parties had frequently been given effect to by the Court.²

and it does not appear either from the decisions or the text-books that the consent of the heritors has ever been thought essential to their validity. It may be that the heritors other than the heritor with whom the excambion is made may have an interest to challenge a transaction which they conceive to be prejudicial to themselves or to the benefice. But a challenge on that ground must be based upon the fact of prejudice. In the present case the heritors make no complaints, and it is not suggested that they have any reason to complain. It does not appear to me that the pursuer can have any title to plead their absence as a ground for reducing an excambion to which he himself was party, with the sanction of the Presbytery of the bounds.

"The second proposition appears to me to be equally untenable. If Lord Seafield had bargained for a right of property in the churchyard, he and his representatives would have been entitled to plead that the contract must either be reduced altogether or affirmed in all its terms. But the defender does not claim to have any proprietary right in the churchyard, and is ready to renounce all such right as may appear to have been given to her by the terms of the conveyance, without demanding in return the restoration of any part of the land given by the late Earl in exchange for the glebe land which she desires to retain. The pursuer and his successors in the benefice are in no way prejudiced by the partial reduction of the excambion or by the failure of the transaction with regard to the churchyard. If he were to lose by the reduction any part of the consideration given to him or the benefice in exchange for his glebe land, he might be justified in demanding that the whole transaction should be set aside. But he loses nothing. The Presbytery is satisfied that the excambion is for the advantage of the benefice, and the only consequence of the churchyard having been taken into account would appear to be that it is more advantageous than it would have been otherwise. The case of *Hart v. Stewart's Trustees*, 3 R. 192, upon which the pursuer relies, appears to me to be inapplicable. It was held to be incompetent to make a new contract for the parties by substituting terms which might appear to the Court to be reasonable for the terms which were actually stipulated but under essential error. But in the present case it is not proposed to make a new contract. The defender is in possession of land under a conveyance which is in part ineffectual, because the minister and Presbytery have no power to convey the churchyard, but in other respects valid, because they have power to excamb glebe land. She is ready to renounce the right which she admits to be ineffectual. But it does not follow that she must also abandon the valid right which the minister and Presbytery had full power to grant, and for which she has given an adequate consideration."

¹ Duncan's Parochial Law, 531; Dalrymple v. Callender (Cranstoun Manse), July 11, 1827, 9 S. 935.

² Erskine's Inst. ii. 10, 61; Connell's Parochial Law, p. 428—see also Supplement, p. 97; Duncan's Par. Law, 528-533; Bremner v. Officers of State, June 29, 1831, 9 S. 838; Stewart v. Lord Glenlyon, May 20, 1835, 13 S. 787; Lockerby v. Stirling, June 25, 1835, 13 S. 978; M'Callum v. Grant, March 4,

LORD PRESIDENT.—I am of opinion that the Lord Ordinary has rightly disposed of this case. I had previously (*Bain v. Lady Seafield*, 12 R. 62) occasion to express my opinion that the contract and deed of excambion libelled on was to some extent illegal and invalid, as being *ultra vires* of the parties who conveyed, and that has been given effect to by the Lord Ordinary. But it is now contended by the pursuers, in the first place, that the Lord Ordinary's judgment does not go far enough, and that the contract should be held invalid in all respects in respect of the invalidity of part of it. Now, I can quite well understand that if the party in whose favour a stipulation is made finds that he cannot maintain it, and that consequently the consideration fails on account of which he undertook the obligation, it is reasonable for him to hold that the deed must go, on the ground that the consideration being removed the obligation no longer remains effectual. Accordingly that would have been a plausible position for the Countess of Seafield to have taken up, the position, namely, that as she could not get the ground of the churchyard and the site of the church she was no longer bound by the contract. But that is not the state of matters, for the Rev. James Bain's position is the reverse of all that. He loses nothing whatever by the judgment of the Lord Ordinary. As the Lord Ordinary has pointed out, he gains by the transaction. The churchyard and the site of the church are restored to the proper possessors, as being the property of the heritors of the parish in trust for the parishioners. It was part of his duty to defend these grounds from any encroachment, and to see that they were used for the proper purposes. Now, he has succeeded in restoring these matters to their proper legal position, so far at least as the site of the church and the churchyard are concerned. It is clear that he has given less consideration, as matters now stand, than under the original stipulation, and yet he retains everything that he stipulated for. And accordingly he cannot maintain that because part is illegal he shall be entitled to cut down that part of the contract which is perfectly legal.

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It is said further that there is an intrinsic nullity in the deed, because it was not consented to by the heritors, and this objection is directed to that part of the contract which excambes a portion of the glebe. The pursuers were asked to give their authority for that proposition, but none was produced. On the contrary, it has been shewn by the respondents that there have been many occasions on which contracts of excambion have been made with consent of the Presbytery and without the sanction of the heritors. The question perhaps may not have been directly raised, but if the objection had been tenable, it would have been stated. The fact remains that in a considerable number of instances the contracts passed without challenge. This plea therefore also entirely fails.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT adhered.

GORDON, PRINGLE, DALLAS, & Co., W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

1826, 4 S. 527—see Lord Glenlee's opinion; *Dalrymple v. Callander*, July 11, 1827, 9 S. 935—see Sess. Papers.

No. 175.

July 16, 1887.
 Guild v. Glas-
 gow Educa-
 tional Endow-
 ments Board.

JAMES WYLLIE GUILD (Macmillan's Judicial Factor), Petitioner
 (Reclaimer)—*D.-F. Mackintosh—Davidson.*

GLASGOW CITY EDUCATIONAL ENDOWMENTS BOARD, Respondents.—
Murray—Dickson.

Judicial Factor—Investment of trust-funds—Loan over buildings in course of erection.—Buildings in course of erection are not a security on which a judicial factor is entitled to lend trust-funds.

Circumstances in which a judicial factor was held liable to make good a loss of trust-funds arising out of a loan over subjects in course of building, which afterwards proved insufficient to meet it.

1st Division.
 Lord Trayner.
 B.

JAMES WYLLIE GUILD, C.A., was judicial factor upon the executry estate of the late Michael Macmillan, which, in terms of a scheme drawn up by the Commissioners under the Educational Endowments (Scotland) Act, 1882, fell to be handed over to the Glasgow City Educational Endowments Board.

Before making over the estate Mr Guild applied to the Court of Session for authority to denude, and for exoneration and discharge.

The estate in the factor's hands amounted to about £16,000, and it appeared upon the report of Mr Molleson, C.A., to whom the Lord Ordinary (Trayner) remitted the factor's accounts, that there had been a loss to the estate upon, *inter alia*, an investment of £2000, and that the Educational Endowments Board objected to the factor taking credit therefor in his accounts.

The £2000 loan was made in 1878 over subjects in Burnbank Gardens, Glasgow, then in course of erection. The facts in regard to the investment are set forth in the Lord Ordinary's opinion, *infra*.

The Lord Ordinary (Trayner), on 25th January 1887, found that the petitioner was not entitled to take credit for the £2000, and of new remitted to Mr Molleson to give effect to that finding, and report.*

* "OPINION.—. . . . 2. In this case, the loan was given over subjects still in the course of erection. They were estimated by an architect in November 1877 as at the value of £3250 'when completed,' over and above ground-annual and feu-duty. The buildings, when completed, were intended to be dwelling-houses with 'a set of private stable offices,' and the estimated annual rental of the whole was £260. On 20th February 1878, the architect certified that £1200 of the loan might be paid to account, and that was paid, the balance of the loan, £800, being deposited in bank to await the requirements of the building. Shortly thereafter the borrower failed, leaving the subjects unfinished and the feu-duty in arrear. Mr Molleson reports that 'the judicial factor thereafter expended the £800 balance in completing, as far as possible, the subjects, but this was insufficient to erect a portion of the buildings intended for stables, &c., estimated to produce one-fourth of the whole rental. The free rents from the property have been insufficient to meet the interest at 4½ per cent in the bond by £424, 7s. 9d., being the amount of interest in arrear at 20th June 1886.'

"In this case, I think, the investment was one which the judicial factor had no authority to make. It is no doubt the fact that money is often lent on the security of buildings still in the course of erection, but persons who make such loans take the risk upon themselves of the building ever being completed, and of its value when completed being such as to make their security sufficient. No objection can be taken to persons who thus risk their own money, but a judicial factor is not in that position. He is managing the property of others, and his first duty is to take care that (so far as acts of management go) nothing shall be done to endanger the safety of the estate, or to diminish its amount. No

Leave having been granted the petitioner reclaimed, and thereafter lodged a minute, in which, *inter alia*, he offered to prove “(1) That the investment for which he has been found not entitled to take credit was a loan over subjects of a high class in a favourable locality, and which have been fully occupied ever since they were completed, at a rental of £155. . . . (3) That the tenement which was actually completed with the said £800, and which formed the principal portion of the said buildings, was at the time of the loan, and also at the date of its completion, namely, in December 1878, and in the then condition of the property market, of the value of £3000 or thereby, and formed a good security for a loan of £2000. . . . (5) That the loss to the estate on the aforesaid investment was the result of an unprecedented fall in the value of house property in Glasgow and the west of Scotland generally, and was not due to negligence or want of proper care on the part of the factor.”

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tional Endow-
ments Board.

The Court, on 26th February following, remitted the minute to Mr Molleson to inquire, and report. Mr Molleson having reported,* the case was further heard on 16th July following.

speculation is admissible even for the benefit of the estate. In this case, the investment was a speculation, and unfortunately it failed.

“I come to the conclusion that the factor must make good to the estate the loss arising out of this transaction, a conclusion which I regret, because I do not doubt that the factor did what he thought was best for the estate. Accordingly, I find that the factor is not entitled to take credit in his accounts for the sum now in question. This will make the factor debtor to the estate in £2000, with interest thereon at 4 per cent, under deduction of any interest received out of which the estate has had the benefit.

“I will allow the expenses of both parties out of the estate.”

* “(1) The property I found to be situated close to the ‘Great Western Road,’ a busy middle class thoroughfare, and not far distant from the West End Park. ‘Burnbank Gardens’ is a square of good self-contained houses, with a considerable garden or pleasure-ground in the centre. The buildings in question are situated at the corner of one of the openings into ‘Burnbank Gardens,’ some of the windows looking into the gardens and some into the street leading into it. The tenement consists of a main-door house with area flat, having right of access to the pleasure-grounds, and the two houses above, entering by a common stair, the upper having an attic flat. The tenement presents a substantial and genteel appearance, the rents received being £55, £45, and £55. These rents are very considerably less than would be obtained for a similar class of houses in Edinburgh, doubtless arising from there being a larger number of such houses in Glasgow than the requirements of the population demand. In connection with the rental it is proper to draw attention to an unfavourable feature in the security, namely, the ground-annual of £53. This of course remains the same when rents fall, and presses more severely in the absence of the completion of the stables, forming part of the proposal upon which the advance was made, a rental of £60 having been reported as derivable therefrom. . . . (3) The loan was made on 22d February 1878, £1200 having been paid to the builder and £800 consigned. No evidence remains to shew the cost which had been put out on the property at that time, whether £1200, more or less, had been expended, and it must now be a matter of conjecture whether the subjects were in 1878 worth £3000. Mr Thomson, the architect, however, remains of opinion that the property formed a good security for £2000 at the date of the transaction being entered into. Evidence exists of the stage towards completion of the building at or about the time of the loan being made, and this may be of importance in assisting your Lordships to dispose of the case. The loan was made on 22d February 1878 to the borrower, Philips. I learned Philips was a builder in a large way, having built about two-thirds of the whole of Burnbank Gardens. He appears shortly after the

No. 175. LORD PRESIDENT.—In this case I have no hesitation in agreeing with the

Lord Ordinary. This is not a kind of investment which a judicial factor or any one in a fiduciary capacity is entitled to make. To give an advance on a building in course of erection is to lend upon no security at all, because the subject on which the advance is made is not in existence. It is to be brought into existence by means of the loan. The investment is purely speculative, and is one which it is quite beyond the powers of a factor to make.

LORD MURE concurred.

LORD SHAND.—I am very clearly of the same opinion. A judicial factor in charge of trust-funds knows that there are certain securities which are sanctioned and recognised, and to which he must limit himself in investing the funds under his charge. A loan which is made on house property to be built,—the money being advanced in instalments according as the building progresses,—is a purely speculative transaction. The builder may fail,—new contracts have to be made, to which the factor must be a party,—or the funds may turn out to be insufficient, and the building never be completed, as has been the case in the present instance. These are merely illustrations of the dangers which attend such securities. Trust-funds in the hands of a factor cannot be subjected to risks of this sort. The factor made an urgent appeal for inquiry on the point which he offered to prove, that the buildings when he made the advance of £1200 were really worth £3000, and could have been sold for that sum. This has not been substantiated, and it has not been shewn that this case can be treated as an exception to the rule which forbids the investment of trust-funds upon such transactions, which involve speculative risks which cannot occur in the case of buildings completed and occupied, and so yielding a present return.

LORD ADAM concurred.

THE COURT adhered.

FODD, SIMPSON, & MARWICK, W.S.—WEBSTER, WILL, & RITCHIE, S.S.C.—Agents.

above date to have been consulting his law-agents, Messrs W. E. and A. J. Annan, and a meeting of his creditors was held on 27th May 1878. Mr Thomson, the architect, who originally valued for the loan, gives a report, dated 9th May 1877, where he states,—‘When the £1200 was paid the building was roofed and all first coated, the plasterers pushing on the finishing of their work in the upper flats.’ This statement is borne out thus. It is probable that in Philips’ the borrower’s, then financial state, much work would not be done in the short period elapsing between his obtaining the loan and meeting his creditors. After some little negotiations, the creditors declined to take up the property, and abandoned it to the bondholder. . . . It would thus appear that when the loan was made and the security fell back into the judicial factor’s hands, the tenement was finished so far as masons and slaters were concerned, but all the internal fittings and such work had to be done, and to do so quite exhausted the £800 retained. . . . (5) This is a point hardly needing inquiry. It is a matter of notoriety that the stoppage of the City of Glasgow Bank in October 1878 was followed by a collapse of the inflated condition of the house property market in Glasgow that had existed prior thereto, as well as by a serious and long-lasting depression.”

THE GLASGOW PROVIDENT INVESTMENT SOCIETY, Pursuers (Respondents). No. 176.

—Pearson—Ure.

THE WESTMINSTER FIRE OFFICE, Defenders (Reclaimers).—

Balfour—Murray.

July 16, 1887.*
Glasgow Provident Investment Society v. Westminster Fire Office.

Fire insurance—Right of postponed bondholder to recover when prior bondholder has received a sum sufficient to reinstate.—The proprietor of mills (which with the site were at least of the value of £10,000) granted bonds over them for £9000, and subsequently a postponed bond to another creditor for £900. Policies of fire insurance for £7000 were taken in name of the prior bondholders for behoof of themselves and of the owner in reversion. The postponed bondholder, an investment society, took a policy of fire insurance from another company for £900 in name of the society and of the owner "in reversion." The policy insured against damage by fire "the property described on the margin hereof." On the margin were set forth various items forming parts of the mills and machinery, with the specific sum insured on each. The owner paid the premiums of insurance.

A fire occurred, which damaged the mills and stopped the works. The holders of the prior bonds obtained under their policies of insurance the sum of £5668, which was sufficient to reinstate the works, but they applied it in reduction of their debt.

Subsequently the investment society raised an action, with consent and concurrence of the owner, against their insurers for declarator that the pursuers were entitled to be indemnified by the defenders against the loss they had sustained by the fire, and for payment. The defenders denied liability, on the ground that the loss caused by the fire had already been made good to the prior bondholders and the owner. It was admitted that at the date of the fire the subjects were of sufficient value to cover all the bonds, and that after the fire the subjects were not of sufficient value to meet the prior bonds.

Held (by a majority of the whole Court, consisting of the Lord President, the Lord Justice-Clerk, Lord Shand, Lord Craighill, Lord Adam, Lord Lee, Lord Fraser, Lord Kinnear, and Lord McLaren, *diss.* Lord Mure, Lord Young, Lord Rutherford Clark, and Lord Trayner) that the defenders were bound under their contract to indemnify the investment society for the loss it had sustained by the fire.

Observed that the investment society, after receiving payment of the indemnity, would not be entitled either to recover the whole sum in the bond for their own benefit, or to give their debtor the benefit of their insurance by discharging any part of his debt, but were bound to give the insurers the benefit, for their relief, of such portion of their claim as had been satisfied by payment of the indemnity.

(*See Scottish Amicable Heritable Securities Association v. Northern Assurance Company*, Dec. 11, 1883, 11 R. 287.)

Messrs Hay Brothers, the proprietors of the property in Glasgow known as the Greenhead Grain Mills, consisting of a site with grain mills and machinery thereon, borrowed certain sums of money from the Scottish Amicable Heritable Securities Association, Limited, James Alexander Robertson, The Glasgow Provident Investment Society, and Thomas Wiseman & Co., and in security granted bonds and dispositions in security over the mills, &c., which were of priority and preference according to the above order of the names. To insure the premises against fire the following policies were taken out:—(1) With the Northern Assurance Company for £3165; (2) with the Edinburgh Fire Insurance Company for £2210; (3) with the West of England Fire and Life Insurance Company for £1610; (4) with the Norwich Union Fire Insurance Society for £500; (5) with the Westminster Fire Office for £900; (6) with the City of London Fire Company for £500; and (7) with the Fire Insurance Association for £500. Of these policies, Nos. 1, 2, and 3 were taken in name of the Heritable Securities Association as heritable creditors *primo loco* and Messrs Hay

2D DIVISION.
(Whole Court)
Lord McLaren.
I.

No. 176. in reversion. No. 4 was in name of James Alexander Robertson as heritable creditor and Messrs Hay in reversion, Robertson being in reality trustee for the Heritable Securities Association, and the total amount of the debt due by the Hays to the Association being about £9000. No. 5 was in name of the Glasgow Provident Investment Society of Glasgow and the Hays in reversion. Nos. 6 and 7 were in name of Thomas Wiseman & Co. *primo loco* and the Hays in reversion, but they applied only to machinery not insured under No. 5.

July 16, 1887.
Glasgow Provident Investment Society v. Westminster Fire Office.

On 1st August 1882 a fire occurred in the mills, and the business previously carried on there was stopped.

The Scottish Amicable Heritable Securities Association and James Alexander Robertson, with consent and concurrence of the Messrs Hay, thereupon raised an action against the insurance companies with which the policies Nos. 1 to 4 inclusive were effected, concluding for payment of the sum of £6500, or such other sum, more or less, as should be found to be the damage occasioned by the fire.

These companies defended the action, and pleaded that the other three offices interested in the policies Nos. 5 to 7 should be made parties to the suit, and that they, the defenders, should not be found liable to pay more than their rateable contribution on the total loss by the fire. This plea was repelled by the Lord Ordinary (M'Laren), and, on a reclaiming note, by the Second Division (Lord Young dissenting)—*Scottish Amicable Heritable Securities Association v. Northern Assurance Company*, Dec. 11, 1883. 11 R. 287. The defenders also offered to reinstate, and in this the other three offices would have joined, but it was held by the majority of the Court that this offer was made too late. The defenders then proceeded to arbitration with the pursuers, in order to fix the amount of the damage occasioned by the fire. The oversman found that the damage amounted to £5668, 16s. 8d., and for that sum the pursuers got decree. This sum with interest was applied by the pursuers towards payment of the amount contained in their preferable bonds.

The present action was raised on 4th March 1885 by the Glasgow Provident Investment Society, with consent and concurrence of the Messrs Hay, against the Westminster Fire Office, and concluded for declarator that the defenders were "bound to indemnify the pursuers for the loss sustained by them through the destruction by fire of the premises, machinery, and others belonging to" the Hays, "and known as the Greenhead Grain Mills, Bridgeton, Glasgow, and upon which the pursuers had effected an insurance with the defenders"; and for decree ordaining the defenders "to reinstate and replace the said premises, machinery, and others in the condition in which they were immediately prior to the 1st August 1882; or otherwise, to make payment to the pursuers, The Glasgow Provident Investment Society, of the sum of £565 sterling, or of such other sum, less or more, as shall be found, in the course of the proceedings to follow hereon, to be the amount of the said loss."

The policy upon which the pursuers founded was dated 13th October 1881, and was in the following terms:—"This policy of insurance witnesseth that The Glasgow Provident Investment Society of Glasgow and William Home Hay, John James Hay, and Robert Hunter Hay, of Glasgow, grain millers, jointly and severally in reversion, hereinafter called the insured, having paid to 'The Westminster Fire Office' * [for the insurance of houses and other buildings, rents, goods, and other property, from loss or damage by fire], hereinafter called the Society, the sum of £10, 2s.

* The words enclosed within brackets were a marginal addition, marked for insertion as printed.

3d. for insuring against loss or damage by fire, as hereinafter mentioned, No. 176. the property described in the margin hereof, the Society hereby agrees with the insured (but subject to the conditions at foot, which are to be taken as part of this policy), that if the said property, or any part thereof, shall be destroyed or damaged by fire at any time between the 11th day of October 1881 and the 11th day of November 1882, both inclusive, or at any time afterwards, so long as the insured or their representatives in interest shall pay to the Society, and it shall accept the sum required for the renewal of this policy, on or before the 11th day of November in each succeeding year, the Society will, out of its funds and property, in accordance with the rules and regulations of the Society, subject to which this insurance is made and granted, pay or make good all such loss or damage, to an amount not exceeding, in respect of the several matters described in the margin hereof, the sum set opposite thereto respectively, and not exceeding in the whole the sum of £900.—In witness whereof," &c.

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vident Invest-
ment Society
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ster Fire
Office.

The property described in the margin consisted of various buildings, &c., fourteen in all, set forth by detailed description, with the sum applicable to each set opposite to each, the whole being headed,—“On the following property forming the ‘Greenhead Grain Mills,’ situate Nos. 95 to 113 James Street, Bridgeton, Glasgow, as afterwards more particularly described, viz.”

The conditions at the foot of the policy included the following:—“7. The Society may, if it think fit, reinstate or replace property damaged or destroyed, instead of paying the amount of the loss or damage, and may join with any other society or insurers in so doing in cases where the property is also insured elsewhere. 9. If, at the time of any loss and damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this Society shall not be liable to pay or contribute more than its rateable proportion of such loss or damage. 10. In all cases where any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering any property hereby insured, either exclusively or together with any other property, in and subject to the same risk only, shall be subject to average, the insurance on such property under this policy shall be subject to average in like manner.”

The following note was also endorsed on the policy:—“This office, in case of fire, will only be liable for the payment of rent for such portion of the said term of one year as the aforesaid buildings respectively may be actually untenanted in consequence of fire.”

The pursuers, after referring to their bond and policy and to the fire, averred,—(Cond. 4) “In particular, the subjects and others undernamed were damaged by the said fire to the extent after mentioned, being the amount to which they were respectively insured under the said policy, namely,—

Barley mill and counting-house,	.	.	£190	0	0
One year's rent thereof,	.	.	120	0	0
Steam-boiler house,	.	.	80	0	0
One year's rent thereof,	.	.	10	0	0
Steam-boiler and connections,	.	.	80	0	0
Smith's shop and furnishing store,	.	.	30	0	0
One year's rent thereof,	.	.	5	0	0
Steam-engine and appurtenances,	.	.	50	0	0

In all, . £565 0 0”

* These conditions are correctly quoted from the policy sued on. The quotation at p. 964 is taken from a later form of policy, copies of which had been inadvertently used and laid before the Judges as copies of the policy sued on.

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vident Invest-
ment Society
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ster Fire
Office.

The pursuers admitted that the £5 had been paid by the defenders.

They stated further, with reference to the defenders' statement of facts, that the sum of £5668, 16s. 8d. paid by the defenders to the prior bondholders was considerably less than the true amount of the damage done by the fire to the security subjects.

The defenders admitted that the sums specified were the sums for which the various items mentioned were insured, and that loss was suffered through the fire on the first two items to an extent exceeding the amounts insured. *Quoad ultra* they denied the statements in cond. 4, and explained that no damage was done to the steam-boiler house, and that with regard to the steam-boiler and connections, the furnishing store, and the steam-engine and appurtenances, the damage caused by the fire did not exceed the sums of £15, £9, 10s., and £20 respectively.

The defenders in their statement of facts further averred,—(Stat. 3) "In the event of the defenders paying to the pursuers the sum sued for, the defenders claim right to require from the first pursuers an assignation to the bond and disposition in security, and bond of corroboration, held by them from the second pursuers, over the property in question, but postponed to the balance due to them under said bond, after deducting the payment that may be made to them by the defenders under their fire policy; and the defenders, in any event, claim right to require from the second or concurring pursuers an assignation of all right competent to them under the foresaid Westminster policy." (Stat. 4) "The said sum of £5668, 16s. 8d. is less than the sums contained in the bonds of the said Heritable Securities Association and James Alexander Robertson, which amounted to £9000. The amounts allowed to them in respect of the damage to the buildings and machinery, and the loss of the rents insured by the pursuers in the present action, are less than the amounts insured on the same items by said preferable bondholders. In these circumstances, the full amount of loss and damage caused by the fire, except the rent of the smith's shop and furnishing store, which has been paid to the pursuers, falls to be paid to creditors preferable to the pursuers; and, there being no reversion, the leading pursuers have not, and never had, any insurable interest, and have not been damaged by the occurrence of the fire, except to the extent of £5, above stated."

The pursuers pleaded;—(1) In respect of the contract of insurance founded on, the defenders are liable to make good the loss sustained by the pursuers in the premises. (2) The subjects insured having been damaged by fire to the amount concluded for, the pursuers should have decree, in terms of the conclusions of the summons.

The defenders pleaded;—(1) The statements of the pursuers are irrelevant, and insufficient in law to support the conclusions of the summons. (2) In the circumstances disclosed, the pursuers, having had no insurable interest, and having suffered no damage from the fire (except to the extent of £5 above mentioned), cannot recover any further sums in respect of the policy sued on. (3) In the event of the defenders making payment to the pursuers, or either of them, of the amount sued for, the defenders will be entitled to an assignation, as set forth in article 3 of the defenders' statement, seeing that a larger sum than the total value of the subjects destroyed or damaged by the fire cannot be got by Messrs Hay in respect of the fire, either in payments to their creditors or to themselves.

The parole evidence, which was entirely that of witnesses adduced by the pursuers, was mainly directed to the question of the comparative value of the subjects after the fire as old materials, and as materials to be used in the restoration of the mills. The details of the evidence on this

point sufficiently appear from the argument of the parties, *infra*, pp. 957- 8 and 961. No. 176.

A joint minute was also lodged, in which the pursuers "admitted that the amount found due and paid to The Scottish Amicable Heritable Securities Association, Limited, in their action against The Northern Assurance Company and Others was sufficient for the reinstatement of the subjects destroyed by fire"; and the defenders "admitted that the present defenders were willing to contribute with the defenders in said action to the expense of reinstating the subjects damaged by the fire, or to contribute towards payment of the loss as the same should be ascertained, provided such contribution was held as full payment by them of all sums due by them in respect of the policy issued by them."

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Mr R. H. Hay, one of the firm of Hay Brothers, gave this evidence:—"The premiums upon the policy now in question were paid by the manager of the Provident Society, and were put to our debit in the account. In short, the money ultimately came out of our pocket. The manager of the Provident Society effected the policy and arranged for it. He got the particulars from us. The principle upon which the £190 for the barley mill and counting-house was arrived at was this, that the interest of the Society was to be insured, and the amount was divided over the different subjects. It would be allocated rateably over the subjects. We gave the rateable allocations. (Q.) Did you not put in the £190 because, except to the extent of £190, the value of the building was covered by other insurances? (A.) Not exactly. It may have been an element in our mind. We had valuations. . . . (Q.) Did you wish to make that an effective insurance by putting it upon what was not already covered? (A.) We distributed it over the subjects. (Q.) Was not your aim to make it an effective insurance, by putting it upon what was not already covered? (A.) I do not know."

On 10th November 1885 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds (first) that the pursuers have sustained damage by fire to the extent of £565, being within the limit of the sum in the policy libelled: Finds (second) that the pursuers have not been indemnified for the said damage, or reinstated in the subjects insured against fire, and that they do not hold the obligation of any other company or person for such indemnification or reinstatement: Finds (third) that the defenders, by the policy of assurance libelled, have undertaken to indemnify

* Appendix A contained a "Tabulated statement of sum insured, claimed, and paid, &c., under the various policies over the Greenhead Grain Mills, Glasgow," which was admitted by both parties. The following are the details bearing on the present question:—

Description of Property Insured.	Amount Insured with 7 Companies.	Statement of Loss against 7 Companies.	Amount Insured with 4 Companies.	Statement of Claim against 7 Companies.	Statement of Claim against 4 Companies.	Valuation by Insur. Companies or by Chinkhill.	Allowance by Overman.	Claim in present Action.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1 Building of Mill, . .	2300 0 0	1724 5 5	2300 0 0	1724 5 5	1724 5 5	1373 12 1	1610 0 0	190 0 0
2 Rent thereof, . . .	553 6 8	553 6 8	433 6 8	553 6 8	433 6 8	...	350 0 0	120 0 0
9 Steam-Engine and Foundations, . . .	350 0 0	10 0 0	300 0 0	10 0 0	300 0 0	...	20 0 0	50 0 0
14 Building of Steam-Boller House, . . .	110 0 0	3 11 1	30 0 0	3 11 1	3 11 1	2 0 0	...	80 0 0
15 Rent thereof, . . .	10 0 0	10 0 0	...	10 0 0	10 0 0
16 Steam-Boller and Connections, . . .	105 0 0	3 0 0	25 0 0	3 0 0	25 0 0	...	15 0 0	80 0 0
17 Building of Store adjoining Boller, . . .	50 0 0	10 15 5	20 0 0	10 15 5	20 0 0	7 18 6	9 10 0	30 0 0
18 Rent thereof, . . .	5 0 0	5 0 0	...	5 0 0	5 0 0
Totals (including the omitted items), . .	9255 0 0	6344 3 5	7485 0 0	6227 9 10	6221 2 11	...	5468 16 8	565 0 0

No. 176. the pursuers against such damage ; therefore decerns against the defenders in terms of the conclusion for payment of the said sum of £565, under deduction of the sum of £5 already paid, with interest as concluded for: Finds the pursuers entitled to expenses," &c.*

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* "OPINION.—The pursuers are creditors in a postponed bond over the mills and machinery of Messrs Hay Brothers, Bridgeton, Glasgow, which were injured by fire on 1st August 1882. This is the second action which has arisen out of this occurrence. The previous action was instituted by the preferable bondholders against four companies, with whom they had effected insurances, and in it they claimed indemnification for the diminished value of their securities resulting from the fire damage. The case was heard by me, and afterwards by the Second Division of the Court, and we held that the preferable bondholders were entitled to recover the full amount of the fire damage, the companies not having elected to indemnify by reinstatement under the powers to that effect contained in the policies.

"In that action a plea was stated by the defenders, to the effect that the Westminster Fire Office (the present defenders) were bound to make a contribution towards the indemnification of the first bondholders ; but this plea was rejected by a majority of the Court, on the plain ground that the insurance policy issued by the Westminster Fire Office was a policy effected by other parties for their own protection, with which the parties to the first action had no concern. We certainly did not say that the Westminster Fire Office was entitled to repudiate their obligation to indemnify the parties to whom their policy was issued, and to allow the loss to fall upon the postponed bondholders after receiving their premiums. I rather think we had in view that in certain eventualities the Westminster Fire Office might be called on to indemnify the parties to whom they were under obligation, and that their obligation under their policy was the limit of the claims which could be preferred against them.

"The postponed bondholders have now brought their action against the Westminster Fire Office, and I am to consider the claim. It is admitted that the subjects have not been, and are not going to be, reinstated. It is also admitted or proved that in their present condition the subjects do not afford to the pursuers the security which was afforded by the margin of value of the completed subjects on which the pursuers lent their money, and against which they insured their interest.

"The sum insured with the Westminster is £900, but the pursuers are not claiming the entire sum, but only £565, being the amount of their insurance on those parts of the subjects which were destroyed by fire. It is proved to my satisfaction that the value of the pursuers' security has, in fact, been diminished to the extent of £565 ; and in these circumstances I conceive that the pursuers are entitled to have their claims against the company constituted by decree.

"My chief difficulty in the case has been to find a stateable argument against the conclusions of the summons ; and although I have received valuable assistance from counsel on both sides, I think they have to some extent laboured under the same difficulty. I understand, however, that it is maintained by the defenders that they ought not to be compelled to pay anything to their assured, because it is said sums equal in amount to the fire damage have been paid by other insurance companies to parties other than the pursuers. It is not said that the pursuers have derived any benefit from such payments, and it is the fact that the indemnity paid to the prior bondholders was applied by them towards the reduction of the debt and interest due to them, and not to the reinstatement of the property. I fail to see how the fact of such payments being made is, or can be, an answer to the present claim.

"Then it is said that it is a universal proposition in the law of insurance that no more can be recovered in the aggregate by the different persons or interests assured than the amount of the fire damage. This is the defenders' proposition,

The defenders reclaimed.

After a hearing the Second Division appointed the case to be sent to the whole Court on minutes of debate.

The following is an epitome of the minutes of debate :—

Argued for the defenders and reclaimers ;—The questions raised by the Lord Ordinary's judgment were these two—(1) Whether any sum was due to the pursuers ; and (2) If any, what sum.

(1) The first question depended upon the affirmance or the reverse of

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but it is not shewn that it has been received into our law, and I see strong objections to its reception.

"There is a rule of law of a more limited nature, that an assured person can in no case recover more than an indemnity for his individual loss. The rule is founded on obvious considerations of public utility and safety, and is but another expression for the proposition that the assured must have an insurable interest to the extent of the sum which he recovers. But the conclusion drawn from this expression—namely, that the aggregate of all the sums which may be recovered under policies insuring different interests cannot exceed the value of the subjects is, I think, an erroneous generalisation, and one which, if acted on, must lead to very inequitable results.

"The proposition only holds true when the indemnity is given by reinstating, because this is specific performance, and is an indivisible act, the benefit of which accrues to every holder of an interest in the subjects, whether he is insured against fire or not. But where compensation is made in money by the different companies for the benefit of the interests which they have respectively insured there is no indirect benefit to anyone. Each of the assured creditors or owners settles his claim with his underwriter on such terms as may be agreed on, and nothing is more likely than that the sum of all the separate payments under such agreements should exceed the amount of the fire damage. This is in fact a very disadvantageous mode of settlement for the insurance companies, but it is not in my view inequitable or unfair, because it is always to be remembered that each of the companies receives in premiums the full equivalent for risks which they respectively undertake, and the actuarial value of each insurance is in no way altered by the circumstance that other insurances have been effected for different interests. The more economical arrangement for the companies obviously is, that they should reinstate, and this they can always do by agreement amongst themselves, because the election to reinstate lies with the companies. If the insurance companies do not reinstate, each pecuniary claim by a bondholder, or interested party, must, in my opinion, be settled just as if no other person had insured his interest in these subjects. This I conceive to be the principle of the decision in the previous action—*Scottish Amicable v. Northern Assurance Company* (11 R. 287), and I see no difference in principle between the two cases.

"My view of the present case may be summed up in this proposition : An insurance against fire by a postponed bondholder is virtually an insurance against the risk that in case of a fire occurring prior insurances may not be available for his benefit, or if available *pro tanto*, may not be sufficient to protect him against loss. I have assumed as a condition of the question, that at the date of the fire the pursuers had an insurable interest in the property to the extent of £900 ; in other words, that the property, if exposed for sale, would have produced a sum sufficient to meet prior incumbrances as well as the £900. Mr Pearson, for the pursuers, stated that he did not propose to lead evidence on the question of the value of the property, because insurable interest was to be presumed. In this contention I think he was well founded. The Dean of Faculty, for the defenders, adduced no evidence in disproof of the assumed value of the property, and for the purposes of the present case I have held that the property was a good security for the sum of £900, and that to the extent of £565 the pursuers have lost the benefit of their security through fire. The sum of £5 having been paid by the defenders, the decree will be for £560."

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this general proposition, which the defenders submitted to be true, viz., that under a contract of fire insurance of subjects specifically described no more money could in the aggregate, however many policies of insurance there might be, be recovered than a sum representing the total damage done by fire. That was the opinion of Lord Young in the former action,¹ but the Lord Ordinary here had taken the opposite view, expressing the opinion that both the former and the present case depended on the same principle, viz., that if the insurance companies did not reinstate, each pecuniary claim by a bondholder must be settled just as if no other person had insured his interest in the subjects. If the former decision involved that principle then the defenders were, in a case sent to the whole Court, entitled to maintain that it was erroneous. In the opinion of the defenders, however, the former case involved no such principle, and raised a question of procedure merely. The Court could deal with that action only as it was presented to them by the parties, and in that action it was common ground between the parties, and conceded by the counsel representing them—(First) That the pursuers, the bondholders, were in right of preferable bonds to the extent of £9000; and (Second) That if the loss, as finally ascertained, was less in amount than £9000, and than the sums insured under the preferable policies, it fell to be paid to the preferable bondholders, leaving nothing for the deferred bondholders. The object of the defenders in the former action in pleading that all parties were not called was based upon this, that the postponed insurance companies were ready to make contribution to the loss, indeed, considered themselves bound to do so, both at common law and in virtue of the contribution clauses contained in all the policies,—provided that they were assured of being free from any claims at the instance of the postponed bondholders or the owners. In other words, the first plea urged by the defenders in that action, viz., all parties not called, was really put forward with a view to their fourth plea being ultimately sustained, viz., the plea that they were only bound to contribute rateably along with the three postponed companies. The Court decided that upon the case as put before them there was no necessity for calling either the postponed bondholder or the three companies, but that was only upon the admission that the sums contained in the prior bonds were greater in amount than the whole sum claimed in respect of the loss. The present action must now be decided just as if the Court had taken the opposite view and called all parties in the first action, and it was no part of the present defenders' case that the sums recovered in the former action, in respect of the damage done by the fire, were wrongly paid to the prior bondholders. On the contrary, had they been called to the prior action, their contention would have been that those sums ought to be paid. To these sums they would have been willing to make their contribution, while at the same time they would have maintained that beyond that contribution no other sum could be recovered from them, except the £5 embraced in the present pursuers' policy and not in the others (falling, therefore, to be paid to the present pursuers), to which the other companies would have been bound to contribute in their turn. The defenders therefore conceived that they were in no way hampered by the decision in the former action.

The Lord Ordinary admitted that the proposition that the aggregate of the different interests in a subject could not exceed the total value of the subject applied when the indemnity was given by way of reinstatement, but he declined to apply it when the indemnity took the form of a money

payment. It was surely a strange result that the rights and liabilities of parties under two modes of giving indemnity, which were always viewed as exactly equivalent, should be so entirely different. The Lord Ordinary further admitted that "there is a rule of law of a more limited nature that an assured person can in no case recover more than indemnity for his individual loss"; but the result of the interlocutor under review was to relieve the Messrs Hay, who were parties to all the policies, of debt to the amount of £6228, 16s. 8d., through the destruction of property worth only £5668, 16s. 8d. Such a result greatly increased the risk which insurance companies undertook by reason of the inducement to over-insurance, and consequently to carelessness, and even wilful fire raising, which it held out. Buildings worth £1000 might be insured in the names of ten creditors on separate bonds each for £1000, and on the total destruction of the premises by fire £10,000 in the aggregate might, on the Lord Ordinary's view, be recovered, the objection of no insurable interest (taking the Lord Ordinary's test of insurable interest "that the property, if exposed to sale, would have produced a sum sufficient to meet the whole encumbrances") being met by supposing the site to be worth £10,000. The Lord Ordinary's view that insurable interest was to be presumed was erroneous; the *onus* was on the insured of proving insurable interest,¹ if it was denied, and it was denied here by the defenders in their stat. 4. This *onus* the pursuers had failed to discharge. Apart from the ground, which was not a proper subject for insurance against fire, there would be no reversion after satisfying the prior bonds. As a matter of fact, it appeared that in the case of three items—the mill, the boiler-house, and the store—there was no margin of value to be insured, their values, according to the pursuer's own witnesses, being respectively £1683, 4s., £20, and £16, 9s. 5d., while the corresponding sums insured by the preferable bondholders were £2200, £30, and £20. The defenders believed that there was no margin on the other buildings either.

The general question was not concluded by direct authority either in Scotland or in England, but the opinions of *Arnould*² and *Bunyon*³ were in favour of the defender's view. Apart from authority, the question must be determined by the terms of the policy. It insured against loss from damage by fire the property described on the margin thereof. The property so described consisted of various buildings set forth by description, with the sum insured applicable to each opposite each item. Such terms constituted a separate insurance of each item, and not an insurance of the whole as a *unum quid*. The general description by name and situation was for identification only, and the case of a set of books put by the pursuers would not be parallel unless a specific sum were insured on each volume.

The first question that arose upon the policy, was whether the bondholders were entitled to treat the contract as one with themselves alone, and to shake themselves free entirely of the interests of the proprietors, in whose names also the insurance was taken, and by whom the premiums were practically paid, being put to their debit in the account between them and the lenders under the bond. On this point the opinion of the majority of the Court in the former case was against the defenders, but they referred to the opinion of Lord Young in that case,⁴ and also to the recent case of

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¹ *Arnould on Insurance* (5th edit.), p. 125; *Cousins v. Nantes*, May 25, 1811, 3 Taunton, 513; *Lucena v. Craufurd*, 1806, 2 Bosanquet & Puller (New Reps.) 269.

² *Arnould on Marine Insurance*, 5th edit. pp. 117 and 118.

³ *Bunyon on Fire Insurance*, pp. 130, 131, 133.

⁴ 11 R. 296.

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evident that the Hays themselves could not recover twice in respect of the same fire injuring the same subjects, simply because they had effected insurances under more than one policy. The interests of the bondholders, whether prior or postponed, were necessarily derivative from the interests of the Hays; and further, the Hays themselves were associated by the very terms of all the policies. It could make no difference that the contracts by the Hays and their various creditors with the insurance companies were contained in more than one instrument. In other words, the owners' interest in the property, after granting the first bonds, was in the reversion only, and the reversion was the only subject conveyed in security to the postponed bondholders. They could therefore insure only the reversion, when the preferable bondholders had already insured, and what was insured as regarded any particular item by the second set of policies was just the margin of value existing upon that particular item remaining uninsured under the first set of policies. The way in which the items into which the whole sums insured by the postponed policy were apportioned was directed by a consideration of what particular portions of the buildings, &c., were not already insured, or were supposed to be not already insured, up to their full value under the preferable policies, and although an attempt was made at the proof to represent that this was not the case, the proof of it appeared from the cross-examination of Mr. Hay. The contingency, which was possible but which did not in fact occur, that the depreciation by fire should exceed the amount insured by the prior bondholders, was what the postponed bondholders insured, and this contingency taken along with the defenders' offer to contribute, constituted an answer to any argument based upon the supposed inequity of the Insurance Company receiving the premiums in respect of this postponed policy. The pursuers never could have recovered independently, except in the case of items not insured under the preferable policies, unless the loss exceeded the sums insured under the preferable policies. Even then they could hardly be said to recover independently, for they could only have recovered the balance of loss after deduction of the amounts, if any, insured and recovered under the preferable policies, and to this balance they would have been entitled even if all the companies had been allowed to contribute according to their contention in the former action. In the present case, on this view, the insurers would pay all that was contemplated by the contract; the owners, by whom all the premiums were practically paid, would be in no worse and no better position than if they had over-insured the property in their own names with different offices, for they would ultimately recover the full amount of the fire damage through the reduction of their bonds; and the postponed bondholders would not suffer loss, for they had practically paid no premiums, and their security, the reversion, did not suffer by the fire, for it became more valuable to the full amount of the fire damage through the reduction of the preferable bonds. In other words, if the second insurance was effected in the interests of the postponed bondholders apart from the owners, then it was an insurance against a contingency which had not occurred, and nothing was recoverable. If it was practically a further insurance by the owners, then only a contribution was recoverable by the owners, or rather in this case by the other companies, which had already paid the amount of the loss.

¹ *Nichols v. Scottish Union and National Insurance Company*, Dec. 18, 1885. A report of this case (not reported in any of the regular reports) was printed as an appendix to the defenders' minute of debate, and is reprinted in appendix to the present volume.

As regarded reinstatement, while the defenders were willing to join with the other offices in reinstating, that course was not possible to the defenders by themselves, the sum insured with them being quite inadequate and their policy not covering all subjects requisite to restore the premises as a going concern.

The next question on the construction of the policy was what was it that was insured by the policy? The pursuers' contention amounted to this—that what they insured was the debt, not the buildings. But the insurance of a debt, while of course perfectly legal, was not a contract which was contained in a policy of fire insurance, it was not a contract which the defenders by their constitution could enter into, and it was not in fact the contract which the policy here constituted. It was said that the word “property” occurring in the policy meant “proprietary interest”—that it had been so held in the former action. But the word did not occur there, as it did here, in the body of the policy, with a reference to the margin, where were set forth various constituent parts of a building; it was found only in the contribution clause. Further, in the case of *The North British and Mercantile Insurance Company*,¹ on which the majority of the Court in the former action founded, the opinions as to the meaning of the word “property” were *obiter*, and the opinion of Lord Justice Mellish, rightly read, was adverse to the pursuers' construction of the word.² The case of *Nichols*,³ already referred to, was likewise adverse to that construction, as also was the case of *Menzies*.⁴

If these two last cases were rightly decided the decision in the former action by the preferable bondholders was wrong, and all the offices insuring ought to have been admitted to contribute, and the insured ranked on the sum contributed according to their preferences and policies.

(2) On the second question raised by the case, viz., upon the supposition that the defenders' general argument was not well founded, what sum were the pursuers entitled to recover, the defenders submitted that even on this supposition the Lord Ordinary's interlocutor must be altered.

With regard to the last item but one of the pursuers' claim as set forth in cond. 4, viz., £5, there was no controversy. With regard to the first item, viz., £190, in respect of the barley mill and counting-house, it was admitted that damage to an extent greater than that sum was done by the fire, and consequently if the defenders were wrong in their general argument, and could not in any way found upon the payments already made by the other offices, they had no defence upon this item. The same result followed as regarded the next item of £120 for the rent of the mill, but under this qualification, that as the policy contained an apportionment of rent clause (*supra*, p. 949), and as the oversman had fixed eight months as the period which might fairly be taken to be the time necessary for restoring the mill, against which there was no contrary evidence, this sum of £120 fell to be reduced to £80. The next item was that of the steam-boiler house, in respect of which the pursuers claimed £80, and £10 for the rent, being the full sums insured. But the steam-boiler house was not injured by the fire at all. The pursuers admitted that the amount found due by the oversman, and paid in the former action, was sufficient for the reinstatement of the subjects destroyed by fire. But the oversman

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¹ *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.*, April 13, 1877, L. R., 5 Chanc. Div. 569.

² 5 Chanc. Div. pp. 583-4.

³ *Nichols v. Scottish Union and National Insurance Company*, Dec. 18, 1885, *supra*, p. 956, note.

⁴ *Menzies v. North British and Mercantile Insurance Co.*, Feb. 13, 1847, 9 D. 694, 19 Scot. Jur. 291.

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allowed nothing in respect of the building of the steam-boiler house, and he could not have allowed anything for the rent if he had been called on to decide in regard to it (which he was not, as it was not insured under the preferable policies), for the building was evidently not untenable in consequence of fire in terms of the rent clause above quoted. In the same way the item steam-boiler and connections, for which the pursuers claimed the sum insured, £80, was according to the oversman injured only to the extent of £15; and the engine, for which they claimed £50, was injured only to the extent of £20; while the store, for which they claimed £30, was injured to the extent of £9, 10s. The pursuers did not attempt to contradict these statements, but they sought to prove their case upon this point by estimating the difference of value between the various items as parts of a going concern, and their break-up value for removal as old material, and the difference in value being more than the sum insured, they contended that they were entitled to recover the whole sum. This method of proof, and the reasoning on which it proceeded, was entirely fallacious. It allowed the pursuers to recover in respect of each item, not the loss which had occurred by reason of fire damage to that item, but the loss which had occurred through the effect of fire damage to other items, and subjects of great value, as, for example, the engine and boiler were treated as total losses, although they were, at most, very slightly injured. The effect of this was, first, entirely to destroy the effect of the specification of the items contained in the contract, and to turn the insurance into a catholic instead of a specified insurance. In the second place, it entirely reversed the principles upon which the loss had been made good, and, it was here assumed, rightly made good in the prior case, and allowed the postponed bondholders' loss to be assessed in a different way from that of the preferable bondholders and owners, with the effect of enabling them to recover on the same items greater sums than the preferable bondholders and the owners could. In other words, the prior bondholder was paid in respect of the damage done to what the fire had consumed. The postponed bondholder was paid in respect of the consequential damage done to what the fire had not consumed, but had left untouched. If the element of a going concern was to be taken into view, then in the case of a manufactory containing two buildings, A and B, the operations of which were dependent each upon the other, A being insured, but B uninsured, it would be possible to recover in respect of A the damage suffered in consequence of a fire which consumed B. If the mill here had not been burned, the boiler and engine would have been useful as parts of a going concern; yet it was presumed that even upon the pursuers' own contention they could not go beyond the terms of their own policy to ask for reinstatement of the machinery, which, though insured in the former policies, was not insured in the pursuers' policy. But the boiler and engine would be just as useless without machinery to drive as they would be without a mill in which that machinery could be placed. In any view, therefore, the pursuers could not recover more than the sums allowed by the oversman in the last action, which they had admitted to be sufficient for the reinstatement of the property.

Argued for the pursuers and respondents;—The result of the judgment in the former case arising out of this fire was to establish the principle for which the pursuers here contended, viz., as the Lord Ordinary in the present case put it, that "if the insurance companies do not reinstate, each pecuniary claim by a bondholder or interested party must be settled just as if no other person had insured his interests in these subjects." The defenders disputed that, maintaining that the only question in the former action was one of procedure, but that the present action was the

necessary corollary of the former one was apparent from the opinion of Lord Young,¹ as well as of the Judges constituting the majority. No. 176.

The pursuers here sought indemnity, as it was undertaken by their contract with the defenders to be given, either by reinstatement or by payment of the loss. On the latter alternative they claimed £565 as the measure of the extent to which their security over the property described in and assured by their policy had been impaired by the fire. That the pursuers, as creditors of the owners of the mills, and holding securities over them, were entitled to insure was not disputed, and had statutory warrant for it.* Nor was it disputed, on record at least, that the pursuers had an insurable interest both at the date of the policy and at the date of the fire, although the defenders now seemed to suggest that they intended to raise the question whether the pursuers at the date of the fire had an insurable interest, maintaining that the pursuers could not prove that the insured subjects, apart from the ground, would have any reversion after satisfying the preferable bonds. The only defence stated on the record was that as £5668, 16s. 8d. would suffice to reinstate the damaged premises, and as that sum had been paid to creditors with rights not only preferable to the pursuers', but also greater in extent than the amount necessary to reinstate the premises, there remained nothing for the pursuers to get. That defence virtually amounted to a denial that the pursuers had suffered any loss by the fire. The fire, it was suggested, had not extended its ravages beyond the limits of the property dedicated to meet the prior bondholders' claim, and had never, therefore, touched the margin of value on which the pursuers relied for payment of their debt; and thus, as the defenders contended, the Hays' interest being limited, after the prior bonds had been granted, to the reversion merely, that reversion was, in reality, the only subject conveyed in security to the postponed bondholders. What, therefore, was insured by them, in the case of any particular item, was simply the margin of value uncovered by prior insurance. Even assuming that to be sound, the defence based on it laboured under the fallacy of assuming that what was insured was not a *unum quid*—a mill and its machinery—but a mass of fungibles, from which, if a certain portion be taken away, the value of what remained was unimpaired. £5668 expended on the mills might suffice to restore them to the condition in which they had been prior to the fire. But that sum not so expended could not be said to afford a measure of the difference between the value of the mills before the fire and the ruins which the fire had left. Let it be assumed that the property insured consisted of a book in several volumes. If one volume was destroyed, the whole set was spoiled. A few shillings might be the value of one volume, but if that volume could not be replaced it could not be maintained that the difference in value between the complete and the incomplete set was measured by the value of the one volume. In the present case the evidence amply shewed that the materials left by the fire were of a very different value according as restoration was proposed or not—(See for some of the details on this point the last paragraph of the pursuers' argument). If the defence put forward were sound, a company with which a postponed bondholder had insured could be called upon to pay only when a fire had occurred so extensive that to restore the property against its effects would require a larger sum than the amount of

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¹ 11 R. 298.

* Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), sec. 6, 119, 122.

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the prior bondholder's debt, and even then only the amount by which the expense of reinstatement exceeded that bondholder's debt. Further, in the case supposed, it would obviously not be in the interest of either the prior or the postponed bondholder's insurer to exercise the option of reinstatement. It was said, however, that if the pursuers' claim in the present action were sustained, they would fare much better than the prior bondholders. That might be so; but it was not inequitable. It was entirely a matter of choice for the prior bondholder, who had received from his own insurers a sum of money, which was confessedly sufficient to put him in as favourable a position as he was the day before the fire.

The defenders perilled their case mainly upon the broad argument that in no case, and under no conditions, could the insurance money, recoverable in consequence of a fire, exceed the amount requisite to reinstate the damaged property. No authority was cited in support of the proposition, either from Scots or from English law, and the pursuers disputed its soundness except where the money recovered was expended in reinstatement; in that event the second bondholder's claim fell, for there was then no loss. The case in Arnould, cited by the defenders, and the case of *Nichols*,¹ were not in point, for in both the interests insured, that of the owner and the mortgagee, were held in the particular cases to be identical, and the contribution clause in consequence was held to apply, but in the former action arising out of this fire, where the contract was precisely similar to the present, that identity of interest between the owner and the prior bondholder was held not to exist, and the existence of a difference of interest between the prior and the postponed bondholders was obvious. The postponed bondholder's insurance was, as the Lord Ordinary put it, "virtually an insurance against the risk that, in the case of a fire occurring, prior insurances may not be available for his benefit, or, if available *pro tanto*, may not be sufficient to protect him against loss." That was the eventuality against which the defenders in return for the premiums undertook to protect the pursuers, and it was that protection which they refused to give.

The proposition that the amount necessary to reinstate was, in all circumstances, the measure of the loss, violated the most elementary principles of the law of contract, and would, if received, work out most inequitable results. To take the case of a house worth £2000 bonded for £1500, there being three creditors, each with a bond for £500, ranking not *pari passu*, but according to the dates of infestment; each creditor insured the property for £500, and a fire occurred which did damage which it would cost £750 to remedy: The first bondholder claimed under his policy the full sum insured—£500; the second did the same, and so also the third. The result was that £1500 of insurance money was recovered in respect of a fire, the effects of which could be remedied by an expenditure of £750. But if the defenders' contention be sound, then the first bondholder would recover £500, the second only £250, and the third nothing, the amount necessary to reinstate having been paid to others holding rights preferable to his. And so a payment by a company, with which the pursuers had no contract, to a person with whom they had equally no contract, and from which they derived no benefit, would enable the pursuers to evade their obligations, however long they might have pocketed the premiums. A result so contrary to justice could only be avoided by holding, as the Court did in the former case, that each bondholder's policy was a separate contract of indemnity, to be fulfilled by

¹ *Nichols v. Scottish Union and National Insurance Company*, *supra*, p. 956. note.

each insurer when loss to his insured had been established, and not to be affected in any way by other insurances effected to protect other interests. Any apparent unfairness to the insuring companies on the ground that they should be compelled to pay among them more than would remedy the disaster insured against was answered by the consideration that they need not so pay unless they chose; they might reinstate if they saw fit.

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The only question which remained was as to the amount of the loss. The claim was for £565; the sum in the policy was £900. The defenders did not dispute the claim for damage done to the mill and counting-house, and the loss of one year's rent, in all £310. They disputed the claim of £80 for damage done to the boiler-house. This, it was true, was untouched by the fire, for its injury was due to operations undertaken for the extinction of the fire. But that was incidental damage within the policy, though to repair the damage would only take £2.¹ And if it were not repaired along with the other property insured in the policy (and there was no offer by the defenders to reinstate), it would be totally useless, and that through the occurrence of risks within the policy. If so, the pursuers would be entitled to £80, being the amount set against it on the margin of the policy, with one year's rent, £10. The next item was the steam-boiler and connections, for which the sum set against it, £80, was claimed. The defenders said that £15 would remedy all the fire damage to it. Even if that were so, there was no proposal for reinstatement, and the boiler, as it stood, was not worth more than £100, instead of £350 before the fire. In like manner, it was said that £20 would suffice to restore the steam-engine and appurtenances, for which £50 was claimed, against the effects of the fire. But here, again, there was no proposal to reinstate, and the engine, before the fire worth £800, was now worth only £100. Similarly with regard to the £30 for damage to the smith's shop and furnishing store, it was said that an expenditure of £9, 10s. would suffice to remedy the fire damage. But prior to the fire they had been worth £30, now they were absolutely useless. The sums awarded, therefore, were trifling in comparison with the diminution in the value of the security subjects consequent on the fire, and it was this diminution in value which the defenders, by their contract, undertook to make up to the pursuers, either by paying the money value of the diminution, or by reinstating; and they refused to do either.

After the minutes of debate had been boxed the parties put in a minute of admissions, in which they admitted—“(1) That immediately before the date of the fire mentioned on record, viz., 1st August 1882, the value of the site, buildings, and machinery of the Greenhead Grain Mills was sufficient to cover not only the prior bonds but also the pursuers' bond. (2) That the value of the site of the said mills, and the salvage thereon of buildings and machinery after the fire, did not exceed, according to the pursuers' valuers, £3500; and according to the defenders' valuers, £6900; and was not sufficient to meet the bonds prior to that of the pursuers, the prior bonds amounting to over £8600. (3) That the insurable subjects, viz., the buildings and machinery, apart from the site, were never sufficient in value to meet the bonds prior to the pursuers'. (4) That of the items insured by the pursuers, and in respect of which they claim—(a) Building of mill, item 1, building of boiler-house, item 14, and building of store adjoining boiler, item 17, of tabulated statement, joint appendix A, page 30,* were fully insured by the prior

¹ Bell's Prins. sec. 511; Johnston v. West of Scotland Insurance Co., Nov. 25, 1828, 7 Sh. 53.

* See *supra*, p. 951, note.

No. 176. bondholders; and if the full sums insured by the said prior bondholders had been recovered, they would have been sufficient to reinstate said subjects in the event of a total loss. (b) Steam-engine and foundations item 9, and steam-boiler and connections, item 16, of said statement, were not fully insured by said prior bondholders; and (c) rent of steam-boiler house, item 15, and rent of store, item 18, of said statement, were not insured at all by the prior bondholders. (d) For values of rents, reference is made to the evidence."

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Thereafter a hearing in presence before the whole Court was appointed. The parties were then heard on the whole case,¹ but on an intimation from the Bench the arguments were mainly directed to the question whether the foregoing minute of admissions involved the admission that the pursuers had had no insurable interest.

The following opinions were returned by the consulted Judges:—

LORD PRESIDENT, LORD SHAND, LORD ADAM, LORD LEE, and LORD KINSMAN.—We are of opinion that the interlocutor of the Lord Ordinary is right, in so far as it finds that the pursuers, who are postponed bondholders over the subjects injured by fire, have sustained damage by the fire and have not been indemnified; and therefore that they are entitled to recover an indemnity from the defenders. The owners of the subjects, who concur in the action, have been fully indemnified already, and are, in our judgment, entitled to no further indemnity. But the question considered by the Lord Ordinary, and the only question upon which we understand the opinion of the consulted Judges to be required, is whether the present claim at the instance of the postponed bondholders can be sustained, notwithstanding that the loss has been made good to the prior bondholders, and to the owners.

It does not appear to us to create any serious difficulty, that the owners and creditors are insured by the same policy. For by the terms of the obligation, the right of the insured is not joint, but joint and several. A security over buildings cannot be regarded as giving an effectual real right, if the bondholder's interest be not directly secured by insurance recoverable by himself, for a fire destructive of the premises would leave the lender the personal security of his debtor only. The policy in question was accordingly taken out by the bondholders themselves. Mr R. H. Hay says,—“The manager of the Provident Society effected the policy and arranged for it.” The policy so effected was taken in name of the Society to secure their interest as bondholders,—with the addition that it was taken in name of the owners “in reversion.” This necessarily gives the bondholders the right and title, on the occurrence of a fire, to recover for loss in respect of the injury to their security or interest as bondholders. They have, therefore, a separate right, upon which they are entitled to sue, independently of the owners; and their legal position in an action upon the policy to recover to the extent of their own loss, appears to us to be precisely the same as if they had insured for their own interest alone, without mention of the reversionary interest of the owners. The questions for consideration in the one case, as in the other, must be whether they have suffered loss by fire, and whether they have been indemnified.

It cannot be disputed that the postponed bondholders had an insurable

¹ *Additional Authorities.*—*Castellain v. Preston*, March 12, 1883, L. R. 11 Q. B. D. 380; *Godin v. London Assurance Co.*, 1758, 1 Bur. 490; *Marshall on Marine Insurance*, 5th edit. pp. 105-6; *Philipps on Insurance*, 4th edit. vol. i. p. 206.

interest, or that they have suffered loss by the damage done by fire to the subject of their security. They had an insurable interest as creditors infest in security; and the value of their security has been diminished by the fire. The only question therefore is, whether they have been in fact, or whether they must be held in law, to have been indemnified. It is admitted, on the one hand, that sums equal to the amount of the fire damage have been paid by other companies to preferable bondholders; and on the other, that these sums have not been so applied as to put the postponed bondholders in the same position as if the fire had not taken place. For it is admitted that before the fire the subjects of security were sufficient to cover the pursuers' bond as well as the prior bonds; and that after the fire, the value of the site with the salvage of the insurable subjects was not sufficient to meet even the prior bonds. The admission in article 1st of the joint minute, that "the value of the site, buildings, and machinery of the Greenhead Grain Mills was sufficient to cover not only the prior bonds, but also the pursuers' bonds," excludes any argument to the effect that the bondholders had no insurable interest. The subject of the insurance was the property—the particular buildings and machinery specified in the policy were all parts of the property—the machinery having been built into or permanently attached to the ground, and the value of the security depended on the unity of the subject—site, buildings, and machinery. The insurance was one over a composite subject, the sum insured being allocated over the particular buildings and machinery enumerated in the policy, and the injury to these by the fire, inasmuch as it not only destroyed the particular buildings and machinery, but greatly depreciated the composite subject, destroyed also the security for the protection of which the insurance was effected. The pursuers, the bondholders, have had no indemnity. It is true that the indemnity paid to the prior bondholders was applied towards the reduction of their debt: and this might have resulted in a practical indemnity to the postponed creditors also, if it could have been shewn that the reduction of the prior debt was in fact an equivalent for the damage by fire. But it is admitted that the damaged subjects do not in fact afford as good a security for the diminished debt, as the entire subjects afforded for the whole debt before the fire. Whether the insured have been indemnified is not a question of law or of legal inference, but a question of fact; and we take it to be conclusively established, by the admissions of parties, that the postponed bondholders have not in fact been indemnified.

The question therefore comes to be, whether the payment of an indemnity by other insurers to other bondholders affords an answer to the action of the postponed bondholders who have not been indemnified, upon their separate policy. If the question be considered, as we think it ought to be, between these bondholders, as suing for their own interest, and their insurers, we are unable to see any reason why they should not be entitled to recover. They have made an insurance in their own name and for their own benefit; and it is no answer to a claim upon their independent contract, that other persons have insured other interests by contracts upon which they have no title to found. The only ground upon which the insurer can plead that other contracts must be taken into account, is that there has been, in substance if not in form, a double insurance. But it cannot be said that there is a double insurance, if the same persons are not to have the benefit of both policies. The principle is very clearly stated by Lord Mansfield in the case of *Godin v. The London Assurance*

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No. 176. *Company*, 1 Bur. 490,—“Two persons may insure two different interests, each for the whole value, as the master for cargo, the owner for freight, &c. But a double insurance is where the same man is to receive two sums instead of one or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods or the same ship.”

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It is true that the pursuers might have derived an advantage from the execution of contracts to which they were not parties, if the insurers had exercised their option of reinstating. But that would have been an incidental advantage arising from their interest in the property, and not from their interest in the policy. As the Lord Ordinary points out, it is an advantage which they would have equally obtained whether they had been insured or not; and the possibility that the insured might have benefited in an event which has not happened, by the performance of a contract to which he was not a party, can afford no answer to the insurer in defence to an action upon a policy. In another passage of his judgment Lord Mansfield points out that if the insured “is to have the benefit of both policies in all events it can never be considered as a double insurance.” And it is just because a postponed creditor will take no benefit from the insurances of prior creditors, except in an event which may or may not happen, and which he has no power to bring about, that he takes the precaution of insuring separately for himself.

For the same reason, we think it clear that the defenders have no answer upon the 9th clause of the conditions of their policy, where it is stipulated, that “if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances whether effected by the insured or by any other person on his behalf, covering the same property,” the Society shall be liable only for a rateable proportion. If the owners alone were suing for their own interest, this contributory clause would come into effect. But the other policies were not effected by the postponed bondholders, or by any person on their behalf. The difficulty which arose in the case of the *North British Insurance Co.*, 5 Chan. Div. 569, from the wording of the policies, does not arise.

But it is said that to allow either pursuer to recover would be contrary to a well-established doctrine in insurance law, viz., that all the insured persons or interests can never recover more in the aggregate from all the insurers than the amount of the damage by fire. We know of no authority for this proposition; and we agree with the Lord Ordinary in thinking it unsound. It may be that in the practical explication of the various rights and liabilities of insurers and insured, the whole number of insurers will not in general be required to pay more, among them, than the amount of the damage. For it is certain, on the one hand, that none of the insured can recover more than full indemnity; and on the other, that the sum of the values of the separate interests in the subject insured cannot exceed the entire value of the subject. But there nevertheless may be cases where different persons having different interests may each insure for the full value of the property; and where, if the property is destroyed by fire, each may recover upon his own policy to the full extent of his insurance. If a house, for example, is burdened with debt to the full extent of its value, the owner and the heritable creditor may each insure in his own name and for his own benefit for the full value of the house; and we know of no rule of law which will prevent either from recovering under his own policy in the event of a total loss. No doubt the insurers of the creditor's interest, if they are called upon to pay, will be entitled, as an incident of the contract of indemnity, to be

assigned into his rights as against the debtor; and if the latter be solvent, they may recover from him the sums which they have paid as indemnity to his creditors. This is the case explained by Lord Justice Mellish in the *North British Insurance Company v. the London and Globe Insurance Company* (L. R. 5 Chan. Div. 583), in a passage of his opinion which appears to have been misunderstood. The Lord Justice points out, that "where different persons insure the same property in respect of their different rights, they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainder-man"; and in that case, "they would recover from their respective insurance companies the value of their own interests, and those values added together would make up the value of the property." But, he adds, "there may be cases where, although two different persons are insured in respect of two different rights, each of them would recover the whole, as in the case of mortgager and mortgagee." And he goes on to explain that "wherever that is the case, it will necessarily follow that one of these two has a remedy over against the other," either in respect of a debt secured over the subject, or upon some collateral contract. In such a case the company which has insured the creditor will be entitled to succeed to his remedy against the debtor. But each of the insured persons will have right to recover the full value of the property from the office with which he has insured, although one of them may be obliged in the result to recoup the office which has insured the other, or to make over for that purpose his claim against his own office. If the remedy which falls to be assigned is made good to the assignee, there will be no practical violation of the rule alleged by the reclaimers. But it may turn out to be of no value, from the insolvency of the debtor; and in that case, we think it clear that the supposed rule will afford no answer to the creditor's claim upon the policy which he has effected for his own benefit. It may happen that the insolvent owner of a house which has been destroyed by fire may have recovered the full amount of its value from his own insurers. But that will afford no defence to an action by a heritable creditor, upon a separate contract of insurance with a different office. It is just because a debtor may become insolvent that a creditor has an interest to insure the subject of his security. And yet the result of the action may be that the sums paid by the two insurance companies together will exceed the amount of the damage. But the solvency or insolvency of the debtors of the insured can make no difference to his right to recover upon the contract of insurance. Nor does it appear to us to be of any consequence to the claim of a heritable creditor upon a policy in his own name, to inquire whether the owner has been insured and indemnified, or whether he has not been insured at all. The only importance of the illustration we have suggested is that it tests the operation of the doctrine to which we are asked to give effect; and we think the doctrine unsound, because in the only cases in which it would be of any practical value, it would operate to withhold an indemnity from the insured.

The true principle is, that fire insurance is a contract of indemnity. We assent to what is said by the learned Judges in the Court of Appeal in the case of *Castellain v. Preston* (L. R. 11 Q. B. 386), that this is "the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law"; and we entirely assent also to what Lord Justice Brett adds as to the necessary consequence of the fundamental principle—viz., that "this contract means that the assured, in case of a loss against which the

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policy has been made, shall be fully indemnified, and shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it—that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give the assured more than a full indemnity—that proposition must certainly be wrong.” But this does not mean that the aggregate of the sums paid to different policy-holders upon a number of policies can never exceed the damage. It means that the assured, upon every separate contract of insurance, must be entitled to indemnity, and to nothing more than indemnity; and it follows that the question whether other insurances over the same subject are to be taken into account is not to be solved by any absolute rule at variance with the principle laid down, but must depend upon the benefit which the assured may be entitled to take, or may have in fact derived from those other insurances.

The application of this principle to the present case appears to us to be clear if we are right in thinking that the heritable creditors who sue this action have not been indemnified by the payments already made to the prior creditors for the damage done by fire to the subject of their security. By the damage so done, they have suffered the loss against which they have insured; and they must therefore be entitled to recover to the extent of the loss, because that will give them indemnity under their contract, and nothing more than indemnity. It is no answer that they may recover their debt from the owners, and in that event will suffer no loss: because we take it to be well-settled law that the right of the insured creditor to recover under his policy depends upon his interest at the time of the loss by fire, and not upon his chance of being ultimately satisfied by the operation of collateral contracts with third persons. If the debt had been already paid, that would of course have been a good defence, for the creditors would have had no interest at the time of the fire. But they still stand infeft in the damaged subjects, in security of a debt which they may or may not be able to recover; and that is precisely the loss against which they may have insured. The insurers may be entitled to an assignation of the debt for their relief, if that can be given without prejudice to the insured. But in the meantime, they are bound to pay in terms of their contract. The case of *Godin*, 1 Bur. 490, appears to us to be a distinct authority to this effect, and the same principle is recognised in the two later cases already cited.

But it is said that if the defenders are called upon to pay, the benefit will ultimately accrue to the indebted owner, who will thus receive more than full indemnity. If that were so, it would, in our judgment, afford no answer to the creditor's claim upon his separate right, unless it could be shewn that he also would be more than indemnified. But the true answer appears to us to be that since the insured is entitled to no more than indemnity, he must assign any remedy which would have enabled him to make good the loss by action against his debtor. The principle is laid down by Lord Cairns in *Simson v. Thomson* (3 L. R., App. Cases, 279):—“On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against.” But then it is only in so far as his retention of these remedies for his own benefit would operate to give him more than full indemnity, that the insured can be compelled to assign them; and where the amount insured is not equal to the debt, he will be entitled to enforce all his rights to the effect of recovering full payment, and cannot be required to assign to his

own prejudice." We express no opinion, therefore, as to whether the third plea in law for the defenders can be sustained, because we have had no argument, either in the written or oral pleadings, as to the defender's claim for an assignation, or as to the conditions upon which the bondholders may be required to assign. But we are of opinion, in the first place, that the defenders are under obligation to pay to the creditors the amount insured by their policy; and, secondly, that the creditors, having received such payment, will not be entitled either to recover the whole debt for their own benefit, or to give their debtors the benefit of their insurance by discharging any part of it, but must, in whatever form, give the insurers the benefit for their relief, of such portion of their claim against the debtors as may have been satisfied by payment of the indemnity.

We have considered the case as if the policy had been taken out in name of the creditors alone, because by the terms of their contract they have a separate and independent right; and a defence which may be good against the owners will therefore be of no avail against them, unless it could have been maintained as effectually if the owners had had no interest in the policy. But the fact that the owners are joined in the policy may have a very important bearing on the questions that may arise as to the defenders' claim to an assignation. It is clear that as the owners also are insured, the insurers could acquire no right to enforce the debt against them, unless they had been already indemnified. And since it is to prevent their being more than fully indemnified that the defenders will recover, if they do in the result recover, a part of the debt due to the other pursuers, questions of contribution may be raised as between them and the other offices. But the possibility of such questions arising cannot affect the right of the insured creditors to recover upon their policy, as soon as the loss occurs. They are not bound to wait for the settlement of questions of contribution that may arise upon contracts to which they are no parties.

While we concur with the Lord Ordinary in his opinion as to the right of the creditors, we think it follows from what we have said that the interlocutor should be so qualified as to make it clear that the other pursuers, Messrs Hay & Brothers, are not to have the benefit of a declarator that they are still entitled to indemnity from the defenders. Their concurrence in the action may probably import nothing more than their assent to the payment of the insurance money to their creditors. But it is possible that a decree in terms of the declaratory conclusion might be construed to mean that they were to be indemnified by the payment *pro tanto* of their debt; and we think the interlocutor should be so expressed as to exclude this inference. It is an inference which would be exactly in accordance with the rights of parties, if the owners had not been indemnified already. But in the admitted circumstances of the case, it appears to be essential to distinguish between the rights of the insured who have been indemnified under other policies over the same subjects, and those of the insured who had no interest in these policies, and have received no indemnity.

We do not understand that our opinion is desired upon any question as to the amount payable under the policy, assuming the right of the pursuers to recover.

LORD MURE.—In the circumstances of this case, as the facts are now ascertained, I am of opinion that decree of absolvitor should be pronounced in favour of the defenders.

When the fire in question occurred, the Messrs Hay, the proprietors of the

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mills which were burned, had borrowed large sums of money upon the security of their property, and had granted bonds for the amount ; and, in conjunction with the various creditors in those bonds, they had from time to time effected policies of insurance over the property with seven different insurance companies for the aggregate sum of about £9200. These policies were all taken in substantially the same terms, in favour of the respective creditors in the bonds, and of the proprietors, Messrs Hay, in reversion ; and were, as I understand, effected under the obligation usually imposed upon proprietors in such cases, to insure their property at their own expense, and pay the premiums as they became due. The premiums in the policy here in question were paid by the Messrs Hay, as explained by one of themselves in his evidence in this case ; and he also states that he furnished the information of the particulars on which the policy sued on was effected, as specified on the margin of the policy.

Shortly after the fire, certain creditors, who were the holders of the first four of these policies, and whose securities were preferable to that of the present pursuers, brought the action to which we have been referred (11 R. p. 287) against the insurance companies with whom their policies had been effected, for payment of the sums due in respect of the damage done by the fire. That action was raised with the consent of Messrs Hay, who are also pursuers in the present case ; and after a variety of procedure, and an arbitration entered into to ascertain the amount of the loss and damage occasioned by the fire, the total loss so occasioned was found to amount to £5668, 16s. 8d., for which decree was pronounced in favour of the pursuers of that action, which was brought with concurrence of the Messrs Hay.

That this sum was the full amount of the damage done by the fire, and recoverable under the policies then sued on, is very clearly proved by Mr M'Kinnell, who acted as overman in the arbitration, and was examined in this case on the part of the pursuers, who says,—“ I was oversman in the reference between the Scottish Amicable, the first bondholders, and the first insurance companies : I awarded the sum which I found the companies liable to pay as the sum that would be required to restore the place . . . I think the allowances I awarded for buildings, machinery, and rent were the full value of the loss. It was upon that footing that I awarded them . . . (Q.) Even if the insurances had been higher, would you have given more for the machinery, or have you given its full value ? I gave its full value. The sums I gave were sufficient to reinstate the mills as a first-class job.”

The sum, therefore, which was so awarded under the first action was the amount of the whole loss occasioned by the fire, and the full measure of the indemnity recoverable from the insurance companies in respect of that fire ; and it went to relieve the Messrs Hay to the extent of £5668 of the debt which they owed to the creditors with whom they were conjoined as pursuers of that action. That there was no further sum, in the shape of loss caused by the fire, available for distribution either among those preferable creditors, or among the holders of any of the other policies, is, I think, clear from the evidence I have quoted, when taken in connection with article third of the admissions, recently adjusted, which bears (3d) “ That the insurable subjects—viz, the buildings and machinery, apart from the site, were never sufficient in value to meet the bonds prior to the pursuers.” That the site or area is not an insurable subject is distinctly laid down by Mr Bell in his Commentaries (vol. i. p. 628), where he says,—“ The loss is estimated on the destructible parts ; or the whole

value of the house, as it would have sold in the market, is taken, deducting the value of the area." No. 176.

Such being the result of the arbitration, and of the admission of parties as to the value of the insurable subjects, it seems to me to be pretty clear, that when the policy now sued on was effected in October 1881, the present pursuers were mistaken in supposing that there remained any margin of insurable property belonging to the Hays, over which a good additional insurance could be effected, after satisfying the claims that might be made under the policies which were then held by the preferable creditors of the Hays, and which covered the whole insurable subjects. Upon the evidence there was no such margin. So that if the pursuers were to obtain decree for the sum now claimed, they would be paid £560 more than the full value of the insurable subjects destroyed, over part of which their policy is said to have been effected, and the Messrs Hay would in this way be relieved of debt to the extent of £560 more than the fair value of the property they were entitled to insure in October 1881, and so to obtain from the defenders £560 more than the value of what was lost by the fire.

Now if such a claim as this had been made by the Messrs Hay, the owners of the mills, upon policies effected by them as proprietors on their own account, it must, as I conceive, have as a matter of course been rejected. It is trite to say, as I have always understood, that no man is entitled to recover, under a fire insurance policy, more than the value of the subjects insured which are destroyed by the fire. This is distinctly stated in most, if not in all, text writers on the subject; and it is very clearly laid down by the late Lord Moncreiff in various parts of his charge to the jury in the case of the *Hercules Insurance Company*, July 1836 (14 Sh. p. 1137), and more particularly where he says (p. 1142), "The rule is that you can get nothing but indemnification for the thing lost, and that you can get nothing more than the value of the thing lost."

It is accordingly, as I understand the case, not disputed in argument for the pursuers, that if the Messrs Hay had themselves effected all these policies, or had effected one policy for the gross amount, and endeavoured to recover more than the amount of the actual loss occasioned by the fire, they would not have been entitled to succeed. But it is said that this is not the position of matters to be here dealt with; that it is the investment company who are the real pursuers, and that the Messrs Hay are nothing more than mere concurreurs for their interest. I am unable to accede to this view. It appears to me, on the contrary, that the Messrs Hay are substantially the effectors of the policy sued on, and the parties most materially interested in the result of this action. They are the proprietors of the subjects, and although they have had to borrow largely upon the property, the reversionary or radical right is still in them, and they had the material interest to insure it. Under the arrangement between them and the investment company, moreover, they were bound to insure the property, and to keep it insured.

The usual course in such cases, I believe, is for the proprietor to insure, assigning the policy to his creditor, in order to enable him to take such steps as may be necessary for keeping up the policy, and securing the sum due under it, if he has any reason to think the proprietor may fail in his duty in that respect. Instead of doing this, however, in the present case, the policy has by arrangement been here taken in the joint names of the parties. But it was still essentially

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the Messrs Hay's insurance, and, as explained in the evidence, the whole premiums have been paid by them. By means of the first four of the policies, their debts to the extent of £5668 have been paid; and should a further recovery be made under the present action, the sum recovered will go to relieve them still further of their debts. The policy is therefore essentially their policy, and I cannot look upon the other pursuers in any more favourable light, or in any different position than that of the holders of an assignation to a policy effected in name of the proprietors of the property insured. In that case the assignees would, as I apprehend, be in law in the precise same position as their cedents, as regards their right to enforce payment of the sum claimed under the present action, which appears to me to amount substantially to a claim for a double or excessive insurance of a considerable amount. To allow the Investment Society in such circumstances to recover the sum sued for, would in effect be to allow the Hays to obtain payment under the name of the Society of a claim which, under their own name, and as in their own right, they would not have been entitled to enforce.

But, even assuming that the Investment Society had here some kind of interest to insure separate from that of the Messrs Hay, I am of opinion that they are not entitled to recover the sum claimed in this action, because I concur in the opinion expressed by Lord Young in the case of the *Scottish Equitable Company*, to the effect that, where various parties or interests are insured over the same subjects, the insurances taken together must not exceed the fair insurable value of those subjects, and that if insurances in excess of value are effected, no more can be recovered in respect of those policies, in the event of fire, than the value of the loss caused by the fire.

It is said that there is no authority for this proposition; and there is, I believe, no decided case to that effect. Neither is there any direct decision to the contrary; and having regard to the fact that the rule is express, that where a variety of policies are effected in one name over the same subjects in excess of the insurable value, no more than the actual loss, or, in other words, than the value of the property destroyed by the fire, however large the interest may be, can be recovered on the policy, it rests, I think, with the pursuers to shew that it has been decided that a different rule applies, where a variety of parties and of interests hold policies over the same subjects in excess of their insurable value. But this has not been done; and in so far as authority apart from actual decision goes, there are, as it appears to me, some very decided indications of opinion in writers of reputation on this branch of the law, both in this country and in England, in favour of the views contended for by the defenders.

The passages, for instance, which are quoted from Arnould on Insurance in Lord Trayner's opinion in this case, in which opinion I substantially concur, are quite distinct, to the effect that "although there may be co-existing liens to a greater extent than the value of the subjects, there cannot be co-existing insurable interest to an aggregate amount beyond that value." And it is added,—“If this be so, then beyond such insurable interest the policy ceases to be a contract of indemnity, and the amount thus in excess is irrecoverable.” That passage is taken from the 4th edition of the work, but in the 5th and last edition it is repeated in equally decided terms; and there are other passages to the same effect (vol. i. pp. 117-119). There are also passages pointing to the same result in Mr Bunyon's work on Fire Insurance, referred to in the defenders' minute of debate.

The only writer of authority who deals with this question in Scotland, in so far as I am aware, is the late Professor Bell, who in his Commentaries (vol. i. p. 626, 5th ed.) says,—“It is not, however, strictly necessary, in order to constitute an insurable interest, that the insured should hold the absolute property of the effects insured. A creditor may have a policy on the house or goods of his debtor, over which he holds a security. A trustee or agent, having the custody of goods for sale on commission, may insure them, provided the nature of the property is distinctly specified, and that all the insurances taken together upon the same property shall not exceed the full value of it.”

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This seems to me to be a pretty distinct authority, in principle at all events, for the proposition contended for by the defenders. Policies without an interest, or taken in excess of the insurable value of the subjects, were not uncommon in the early days of insurance, and were described as being not insurances but mere wagers ; so that it became necessary for the Legislature to interfere to put a stop to them. In the passage preceding the one I have quoted from Mr Bell, he explains that when fire insurances were introduced, it was considered essential, on grounds of public policy, to extend the operation of the rules of the statutes to fire insurance. For it appears to have been felt that such insurances required to be at least as strictly guarded and dealt with in the matter of insurable interest as marine policies, and to be strictly limited as to the amount for which they might be effected over the property insured ; and I am disposed to think that the rule laid down in the passage quoted must have proceeded and been framed on that footing.

When several policies are effected on the same subjects to an amount exceeding the fair insurable value of those subjects, the insurance is, I think, without an interest in so far as regards the excess. Now that, as I read the evidence, was the position of the pursuers with regard to the policy in question. Mr M’Kinnell says that the value of the whole insurable articles destroyed by the fire amounted to £5668, and that sum was awarded by him, and paid to the prior bondholders whose policies covered the whole subjects. It is now admitted that the insurable subjects, apart from the site, which is not insurable, were never sufficient in value to meet the bonds preferable to that of the pursuers. In these circumstances, I am unable to see that at the date when the pursuers’ policy was effected there was any margin of insurable subjects available to meet the pursuers’ bond over which a valid policy could be effected. The insurance therefore was, in my opinion, in excess of the insurable value of the subjects, to the extent of the sum here claimed, and the pursuers had not therefore any proper insurable interest at the date of the fire, or even at the date of their insurance.

On the whole, therefore, I have come to the conclusion that the pursuers are not entitled to succeed in the present action.

LORD FRASER.—I am of opinion that the interlocutor of the Lord Ordinary should be adhered to, with the qualification suggested in the opinion signed by the Lord President, Lord Shand, Lord Adam, Lord Lee, and Lord Kinnear.

Insurance against sea risks has been long known, but this contract of fire insurance is one of comparatively modern origin ; and even in a recent case in England there was a controversy as to whether it was merely a contract of indemnity,—or that and something more (*Castellain v. Preston*, L. R. 8 Q. B. D. 613, and 11 Q. B. D. 380). Erskine has not a sentence upon fire insurance. Pothier has an elaborate disquisition upon maritime insurance, and incidentally

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he mentions as a novelty that in 1754 it was proposed to establish at Paris a company for the insurance of houses against fire; and he adds that he had learnt that this was carried into execution by the formation of the company ("Traité du Contrat d'Assurance," chap. 1, sect. 1). The latest editor of Pothier, writing in 1847, says that as contracts of fire insurance have not been in use in France for more than thirty years, the French Code is silent on the subject.

In 1774, Parliament (14 Geo. III c. 48), while enacting that no person shall be entitled to insure a life unless he has an interest in it, does not refer to fire insurance expressly, although the Courts have construed the Act to apply to these insurances. The enactment is, that "no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest." Both in England and in Scotland, the words, "event or events," here employed, are held to apply to insurance against fire—1 Ball Com., p. 626, and Smith's Maritime Law, p. 414. This statute further enacts, "that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." It is clearly implied, however, that the insured shall recover up to the amount insured the full value of his interest.

Now, then, there may be a number of persons who may have an interest in the house—(1) the fiar, (2) the liferenter, (3) the holder of a ground-annual, (4) a bondholder, (5) the tenant. Each of these persons is entitled to insure his own interest; each has a distinct interest from the other. What each insures is not the house, but the risk which he runs of losing his own special interest. In the case of *Castellain*, the point is stated thus by Bowen (L. J.)—"It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind. What is it that is insured in a fire policy? Not the bricks and the materials used in building the house, but the interest of the assured in the subject-matter of insurance." No doubt the insurance company may discharge their obligation by re-erecting the house, this being the ordinary clause in the policy. If, however, this is not done, each insurance company who has insured these five different interests must pay up to each of the insured the value of the interest that is lost by the fire. It is no good answer to this to say that one of the insurance companies has indemnified one of the insurers up to the amount of the damage caused by the fire. This is not compliance with the obligation to indemnify the other insured. The obligation of the insurers is absolute, to pay to every one of the assured a sum of money on a certain event happening—viz., the destruction of the insured's interest by fire, and this without the slightest regard to the fact that the whole fire damage has been made good to one of the assured. It is a contract of wagering,—but wagering which the law, for wise reasons, sanctions, under the condition only that the insured shall have a pecuniary interest in the subject of the insurance.

The contract is undoubtedly merely a contract of indemnity; but then the question is, who is entitled to be indemnified? Indemnification does not mean the payment of the whole fire damage to one of several classes of persons interested in the property. It means indemnity to all those who have effected a

lawful insurance. Each can claim no more than to the extent of his own interest, No. 176. however large may be the sum contained in his policy. But to that extent he is entitled to demand payment, limited only by the value of the property; and if he does not receive it, the contract of indemnity *quoad* him is broken.

Now all that remains to be ascertained is whether the pursuer of this action had such an interest. He was a bondholder, and the property on the morning before the fire was of sufficient value to carry all its burdens. The admission by the parties is, "that immediately before the date of the fire mentioned on record—viz., 1st August 1882—the value of the site, buildings, and machinery of the Greenhead Grain mills was sufficient to cover not only the prior bonds, but also the pursuers' bond."

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LORD M'LAREN.—I am of opinion that the interlocutor under review ought to be affirmed, with the variation proposed in the joint opinion signed by the Lord President and other Judges.

The argument addressed to me as Lord Ordinary did not suggest to my mind the possibility of any claim at the instance of the proprietor in reversion; and therefore, in the interlocutor under review, no reference is made to his interest. But as the opinions of the Judges have been called for on the general question of the right of a second bondholder to recover to the extent of his loss, without reference to the payment previously made to a prior bondholder under his separate contract, it has been proposed that our judgment should be so expressed as to make it clear that we should not, under any circumstances, sustain a duplicate claim by the same person or persons suing in the same right. In the justice of this reservation I entirely concur.

While referring to my individual opinion delivered as Lord Ordinary in the case, I desire also to express my concurrence in the views expressed by the majority of the consulted Judges, and in their interpretation of the cases bearing upon this important question.

LORD TRAYNER.—In August 1882 a fire occurred in the Greenhead Grain Mills, by which the mills and machinery were seriously damaged. The pursuers, the Messrs Hay, the proprietors of the mills, had, previously to the fire, borrowed money from several persons, in security of which they had conveyed the mills and machinery to the several lenders. Each lender, in conjunction with the Messrs Hay, had effected an insurance or insurances over the mills and their contents, so that, at the date of the fire, the mills and their contents were insured under policies issued by the seven different insurance companies mentioned in the defenders' minute of debate. The pursuers, the Glasgow Provident Investment Society, were creditors of the Hays to the extent of about £800, and in October 1881 they, along with the Hays, insured the mills and their contents for the sum of £900 with the defenders, whose policy (on which this action is grounded) is in name of the Glasgow Provident Investment Society, and the Hays "in reversion." The whole seven policies of insurance were, as regards the statement of the insured, expressed in practically the same terms. Of these seven policies, four were held by two heritable creditors, whose claims upon the mills were preferable to the claim of the pursuers. The debts due to these two creditors at the date of the fire amounted to about £9000, and the four policies held by them represented insurance to the amount of £7485. Some time after the fire, the two heritable creditors I have referred to, with the consent and concurrence of the Hays, raised an action against the

No. 176. four offices with which they were insured, for payment of the amount of damage
 July 16, 1887. occasioned by the fire, and in that action decree was pronounced against the
 Glasgow Provident Investment Society v. Westminister Fire Office. defenders therein for the sum of £5668, 16s. 8d., which (by arbitration) had
 been ascertained and fixed as the amount of the whole of such damage. That
 amount has been paid. Notwithstanding of such payment, the pursuers (the
 Glasgow Provident Investment Society, with consent and concurrence of the
 Hays) now claim from the defenders, with whom they had effected their insur-
 ance, the sum of £560 as the amount of the loss which they have sustained
 through the injury done to the mills and machinery by the foressaid fire. The
 question is, whether the pursuers are entitled to decree for the sum sued for, or
 any part thereof.

The pursuers maintain that the result of the judgment pronounced in the
 action I have referred to, at the instance of the prior bondholders, with consent
 of the Hays, established "the principle upon which the claim in the present
 action rests." The same view is expressed by the Lord Ordinary in the judg-
 ment under review, and he states very precisely what that principle, in his
 view, is. He says,—“If the insurance companies do not reinstata, each
 pecuniary claim by a bondholder, or interested party, must, in my opinion, be
 settled just as if no other person had insured his interest in these subjects.
 This I conceive to be the principle of the decision in the previous action, and I
 see no difference in principle between the two cases.” I venture to think that
 no such “principle” was determined in the previous case, although probably
 such a principle might be deduced from some of the opinions there delivered.
 For my own part, I dissent from any such principle, because I regard it as not
 only unsupported by any authority, but as contrary to and subversive of a prin-
 ciple of insurance law which is well established, and to which I shall have
 occasion afterwards to advert. It is not necessary for me to examine here
 minutely what was the question raised or the decision given in the previous
 case, for I do not suppose it is contended that that decision was conclusive of
 the question now to be decided. In my opinion the two cases differ materially.
 In the former case it was decided that the owners of the mills and their herit-
 able creditors were entitled to decree for damage done by fire against which
 they were insured, without the necessity of calling as parties to their action
 other bondholders or their insurers, and were entitled to judgment apart from
 all considerations of the liability of other insurers than their own to contribute
 to the loss sustained. In the present case the question is, whether the whole
 loss occasioned by the fire having already been paid, any farther claim on
 account of that loss can be maintained. I therefore approach the consideration
 of this case as one involving a question still open, and not affected favourably
 or unfavourably by the previous decision.

The first matter which I shall consider is, who were the insured under the
 policy in question; for if it can be shewn that the Hays were the insured, and
 not their creditors, I think it clear that the present action cannot be successfully
 maintained. The policy is issued in name of the Glasgow Provident Invest-
 ment Society and the Messrs Hay “in reversion,” and sets forth that they had
 insured the property there described against loss or damage by fire. But these
 words by themselves do not instruct that the Investment Society were the
 insured. On the contrary, they shew that some other interest than theirs was
 involved, and that both were insured. It is plain enough, however, that both
 the Society and the Messrs Hay could not have the same insurable interest in

the same subjects at the same time, 'because the same property cannot in value belong at the same time to two different persons.'—*Per Mellish, L. J., in N. B. and Mer. Insur. Co. v. London, L. and G. Co., 5 Chan. Div. 583.* Other considerations, then, must be regarded in ascertaining who were the insured under the policy. And, first of these, what was the property insured, and to whom did it belong? The property insured was the mills and machinery therein, not the debt due to the Investment Society, nor the solvency of their debtors. The mills and machinery were the property of the Messrs Hay—not the less their property that the debts due to their several creditors had been secured over it. The real security held by the creditors was not a right of property, but a right over the property by which they could, in certain circumstances, obtain payment of their debt out of it. The property, therefore, being that of the Messrs Hay, the interest to secure it against loss by fire was theirs. And if the property which was theirs—and as property theirs alone—was fully insured by them, there was no farther interest in the property insurable. Standing such an insurance, it appears to me more than doubtful whether the Investment Society could validly insure the property on any interest which was in them. But whether or not the Investment Society could validly have insured the mills while they were fully insured by the owners, it is clear enough that such additional insurance was unnecessary, because any benefit derived by the owners under their insurance would enure to the Investment Society as creditors for whose benefit (at least to the extent of their debt) the mills had been insured. If it be asked why in such circumstances the name of the Investment Society was inserted in the policy, the answer is not far to seek. If their name had not appeared on the policy, and a claim under the policy had arisen, the insurance company would have been entitled, and indeed bound, to pay over the amount of the claim to the Messrs Hay. But the insertion of the name of the Investment Society prevented the insurance company making payment of any such claim to the Hays without the consent, or at all events without notice to, the Society, who were thereby secured that no money would be paid to their debtors out of the security subjects without their having an opportunity of attaching it, if circumstances made that reasonable or necessary. In short, they were placed in the same position (but no better position) as if the Hays had insured the subjects in their own names, and assigned the policy in security. Such an assignation would not have placed the society who held it in the position of the insured under the policy, although it would have secured to them, preferably to the Hays, who were the insured, payment of any money which might be exigible in respect of any claim arising under the policy so assigned.

2. Another consideration in favour of the view that the Hays were the insured is this, that theirs was the primary and most important interest to secure. Any claim arising under a policy insuring their interest in the property could be made available to their creditors; but if the creditors' interest alone was insured, a loss might arise for which no claim under the policy could be enforced. I do not elaborate this view, because it is made very clear by the learned Judges who decided the case of *Nichols & Co.*, printed as an appendix to the defenders' minute of debate, in whose opinions I concur.

3. If, during the currency of the defenders' policy, the debt due to the Investment Society had been paid off, the insurance would still have remained good, so long as the Hays were the owners of the mills. The paying off the

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No. 176. debt would not have affected their insurable interest, on which the policy was based.

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4. Further, the insurance in question was effected by the Hays. They were (in accordance with general practice) taken bound by their bond to the Investment Society to insure the subjects, and they did so. The whole premiums of insurance were admittedly paid by the Hays.

On these considerations I come to the conclusion that under the policy in question the Hays, and not the Investment Society, were the insured. On the same grounds I am of opinion that the Hays must be regarded as the insured in the whole seven policies effected over their mills, current at the date of the fire. The whole policies stand *in simili casu* so far as the statement of the insured is concerned.

Assuming, then, that the Hays are the insured under the policy in question, what is the extent of their claim? I take it to be an elementary principle in the law of insurance, that the insured cannot under any circumstances recover more than the amount of his loss. "The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only; and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it—that is to say, which will either prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong"—(*Per Brett, L. J., in Castellain v. Preston*, 11 Q. B. Div. 386). It is not difficult to apply this rule of law to the present case. The damage done to the insured by the fire insured against is ascertained to be £5668, 16s. 8d. That money has been paid to the insured—the Messrs Hay. I say paid to the Messrs Hay, because it is not the less paid to them that it has gone into the pockets of some of their creditors. It was paid to the persons who received it with the concurrence of the Hays, and it has reduced the debt of the Hays to that extent. That which goes to reduce their debt makes them so much the richer, or so much the less indebted, which is the same thing. But if the Hays have already received the full amount of the damage done by the fire, what farther claim can they have in respect of alleged damage done by the same fire? The Lord Ordinary in this case has decreed in favour of the pursuers for £560. If that amount be added to what has already been paid, then it appears that the assured will receive the sum of £6228, 16s. 8d. in respect of the damage done by the fire, being just £560 in excess of the whole damage sustained. I venture to think that a judgment producing that result "must certainly be wrong." If the principle of that judgment was sustained, and there were a sufficient number of separate insurances, the Messrs Hay might easily find themselves very largely enriched by the burning of their premises. But that would not be in accordance with the view that an assured "shall be fully indemnified, but shall never be more than fully indemnified."

The Lord Ordinary admits the rule of law, "that an assured person can in no case recover more than an indemnity for his individual loss." He would therefore agree with me, I suppose, that the present claim could not be enforced if the Hays were the only persons who were insured, seeing that they have received payment already of the whole loss occasioned by the fire. But, holding

that there are here several persons insured, he reaches the conclusion given effect No. 176.
 to in his judgment, on the principle I have already alluded to, namely, that
 where several persons insure the same subjects, having different interests, each
 is entitled (where there has been no reinstatement) to claim, "just as if no other
 person had insured his interest in these subjects." Consistently with this view
 the Lord Ordinary disputes the proposition as "a universal proposition in the
 law of insurance that no more can be recovered in the aggregate by the different
 persons or interests insured than the amount of the fire damage"—a proposition
 which he says has not been shewn to have been "received into our law." I
 concede that there is no decision reported in our books which affirms the pro-
 position thus disputed; but equally there is no decision which negatives it.
 The question does not appear to have been presented for decision before the
 present time, which is somewhat surprising (for the case must have happened
 before) if the proposition is unsound. Not surprising, however, if the proposi-
 tion has hitherto been recognised as sound; and it is perhaps worth observing
 that the proposition was conceded by the counsel for the insured in the previous
 case (11 *Rettie*, 296). There is some authority, however, for the proposition.
 "A mortgager and mortgagee of the same ship may each effect an insurance on
 the vessel, and, if he pleases, each may cover the vessel to her full value. The
 sum recoverable under each seems to be such an amount as, when added to the
 other, would equal the full value of the vessel and no more."—(*Arnould on*
Insurance, 4th ed. p. 107.) "Although there may be co-existing liens to a
 greater amount than the value of the subjects, there cannot be co-existing insur-
 able interests to an aggregate amount beyond that value. If this be so, then
 beyond such insurable interest the policy ceases to be a contract of indemnity,
 and the amount thus in excess is irrecoverable."—(*Arnould on Insurance*, 4th
 ed. p. 108.) "Whilst policies like liens may overlie the subject in numbers
 to an aggregate amount exceeding indefinitely the value of it, the right to recover
 on all of them together in respect of any one loss is restricted by the principle
 of indemnity that underlies the contract, to the ascertained or agreed worth of
 the subject."—(*Arnould on Insurance*, 4th ed. p. 109.) Or, if the destruction
 of the subject be partial instead of total (it is of total loss the author quoted is
 evidently speaking), then the whole loss can only once be recovered, no matter
 how many are the liens or policies that overlie it, for the principle of indemnity
 is the same, whether the loss is total or partial. The same principle is recognised
 by Lord Justice Mellish in the case I have already cited. He says,—"Where
 different persons insure the same property in respect of their different rights,
 they may be divided into two classes. It may be that the interest of the two
 between them makes up the whole property, as in the case of a tenant for life
 and remainderman. Then, if each insures, although they may use words
 apparently insuring the whole property, yet they would recover from their
 respective insurance companies the value of their own interests, and of course
 those values added together would make up the value of the whole property."
 "But then there may be cases where although two different persons insured in
 respect of different rights, each of them can recover the whole, as in the case of
 a mortgagor and mortgagee." Obviously the learned Judge meant that either
 of the parties in the case supposed could recover the whole, and not both, for
 he adds,—"But whenever that is the case, it will necessarily follow that one of
 these two has a remedy over against the other, because the same property cannot
 in value belong at the same time to two different persons."—(5 *Chan. Div.* 583.)

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mills which were burned, had borrowed large sums of money upon the security of their property, and had granted bonds for the amount ; and, in conjunction with the various creditors in those bonds, they had from time to time effected policies of insurance over the property with seven different insurance companies for the aggregate sum of about £9200. These policies were all taken in substantially the same terms, in favour of the respective creditors in the bonds, and of the proprietors, Messrs Hay, in reversion ; and were, as I understand, effected under the obligation usually imposed upon proprietors in such cases, to insure their property at their own expense, and pay the premiums as they became due. The premiums in the policy here in question were paid by the Messrs Hay, as explained by one of themselves in his evidence in this case ; and he also states that he furnished the information of the particulars on which the policy was effected, as specified on the margin of the policy.

Shortly after the fire, certain creditors, who were the holders of the first set of these policies, and whose securities were preferable to that of the present pursuers, brought the action to which we have been referred (11 R. p. 287) against the insurance companies with whom their policies had been effected, for payment of the sums due in respect of the damage done by the fire. That action was raised with the consent of Messrs Hay, who are also pursuers in the present case ; and after a variety of procedure, and an arbitration entered into to ascertain the amount of the loss and damage occasioned by the fire, the total loss so occasioned was found to amount to £5668, 16s. 8d., for which decree was pronounced in favour of the pursuers of that action, which was brought with concurrence of the Messrs Hay.

That this sum was the full amount of the damage done by the fire, and recoverable under the policies then sued on, is very clearly proved by Mr M'Kinnell, who acted as oversman in the arbitration, and was examined in this case on the part of the pursuers, who says,—“ I was oversman in the reference between the Scottish Amicable, the first bondholders, and the first insurance companies : I awarded the sum which I found the companies liable to pay as the sum that would be required to restore the place . . . I think the allowances I awarded for buildings, machinery, and rent were the full value of the loss. It was upon that footing that I awarded them . . . (Q.) Even if the insurances had been higher, would you have given more for the machinery, or have you given its full value ? I gave its full value. The sums I gave were sufficient to reinstate the mills as a first-class job.”

The sum, therefore, which was so awarded under the first action was the amount of the whole loss occasioned by the fire, and the full measure of the indemnity recoverable from the insurance companies in respect of that fire ; and it went to relieve the Messrs Hay to the extent of £5668 of the debt which they owed to the creditors with whom they were conjoined as pursuers of that action. That there was no further sum, in the shape of loss caused by the fire, available for distribution either among those preferable creditors, or among the holders of any of the other policies, is, I think, clear from the evidence I have quoted, when taken in connection with article third of the admissions, recently adjusted, which bears (3d) “ That the insurable subjects—viz, the buildings and machinery, apart from the site, were never sufficient in value to meet the bonds prior to the pursuers’.” That the site or area is not an insurable subject is distinctly laid down by Mr Bell in his Commentaries (vol. i. p. 628), where he says,—“ The loss is estimated on the destructible parts ; or the whole

value of the house, as it would have sold in the market, is taken, deducting the value of the area." No. 176.

Such being the result of the arbitration, and of the admission of parties as to the value of the insurable subjects, it seems to me to be pretty clear, that when the policy now sued on was effected in October 1881, the present pursuers were mistaken in supposing that there remained any margin of insurable property belonging to the Hays, over which a good additional insurance could be effected, after satisfying the claims that might be made under the policies which were then held by the preferable creditors of the Hays, and which covered the whole insurable subjects. Upon the evidence there was no such margin. So that if the pursuers were to obtain decree for the sum now claimed, they would be paid £560 more than the full value of the insurable subjects destroyed, over part of which their policy is said to have been effected, and the Messrs Hay would in this way be relieved of debt to the extent of £560 more than the fair value of the property they were entitled to insure in October 1881, and so to obtain from the defenders £560 more than the value of what was lost by the fire.

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Now if such a claim as this had been made by the Messrs Hay, the owners of the mills, upon policies effected by them as proprietors on their own account, it must, as I conceive, have as a matter of course been rejected. It is trite law, as I have always understood, that no man is entitled to recover, under a fire insurance policy, more than the value of the subjects insured which are destroyed by the fire. This is distinctly stated in most, if not in all, text writers on the subject; and it is very clearly laid down by the late Lord Moncreiff in various parts of his charge to the jury in the case of the *Hercules Insurance Company*, July 1836 (14 Sh. p. 1137), and more particularly where he says (p. 1142), "The rule is that you can get nothing but indemnification for the thing lost, and that you can get nothing more than the value of the thing lost."

It is accordingly, as I understand the case, not disputed in argument for the pursuers, that if the Messrs Hay had themselves effected all these policies, or had effected one policy for the gross amount, and endeavoured to recover more than the amount of the actual loss occasioned by the fire, they would not have been entitled to succeed. But it is said that this is not the position of matters to be here dealt with; that it is the investment company who are the real pursuers, and that the Messrs Hay are nothing more than mere concurreurs for their interest. I am unable to accede to this view. It appears to me, on the contrary, that the Messrs Hay are substantially the effectors of the policy sued on, and the parties most materially interested in the result of this action. They are the proprietors of the subjects, and although they have had to borrow largely upon the property, the reversionary or radical right is still in them, and they had the material interest to insure it. Under the arrangement between them and the investment company, moreover, they were bound to insure the property, and to keep it insured.

The usual course in such cases, I believe, is for the proprietor to insure, assigning the policy to his creditor, in order to enable him to take such steps as may be necessary for keeping up the policy, and securing the sum due under it, if he has any reason to think the proprietor may fail in his duty in that respect. Instead of doing this, however, in the present case, the policy has by arrangement been here taken in the joint names of the parties. But it was still essentially

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the Messrs Hay's insurance, and, as explained in the evidence, the whole premiums have been paid by them. By means of the first four of the policies, their debts to the extent of £5668 have been paid; and should a further recovery be made under the present action, the sum recovered will go to relieve them still further of their debts. The policy is therefore essentially their policy, and I cannot look upon the other pursuers in any more favourable light, or in any different position than that of the holders of an assignation to a policy effected in name of the proprietors of the property insured. In that case the assignees would, as I apprehend, be in law in the precise same position as their cedents, as regards their right to enforce payment of the sum claimed under the present action, which appears to me to amount substantially to a claim for a double or excessive insurance of a considerable amount. To allow the Investment Society in such circumstances to recover the sum sued for, would in effect be to allow the Hays to obtain payment under the name of the Society of a claim which, under their own name, and as in their own right, they would not have been entitled to enforce.

But, even assuming that the Investment Society had here some kind of interest to insure separate from that of the Messrs Hay, I am of opinion that they are not entitled to recover the sum claimed in this action, because I concur in the opinion expressed by Lord Young in the case of the *Scottish Equitable Company*, to the effect that, where various parties or interests are insured over the same subjects, the insurances taken together must not exceed the fair insurable value of those subjects, and that if insurances in excess of value are effected, no more can be recovered in respect of those policies, in the event of fire, than the value of the loss caused by the fire.

It is said that there is no authority for this proposition; and there is, I believe, no decided case to that effect. Neither is there any direct decision to the contrary; and having regard to the fact that the rule is express, that where a variety of policies are effected in one name over the same subjects in excess of the insurable value, no more than the actual loss, or, in other words, than the value of the property destroyed by the fire, however large the interest may be, can be recovered on the policy, it rests, I think, with the pursuers to shew that it has been decided that a different rule applies, where a variety of parties and of interests hold policies over the same subjects in excess of their insurable value. But this has not been done; and in so far as authority apart from actual decision goes, there are, as it appears to me, some very decided indications of opinion in writers of reputation on this branch of the law, both in this country and in England, in favour of the views contended for by the defenders.

The passages, for instance, which are quoted from Arnould on Insurance in Lord Trayner's opinion in this case, in which opinion I substantially concur, are quite distinct, to the effect that "although there may be co-existing liens to a greater extent than the value of the subjects, there cannot be co-existing insurable interest to an aggregate amount beyond that value." And it is added,—“If this be so, then beyond such insurable interest the policy ceases to be a contract of indemnity, and the amount thus in excess is irrecoverable.” That passage is taken from the 4th edition of the work, but in the 5th and last edition it is repeated in equally decided terms; and there are other passages to the same effect (vol. i. pp. 117-119). There are also passages pointing to the same result in Mr Bunyon's work on Fire Insurance, referred to in the defenders' minute of debate.

The only writer of authority who deals with this question in Scotland, in so far as I am aware, is the late Professor Bell, who in his Commentaries (vol. i. p. 626, 5th ed.) says,—“It is not, however, strictly necessary, in order to constitute an insurable interest, that the insured should hold the absolute property of the effects insured. A creditor may have a policy on the house or goods of his debtor, over which he holds a security. A trustee or agent, having the custody of goods for sale on commission, may insure them, provided the nature of the property is distinctly specified, and that all the insurances taken together upon the same property shall not exceed the full value of it.”

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This seems to me to be a pretty distinct authority, in principle at all events, for the proposition contended for by the defenders. Policies without an interest, or taken in excess of the insurable value of the subjects, were not uncommon in the early days of insurance, and were described as being not insurances but mere wagers; so that it became necessary for the Legislature to interfere to put a stop to them. In the passage preceding the one I have quoted from Mr Bell, he explains that when fire insurances were introduced, it was considered essential, on grounds of public policy, to extend the operation of the rules of the statutes to fire insurance. For it appears to have been felt that such insurances required to be at least as strictly guarded and dealt with in the matter of insurable interest as marine policies, and to be strictly limited as to the amount for which they might be effected over the property insured; and I am disposed to think that the rule laid down in the passage quoted must have proceeded and been framed on that footing.

When several policies are effected on the same subjects to an amount exceeding the fair insurable value of those subjects, the insurance is, I think, without an interest in so far as regards the excess. Now that, as I read the evidence, was the position of the pursuers with regard to the policy in question. Mr M’Kinnell says that the value of the whole insurable articles destroyed by the fire amounted to £5668, and that sum was awarded by him, and paid to the prior bondholders whose policies covered the whole subjects. It is now admitted that the insurable subjects, apart from the site, which is not insurable, were never sufficient in value to meet the bonds preferable to that of the pursuers. In these circumstances, I am unable to see that at the date when the pursuers’ policy was effected there was any margin of insurable subjects available to meet the pursuers’ bond over which a valid policy could be effected. The insurance therefore was, in my opinion, in excess of the insurable value of the subjects, to the extent of the sum here claimed, and the pursuers had not therefore any proper insurable interest at the date of the fire, or even at the date of their insurance.

On the whole, therefore, I have come to the conclusion that the pursuers are not entitled to succeed in the present action.

LORD FRASER.—I am of opinion that the interlocutor of the Lord Ordinary should be adhered to, with the qualification suggested in the opinion signed by the Lord President, Lord Shand, Lord Adam, Lord Lee, and Lord Kinnear.

Insurance against sea risks has been long known, but this contract of fire insurance is one of comparatively modern origin; and even in a recent case in England there was a controversy as to whether it was merely a contract of indemnity,—or that and something more (*Castellain v. Preston*, L. R. 8 Q. B. D. 613, and 11 Q. B. D. 380). Erskine has not a sentence upon fire insurance. Pothier has an elaborate disquisition upon maritime insurance, and incidentally

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4. That the pursuers have proved no loss by reason of the fire.

I am of opinion that all of these propositions are unfounded, and I shall shortly explain the grounds on which I reach that conclusion.

I think I may assume it as certain, in the law of fire insurance, that the holder of an heritable security over his debtor's premises has an interest in the premises which is insurable. I know no reason for doubting that general proposition; and certainly the defenders saw none when, in the full knowledge of the pursuers' position, they promised to reimburse them, and were paid for doing so. In all the cases which have been cited that proposition has been assumed, and especially in the very interesting remarks of Sir G. Jessel in the case of the *North British and Mercantile Company*, 5 Ch. Div. 569.

It appears equally indisputable that the pursuers might insure for their own interest only, and acquire by so doing a direct right of action against the defenders, without any regard to the separate interest of the owners of the premises. It is no doubt true that when a creditor insures his debtor's premises his interest will terminate if his debt terminates. It is also true, although quite irrelevant to this matter, that any increase in the debtor's funds, by insurances or otherwise, may increase the creditor's chance of payment. But these considerations are quite apart from any question we have here. The obligation in the policy is distinct, and is precisely the same as it would have been although the owners had been no parties to the contract. That the latter are only parties for the reversion seems clear enough on the terms of the instrument, and the reversion means what remains over when the creditor has been indemnified.

But it is maintained, secondly, that even if the pursuers had an insurable interest, they did not insure it by this policy; that it conferred no right on the pursuers, and imposed no direct obligation on the defenders; that it was a contract solely for the interest of the owners, and that any interest the pursuers might have in it was incidental and subordinate to the paramount right of the Messrs Hay.

I can find nothing like this in the terms of the contract; on the contrary, I find words of obligation utterly inconsistent with any such construction. The policy says "jointly and severally, in reversion," but it seems not subject to doubt that the owners became parties only for the reversion, after any claim of their creditor was satisfied, and accordingly they are not pursuers in this action, but only give their consent and concurrence to it.

What seems to have suggested this plea is the fact—a very usual one in such cases—that the owners undertook to pay the premiums on the policy as they fell due. This undertaking was of course to the advantage of the creditors, as improving their security. But with that the defenders had no concern. That obligation was the subject of a contract between the bondholders and their debtors, to which the defenders were no parties, and in which they had not the slightest interest. The contract of insurance was contingent on payment of the premium, and it was wholly immaterial to any interest of the defenders which of them paid it. There is nothing in this consideration which in any degree alters the relation of the Investment Company and the defenders as respectively creditors and debtors under the policy.

Apart from this, the struggle to represent the Messrs Hay as the sole insurers seems to me baseless. The Investment Company had the same rights against

the defenders which they would have had if the Hays had been no parties to the policy. The latter could not have dealt or transacted in any way with the interest of the Investment Company without their consent, except indeed by paying their debt. The owners could not have interposed between their creditor and the obligation of the insurance company; neither could they have discharged it. They joined in the policy for the same reason as that for which they consent to and concur in this action—to secure, in the first instance, indemnity to their creditor.

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The third argument maintained by the defenders is one which alone has an aspect of novelty. It is contended that even admitting that this policy was entered into by the Investment Company, and that they had an insurable interest, they have no right to recover, because the debt constituted by the policy has been already paid. It is said that another insurance company, under a contract with a third party, has paid to that third party the full insurance value of the premises insured by this policy; and that thereby the obligation incurred by the defenders has been fulfilled.

This is hardly a satisfactory mode of payment for the pursuers. It means that in this, which is called a contract of indemnity, the pursuers, although they prove their loss, are not to receive a single shilling, while the defenders, the obligees, are to keep the premiums. The categories to which the defenders try to assimilate this case furnish no analogy. We are referred to the rules, quite equitable in themselves, introduced to prevent over-insurance, or over-recovery, when the same risk has been insured by the same person more than once. Thus, when the same interest is insured in different offices, the insurance office which has paid the indemnity to the policy-holder has, or may have, a right of contribution against the others, who have not paid. Here, of course, there is no such case, as the Investment Company held no second insurance. In like manner, if the assured, having received full indemnification, retains any separate or collateral right in diminution of the loss, the insurer who has paid him may claim to stand in his place as regards such rights, on the ground of subrogation. But these rules can only be applied to cases in which indemnity has been made. Their *rationale* implies that while the contract is one for securing full indemnity to the assured, it is not in accordance with the good faith on which it proceeds that it should be so used as to give the assured more than indemnity. But I am at a loss to see how either of these principles can avail the defenders here, when neither restitution nor compensation has been made, and the defenders are to retain all the premiums which have been paid, while their creditors are to receive nothing in return. No decision has been referred to, and I know of none, which could give countenance to a result so manifestly inequitable.

Under the policy the defenders had the option, of which they have not availed themselves, of reinstating the premises. If they or the combined offices had chosen, as they very reasonably might, to adopt that course, they would have recompensed all concerned, insured or uninsured; and it is both good law and good sense that a man should not be paid for an injury the whole effect of which has been effaced and obliterated. But it does not seem to be good sense, and I do not think it is law, that when there has been no reinstatement, and no indemnification, when the alleged loss remains unrepaired and unrecompensed, it shall be assumed, contrary to the fact, that the sufferer has been indemnified, because someone else has paid someone else, under contracts

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It seems to be supposed, rather fancifully, that in a question about fire insurance, the ordinary incidents of contract are superseded, and that the creditor rights of the assured can be affected by transactions to which they are not parties. I had occasion to indicate my view of this doctrine in the case of the *Northern Assurance Company*, 11 R. 287, which was lately before us. I still retain those views, and I am glad to find so much confirmation of them in the opinions of the majority of the consulted Judges. It is not, in my opinion, reasonable to consider the aggregate value of the injury done by the fire as a specific and limited fund to be divided among the assured, however varied and separate their contracts and their interests; or to assume that when this aggregate sum has been exhausted by payment by any insurance company to any policyholder, all other contracts under which the same premises were assured must be held to be fulfilled. I agree with the opinion of the majority that there is neither authority nor principle for this view. The defenders are sued on their obligation, and they must answer on it in the usual way.

On these general views I concur in the results at which the majority of the consulted Judges have arrived. It remains to come to a conclusion on a question with which the consulted Judges who form the majority have not dealt,—the amount due to the pursuers on the footing that these views are sound.

If I understand the argument for the defenders aright, they maintain that, even on that assumption, there is nothing due to the pursuers. It seems to be alleged that the prior securities burdening the property would have left nothing for the pursuers, even if the fire had not taken place. But the fact is otherwise. It is admitted by the minute of admissions that before the fire the value of the buildings, including the site, machinery, &c., was sufficient to have met all the burdens on them; and that they have only been reduced below that value by reason of the effect of the fire on the buildings and plant. The indemnity therefore stipulated in the policy means the reparation of the loss so sustained, subject of course to the conditions of the policy. That the site was not insured or insurable does not affect this result in any way. The interest which the pursuers have under the policy is, that this portion of the subject of their security which has been destroyed or damaged by the fire, shall be replaced, either specifically or by payment.

It is quite true that the policy contains a specification of the different portions of the premises to which the insurance applies, and an allocation of the values attributable to each. I do not understand the pursuers to dispute that they are bound by this allocation; and accordingly their summons does not conclude for the whole sum assured, but for a sum of £565, considerably short of it. Their claim, therefore, must be held to be not for the whole amount of their debt, £900, but for the value of those portions of the premises which are specified in the policy, and which were destroyed or actually affected by the fire; and that at the value allocated on them in the policy. Of these, two items, of the value of £120 and £190, are admitted in the answer to the 4th article of the pursuers' condescendence to be rightly claimed. The Lord Ordinary has sustained the amount demanded in the summons to the extent of the full sum of £565. I have not been able to follow the views by which he arrives at that result. The only farther sums which are admitted are three items contained in the second last column of the valuation printed in appendix A, which I understand to have

been held as evidence. These amount to about £40, which I propose we should admit, making the amount due £350; and with this qualification I am for adhering to the Lord Ordinary's interlocutor.

The consulted Judges have expressed an opinion that the Messrs Hay are not entitled to any individual decree, and our interlocutor will so bear.

The defenders have pleaded that for any sum to be found due they are entitled to an assignation as against the Messrs Hay. On that, if they desire it, they will be heard.

LORD YOUNG.—In the case of *The Scottish Amicable*, 11 R. 287, I formed and expressed the opinion that when property is burdened with debt no more can be done by fire insurance (in the common and familiar form) for the indemnity of the owner and his creditors against damage by fire than will be effected by a policy in name of the owner with a provision satisfactory to the creditors that payment shall be made to them according to their rights and preferences. I thought it immaterial to the insurers' liability whether the creditors are conjoined with the owner in the policy or not, being of opinion that in any question with the insurers the interests of the owner and of his creditors are indistinguishable. Creditors have no right or interest in their debtor's property except what he has given to them to the exactly corresponding diminution of his own. When, therefore, a proprietor contracts debt, and gives security over his property, which is forthwith insured against fire by him and his creditors in conjunction, I could not regard the policy by which such insurance is effected as differing in legal character or in the liability which it imposes on the insurers from a policy in similar terms and for the same amount, to an unburdened proprietor. Had this opinion prevailed, the seven fire policies which the Messrs Hay, in conjunction with their several creditors, had effected upon their mill and machinery would, with the parties thereto, have been brought together into Court, and if reinstatement was not ordered, which (the insurers desiring it) I rather think it would have been as the fairest thing to all concerned, the amount of the fire damage due by the insurers would have been ascertained, and paid and distributed according to the rights and preferences of the insured *inter se*, with which obviously the insurers had no concern. It did not prevail, however, the majority of the Court being of opinion that each of the seven policies was an individual independent contract, and that there was no legal connection or relation amongst them. The parties insured by four of the seven policies were pursuers in that case, and had decree for the money value of the whole fire damage to the property thereby insured.

The action now before us is upon another of these seven policies—the fifth that has been sued on. The parties insured by this policy are the Messrs Hay (the proprietors) and the Glasgow Investment Society, a creditor of theirs, holding a security from them over the property thereby insured. Its terms are indistinguishable from those of any of the four policies formerly sued on, and I am unable to resist the pursuers' argument that it is as independent of these four as they were of it, or to put the proposition, as indeed the pursuers do, quite distinctly, that in dealing with the claim under this policy we have, according to the principle of our former decision, no concern with the four policies previously before the Court, and can take no account of anything done or paid under them. In the former case we assumed—I daresay truly in point of fact—that the creditors insured (along with their debtor) by the four policies

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We thought it fitting that the principle on which we (by a majority) proceeded in the former case—that of *The Scottish Amicable*—should be reconsidered, with the assistance of all our brethren, in this case, which involves the practical application of it, and the extent to which it must be carried if admitted at all. In the former case the contention of the Scottish Amicable Association was that as first, and so preferable, creditors to an amount exceeding the fire damage they were entitled to the whole without reference to subsequent and postponed creditors, who, according to the rules of law which govern the rights of creditors *inter se*, could not compete with them. I have indicated why I thought that we could not regularly sustain this contention, either in fact or law, in the absence of the creditors alleged to be subsequent and postponed, and so excluded from participation. But in this case the Glasgow Investment Society, admitting that they are subsequent and postponed creditors, contend that they have no concern with the prior and preferable creditors, or with the fact that the whole fire damage has been paid to them. This contention obviously involves important questions beyond that which we had to consider in the former case.

And I venture in the outset to say that I am averse to waste time by considering the quite fanciful case of a fire insurance effected on property by a creditor independently of his debtor the owner. Such an insurance probably never has existed, and I should think never will, although it is sufficient to say that we have none such to deal with now. The policy before us is to the Glasgow Investment Society (the creditor) and the Messrs Hay (the owner) in conjunction, payable to the former primarily and to the latter in reversion, and thus subsisted from the first, and subsists now according to its terms, quite irrespective of the debt of the Investment Society, which the insurers have, so far as I see, no title whatever to inquire into. A creditor may possibly, or certainly, lawfully insure against any special risk to which he (as distinguished from his debtor and other creditors) is exposed, but this must be by a special insurance proposed to and accepted by the insurers. So also an owner may insure specially against special risks, such as, for example, the stoppage or destruction of his business, or liability in damages for breach of contracts which a fire may disable him from performing. A familiar instance of such special insurance—so familiar that it occurs in most fire policies—is rent, which is interpreted to mean the loss from deprivation of the use of premises from the time of a fire till they can be made fit for occupation again. This loss, although always accompanying a fire, is, I need not say, not included by implication, but must be specially insured. We have here to deal with a common fire policy on combustible property, without anything special in it, except only the now all but universal special insurance of rent.

It seems to me reasonable to impute to the insurers knowledge of the fact that the Messrs Hay were the owners in actual occupation of the insured premises

in which they carried on business, that being such a fact as all fire insurance offices look to, inasmuch as it affects the risk. But what occasion had they to concern themselves with the relation between the Messrs Hay and the Glasgow Investment Society? They probably assumed it to be that of debtor and creditor, it seemed so likely; but it was no concern of theirs what it was, or whether it should continue or not. I only notice this in passing, for I shall not dwell on the topic, but I am quite unable to see how the existence or extent of the liability of the insurance office by virtue of the policy could be dependent on or affected by the relation subsisting between the Investment Society and the Messrs Hay at the date of the policy, or anything transacted or done between them subsequently. Whatever should become due by the policy was to be paid to the Investment Society (and you might substitute A B) *primo loco*, and to the Messrs Hay in reversion. It was to the office matter of indifference to whom they paid, and I can find no reason for thinking that the amount payable by them could be different according as the demand was made by the one or the other.

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In the former case (that at the instance of the Scottish Amicable Association) four policies in four offices were sued on, but were, I think, properly dealt with exactly as one policy in one office would have been, in so far as regarded the amount of fire damage due and payable. One of them (for £500) was in name of J. A. Robertson, the manager of the Association, but it was represented to us, I presume truly, that it was really to the Association. So taken, the Scottish Amicable Association were creditors of the Messrs Hay for £7485, and held first and preferable securities to that amount over their mills and machinery at Greenhead. By the four policies to which I have referred they were insured to that amount against fire on the subjects of their securities—that is, such of them as were so insurable, viz., the combustible parts which were inventoried, and the several parts separately valued in the policies.

In their action on these four policies (in conjunction with the Messrs Hay) they had decree for £5668 as the ascertained amount of the whole fire damage, the several offices agreeing among themselves as to their contributions. The fire occurred on 1st August 1882, and the pursuers in this case (the Glasgow Investment Society and the Messrs Hay) claim as due to them on their policy from the defenders (the Westminster Fire Office) the damage by the same fire to certain property thereby insured. Had this property not been included in the insurance by the Scottish Amicable (and the Messrs Hay), and had the damage to it by the fire of 1st August not been paid to them as owners and prior and preferable creditors, there could have been no defence to the present action except upon the amount demanded. But it was so included, and the fire damage to it so paid. The question then occurs, Whether when property is insured by the owner and one of his creditors, being a first and preferable creditor, and the whole damage to it by a certain fire has been paid to them, and the same property is insured by the same owner in conjunction with another creditor, being a postponed creditor, anything, and if so, how much, is recoverable under the latter insurance in respect of the same fire?

The case is not one of double insurance in any sense. It is not alleged—and there is no reason for thinking—that the Messrs Hay's property was in whole, or with respect to any item of it, insured beyond its fair insurable value when all the insurances were added together. Their system seems to have been to insure to the amount of each debt as it was contracted or adjusted and security

No. 176. granted for it, and if, therefore, the property fairly carried the debts it was fairly insurable to the aggregate amount of the debts. Had one policy been substituted for the seven, insuring the same amount on each item of property, and the aggregate of all the items been the same, viz., £9255 (the amount of debt on the property, and which it fairly carried), there could have been no suggestion of double insurance. Whether the creditors were named or not in this (supposed) policy for £9255, they would have been primarily interested in it according to their rights *inter se*, and with interests which could not have been defeated or baffled anyhow without fraud on the part of their debtor and gross neglect on their own.

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The general question is interesting, and having been thought of sufficient magnitude to be submitted to the consideration of all the Judges, and to be argued before them both in writing and orally, I hope to be pardoned if, in explaining the grounds on which I am compelled to differ from the views of the great majority of my brethren, I venture to begin by submitting some very general and comprehensive propositions in the law of fire insurance which I regard as elementary, but which I think have been, some of them overlooked, and others violated by my learned brethren. The difference between their views and mine is fundamental, and I should desire to bring the difference to the test of as close and exhaustive reasoning as I can.

The primary obligation of insurers by a fire policy is a money obligation. It is to pay in money to the assured the damage by fire to the property insured. There is indeed usually a stipulation for an option to reinstate, but that is a mere precaution against fraudulent or exorbitant claims, and when not exercised does not affect the money obligation, which must be measured and fulfilled exactly as if there were no option.

To this money obligation there are three limits, viz., 1st, the sum insured on the property; 2d, the damage to the property by fire; and 3d, the damage suffered in consequence by the assured. And the liability of the insurers can in no case exceed the least of the three. It cannot of course exceed the sum insured, while it may and must fall short of it to the extent that the fire damage falls short of it. Further, it cannot exceed the fire damage to the property, while it may and, on the principle of indemnity, must fall short of it to the extent that the consequent loss or damage to the assured falls short of it. This principle of indemnity may thus limit the liability of the insurer to pay within the two limits—of sum insured and fire damage—(or even extinguish it), but cannot possibly extend it beyond the least of them.

These are familiar rules, and I have thought it proper to express them only because I think some of the learned Judges have not had them sufficiently in view in considering this case. It occurred to me at least that the language which they use indicates an impression that the principle of indemnity may extend the insurers' liability beyond the fire damage to the property insured. The decisions and judicial *dicta* regarding this principle, which these Judges refer to, all relate to claims within the admitted amount of fire damage to the property, and which were resisted only on the ground that the assured had not been damaged up to that amount, or at all; as does also some judicial language to the effect that it is really not the property but the interest in its preservation that is insured—language which has a quite sensible meaning for the purpose for which it was used, but is grossly misunderstood if supposed to signify that insurers may be liable beyond the amount of the fire damage to the property where the assured

has suffered damage beyond that amount, which is a very common case No. 176.
indeed.

The first thing to be done when insured property is damaged by fire is to ascertain the amount or just estimate of the damage in money. The consequent injury to the assured, which may limit or extinguish his right to recover, is generally a subsequent question—and indeed always, except in the rare case where the assured has so obviously sustained no loss, having no interest in the property at the time of the fire, that it would be idle to inquire about the extent to which it had been damaged.

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Now, I venture to assert that the money value or estimate of the damage by a given fire to any given property cannot be affected by the character or extent of the assured's interest in it, but must be absolutely the same for anybody and everybody. The right to payment is another matter, and will, as I have said, be affected by the interest of the assured and the damage thereto consequent on the damage to the property, which it can never exceed, although it may fall short of it to any amount.

The rule for estimating fire damage to property is quite fixed. In the case of total destruction it is the market value at the date of the fire, and in the case of partial damage it is the depreciation of that market value by the action of the fire (or of the means used to extinguish it), or, which amounts to the same thing, the sum necessary to repair the damage. This is what the insurer of property against fire by a common fire policy, for I speak of no other, undertakes to pay, but always within the limits I have already expressed, viz., 1st, the sum insured, and 2d, the damage to the interest of the assured.

It is, I should have thought before this case occurred, unnecessary to observe that no allowance is made for breaking an assortment. Where each of a catalogue or inventory of subjects or articles of property is insured for a distinct sum, nothing can be allowed in respect of any one of them beyond the fire damage to it estimated according to the rule, although the value of the others may thereby be depreciated.

It may happen, and often does, that a fire occasions damage to the assured, no matter what the character of their interest, greatly in excess of the amount recoverable under a policy whereby the property burnt is insured up to its full insurable value. This is very apt to occur, and probably always does, when the property insured consists of the buildings and machinery of premises where a manufacturing business is carried on. A serious fire in such premises may wreck not only the property, but also a valuable business, to the utter ruin of the trader, and with serious consequences to his creditors also. In the case we have to deal with the business of the Messrs Hay appears to have been not merely paralysed and suspended for a season in consequence of the fire, but killed; at least we are told that although five years have since elapsed it has not been resumed, and that their manufacturing premises continue now in the state of wreck and ruin in which the fire left them. The Messrs Hay must of course suffer without indemnity this destruction of their business, and very possibly liability in damages for broken contracts which the fire, by destroying their buildings and plant, disabled them from fulfilling to an amount in excess of the value of the whole property. But the value of the property itself, including the site, may have been, and no doubt was, depreciated by this destruction of the business carried on there. It is not only an intelligible idea, but a familiar fact, that manufacturing premises, where a really or apparently extensive and

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thriving business is being carried on, will be valued even by money-lenders and their advisers at a larger sum than similar premises closed and unoccupied through the recent ruin (from whatever cause) of the trade that had been carried on there. I should think it not only probable, but certain (looking to the admission that has been so much relied on), that the Messrs Hay's property has been thus depreciated to a considerable extent beyond the fire damage covered by the policies. For if it was depreciated only to the amount of the fire damage it follows that if you add the value of that to the site and salvage you obtain the original value. The postponed creditor can indeed say, and does with some simplicity (as an argument), that the fire damage has not been paid to him. But the question I am now considering is, not to whom the fire damage ought to be paid, but what is the amount of it. Assume that the property is depreciated only by the fire damage, then if you value that and also value the site and salvage, the sum of the two values must give you the original value of the property. But if there is a further depreciation of the property from the wrecking of the business, so that it cannot profitably be resumed, and in fact is not, that further depreciation is not covered by a fire policy (in common form) any more than the destruction of or damage to the business whereby it is caused. What might be done by special insurance I have no occasion to consider.

It is clear, I think, from what I have said, that no property can be available insured against fire beyond its fee-simple value, and I should respectfully invite anyone who thinks otherwise to try to specify for what beyond this it can be insured. If you think of the various interests that can exist in any subject of property you will find that their value is limited by the fee-simple value of the property, and that any interest beyond it, if conceivable, must be nominal and worthless. No property can carry interests beyond its fee-simple value. The owner may transfer, divide, and share his interest in his property as he pleases, but he cannot multiply it or add to it. When the owner contracts debt and pledges the property to his creditor, a partition of interest is effected, the interest of the owner (as it previously existed) being diminished to the exact amount to which an interest is given to his creditor, the creditor taking all that the owner parted with (by giving it to him), but just as certainly taking no more. Whatever he confers on another, he himself parts with, so that adding what he parts with to what he retains, you have exactly the value of his original estate. Nor is the fact varied by speaking of what is retained and parted with as insurable interests. The insurable interest retained *plus* that parted with are together of the exact value of the original insurable interest as it existed entire in the owner before the partition. Of course the indebted owner does not necessarily part absolutely and for ever with the interest which he confers on his creditor, but he does part with it so long as the creditor lawfully retains it. The contingency of possible or probable return, in whole or in part, may be called "reversion" or "remainder." I have spoken in the singular, of a creditor, but the case will not be varied by speaking in the plural. Whether an indebted owner pledges his property to one creditor for £10,000, or to two creditors for £5000 each, the result must be the same. In either case the owner has parted with exactly the same amount of interest in his property, although in the former case there is one recipient, and in the latter two. The total of the retained and the transferred interests is the exact equivalent of the unity before partition, and indeed must be, unless there is some miraculous generation in the process of partition.

If these views are true—and I think they are elementary and indisputable—

a fire office to which a common fire risk on property is proposed need have no concern with the debts upon it, or with the owner's pecuniary circumstances, and I should indeed be surprised to hear that a fire office required a search of incumbrances or troubled itself about the pecuniary circumstances of the owner of property proposed for insurance.

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I have already said that I speak only of common fire policies on articles or subjects of property, and I may here notice that the exigencies of the case before us do not require the consideration of any insurable interests therein, except those of the owner and his creditors (one or more) to whom he has pledged it, that is, transferred his interest in it to a certain extent for a certain purpose. There may be others of which the case of *The North British Insurance Company* (5 Chan. Div. 569) affords a striking example. That case was cited to us in *The Scottish Amicable Association v. Northern Assurance Company* (11 R. 287), and is greatly relied on by the majority of the learned Judges in the present case. I did not think it in point in the case of the *Scottish Amicable*, and do not think it in point in this case, but as there is weighty opinion to the contrary, I must explain my views.

In that case goods, the property of a merchant, were in the custody of a wharfinger (at his wharf), under a contract whereby the wharfinger was bound to the owner to make good to him any loss or damage which the goods might sustain (by fire or otherwise) while in his keeping. The goods were fully insured against fire by the merchant in one office, and by the wharfinger in another. A fire occurred at the wharf and the goods were burned. There was no question as to the amount of the fire damage or the right of the merchant (the owner of the goods) to receive it. It was accordingly paid to him by arrangement between the insurance offices, who both acknowledged liability to him—the one directly and the other mediately through the wharfinger. The question before the Court was whether or not the wharfinger's insurer, who made the payment, was entitled to demand contribution from the merchant's insurer, and it was decided in the negative, on the ground that as the wharfinger's insurable interest was his contract liability to the owner, the payment to the owner by the wharfinger's insurer was equivalent to payment by the wharfinger himself in implement of his contract obligation, which, had he made it, would clearly have given him no claim for contribution from the owner's insurer. It was pointed out by the Master of the Rolls that had the merchant got payment from his insurer, as he might, he must have assigned his contract claim against the wharfinger, through which his insurer who had paid him would have recovered full relief from the insurer of the wharfinger. These views, if sound, and they were the grounds of the judgment, were of course conclusive against the claim for contribution there in question.

But although the decision in this Chancery case is not in point to the case before us, or to the case of *The Scottish Amicable*, I am far from thinking that it may not be usefully referred to. I think, on the contrary, that a right understanding and appreciation of it will serve to remove some erroneous views which seem to me to have influenced the opinion of a majority of the consulted Judges. There was in that case no question whatever as to the mode of estimating the fire damage to the property insured. It was estimated in the usual way, according to the rule which I have stated, and to the satisfaction of all concerned. Nor although the same property was fully insured in each of two offices, each of which received full premium, did the notion (extravagant as I

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regard it) occur to anyone that double payment, or more than single payment, could be exacted. It was postulated that the wharfinger was under contract obligation (by his contract of custody as wharfinger) to make good to the merchant any damage to the goods while in his custody, including damage by fire, and that this contract obligation was not diminished or affected by the circumstance that the merchant held a policy on them from a fire office. If he fulfilled his contract obligation to the merchant by paying to him the fire damage, the merchant in that case sustained no damage by the fire to be made good under his policy, and it was and could be of no significance to either the merchant or his insurer where the wharfinger got the money with which he paid the amount due by him. If he did not fulfil the contract, the merchant, as the creditor in it, was bound to assign it to his own insurer on payment by him under the policy. On this assignation the merchant's insurer was clearly in a position to demand from the wharfinger, not a contribution, but full payment of his contract obligation, and if he held an unpaid policy in his own name on which he was in a position to demand what would enable him to meet his contract obligation, it was not doubtful, and at least the Court of Chancery so held, that recovery could be had under that policy by the merchant's insurer—not at all by way of contribution, but of total relief due by the insurer of the primary and ultimate obligant for the damage. This was of course absolutely inconsistent with the notion of contribution by the two insurers. There might, indeed, have been a double payment of the fire damage had the wharfinger contrived secretly to obtain payment from the insurer and embezzled the money, but in no other event that I can imagine.

I return to the case of burdened property insured by the owner for behoof of his creditor (or creditors), and of himself in reversion. And to make the case quite precise and definite, let us suppose that the debt is £9000, that this is as much as the property will carry, that it is all held by one creditor—say the Scottish Amicable Association—that this creditor has security therefor (indistinguishable in character from the security of the present pursuers, The Glasgow Investment Society), and that the insurance on the property, to the amount of £9000, is by a policy indistinguishable, except in names and sums, from that now sued on—the property being inventoried on the margin of the policy with a distinct sum insured on each article—the aggregate being £9000, and the insurance being to the Scottish Amicable Association and to the owners—(say the Messrs Hay)—in reversion. Let the policy be in any fire office you please,—say the Westminster. During the subsistence of this policy the fire of 1st August 1882 occurs, whereby damage is done to the property insured to the amount of £5668, estimated at what would suffice to repair it completely, including nine months' rent as the damage for the premises being incapable of occupation and so idle during the time ascertained to be necessary to make the repairs. On these assumed facts what sum would be recoverable from The Westminster Fire Office under the policy, and by whom? Or are these facts insufficient to enable you to judge of the amount? I assume that the facts are sufficient, that the amount recoverable would be £5668, and that it would be recoverable by The Scottish Amicable, leaving no reversion for the Messrs Hay. I do not argue the matter, this being exactly how The Scottish Amicable were dealt with in their action as creditors to the amount of £7485 and similarly insured. My suppositions really made no change beyond increasing the amount of their debt by £1515—property and security the same, fire and consequent

damage the same, only the debt and insurance larger by £1515. Is it conceivable that this addition to the debt and sum insured would increase the fire damage to the property insured, or the claim of the assured? If anyone can conceive it, I should like to be favoured with his estimate of the amount of increase, and his distribution of it over the several items in the schedule or inventory of the damaged property.

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But taking the articles of property to be exactly as they in fact were, and the fire damage to each to be exactly as it was ascertained to be, giving a total of £5668, it is obviously impossible that more than this would have been recovered under an insurance for £9000 (adding together the sums insured on the several items) to a creditor in a debt of £9000, and to the owner in reversion, unless the insurance covered something *ultra* the fire damage to the property. What is that something *ultra* supposed to be? Nothing *ultra* is specified in the policy. What is there besides the fire damage to those specified items to be taken account of? The answer, as I collect it from the opinions of the majority of the consulted Judges, is, depreciation of the creditor's security considered as existing over the whole property regarded as a composite subject, and consisting of site, buildings, and machinery, so that after crediting the sum of £5668 paid as the fire damage to the property specified in the policy, the site and salvage after the fire does not afford as good security for the balance of his debt as the whole property before the fire did for the whole debt.

The objections to this certainly novel idea are I think insuperable. At present, however, I desire only to point out that if it will hold good in the case of a postponed creditor (among any number of creditors you please to think of), it must equally hold good in the case of one creditor who holds the whole debt on the property. Taking the whole debt at £9000, and supposing it to be held by one creditor who accordingly receives £5668 as the whole fire damage, his position is that of an unpaid creditor for the balance of £3332 with the depreciated security of site and salvage which is assumed not to be as good security or it as the entire property was for £9000. His case is indistinguishable from that of a postponed creditor for that amount, or any less amount, on the assumption on which the notion is based, that the security therefor has been depreciated by the fire.

It must of course also hold good in the case of a preferable creditor, and there is indeed something paradoxical if not absurd in the notion that a postponed creditor can be in a better position than a preferable creditor. But why, then, did the Scottish Amicable under their insurance for £7485 receive only £5668? Their debt was thus left unpaid to the amount of £1817, with the depreciated security of site and salvage. It is, indeed, true that they made no claim in respect of depreciation of security *ultra* the fire damage to the several items of property insured—I should have thought for the sufficient reason that their policies covered nothing *ultra*. But then neither does this Glasgow Investment Society make any claim for such depreciation of security. Their policy is in the same terms as the policies to the Scottish Amicable, and their claim is made on the same footing exactly. This novel idea of a claim for depreciation of composite subjects had not been thought of when the case of *The Scottish Amicable* was decided, or even when the record in the present action was closed.

I have, I hope, made it clear that taking the debt at any amount you please, the number of creditors who hold it cannot affect the estimate of fire damage payable on a common fire policy to the creditors and their debtor (the owner) in

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reversion. Nor can the number of policies by which or of fire offices in which the insurance is effected signify. I assume that no concealment or trickery is intended, or indeed could be successfully practised by going to several offices, and that the only purpose in doing so is distribution of business or greater security. The insurable interests of creditors (one or more) cannot be increased or diminished according as they are insured in one office, or in more than one, and plainly the damage to the same property by the same fire and the consequent suffering of the assured must be quite independent of the number of policies or offices. I may here again point out that the insurances to the Scottish Amicable (and their debtor in reversion) for £7485 were by four policies in four offices, which were all, I think, most properly regarded and dealt with as one. If property will fairly carry £9000 of debt, and is fairly insurable to that amount, it cannot affect the estimate of fire damage, or the amount recoverable by fire insurance, whether the debt was contracted and the insurance effected all at once or piecemeal. If the whole debt is held by one creditor he must necessarily suffer the whole damage which the fire could possibly do to any number of creditors among whom it might be divided, and his suffering will be the same whether he lent £9000 at once and in one sum, or on two occasions in sums of say £8100 on the first and £900 on the second, and whether he holds one policy for £9000 or two policies for £8100 and £900 respectively. Again, if you assume, say two policies, one for £8100 and the other for £900 over the same property and in the same terms, but in different offices, to say that the sums recoverable under them in respect of the same fire will be different according as they are both to the same money lender or each of them to a different money lender (in conjunction with the debtor), appears to me to be almost, or I should say quite, irrational. The damage to property by a given fire, and recoverable under a common fire policy, must be independent of the amount of debt on it or the number of creditors by whom it is held, and it must indeed be startling to fire offices to hear that their risk and liability under policies is or may be increased or diminished according to the indebtedness of the owner of the property insured, and that they are concerned to inquire into the position of anyone to whom they are directed by the policy to pay *primo loco* what may become due under it—to inquire whether he is a creditor, as to the amount and validity of his debt and security, and whether he is a preferable or postponed creditor—and the “composite subject” over which his security extends their liability under the policy depending on these facts. I think this will be news to the oldest and most experienced fire offices in the kingdom, although what they are to make of the news when it breaks upon them, and they try to realise it and find out what exactly it practically means, I have myself no conception, beyond this, that something to be ascertained somehow in excess of the fire damage to the property insured will have to be paid preferably to postponed creditors in case they should otherwise be left without indemnity by the fact, which has heretofore been regarded as common and familiar enough, that the whole fire damage has been properly claimed by and paid to preferable creditors.

It is, I assume, certain that the position of the Glasgow Investment Society, as creditors of the Messrs Hay in a debt of £900, with a security therefor over their mill and machinery, has been prejudiced or worsened by the fire of 1st August 1882, although I should myself find it impossible to estimate the extent and bring it within this action, and am not surprised that my learned brethren shrank from the task. The general view which my learned brethren find

resistible seems to be that this society, holding a fire policy over the property, No. 176. he burning of which worsened their position as creditors holding a security for July 16, 1887. left upon it, as part of a "composite subject," they must have something out of Glasgow Pro- he policy, and that this something must be estimated at what will indemnify vident Invest- ment Society hem for their suffering—indemnity being the great leading and governing v. Westmin- principle of the law of insurance. But indemnity, according to the law of in- ster Fire Office. urance, must be paid with money, which the same law of insurance produces, nd I have indeed laboured in vain if I have not shewn that the law of insurance will produce no money out of a fire policy on property beyond the damage done o the property by fire, estimated by the rule of what will completely restore or epair it. If that will indemnify those who have suffered—whose position has een prejudiced or worsened—by the fire, it is indeed well. If not, there must f necessity be a residue of suffering without indemnity. I need hardly repeat hat I do not refer to insurances of special risks and interests (which may con- eivably be infinitely various, although I do not happen to have met with an stance of any such) distinctly proposed and accepted, and therefore specified nd paid for.

It seems to be thought too dreadful to be contemplated with equanimity that he Glasgow Investment Society, though sufferers by the fire, should take nothing by the policy sued on, and that the Westminster Fire Office, which eceived a premium, should pay nothing. But I have to point out, first, that lthough according to my view of the law the Investment Society take nothing y this policy, i.e., nothing which, as it happens, they would not have taken ad it not existed—they do take as much as creditors in their position can ossibly take by fire insurance, viz., the extinction of preferable debts to the ull amount of the fire damage: and second, that it is not according to my opinion that the Westminster shall escape without payment, inasmuch as I think hey are right in the view which they take and avow of their position, viz., that hey are liable to contribute proportionally to the payment of the fire damage y the payment of which the assured with them have benefited. It will not, I hink, be disputed that all the bondholding creditors of an insured owner will, ven without being named in his policy, take preferably to him all that may ecome due under it, and that (named in the policy or not) their rights *inter se* will be governed by the priority of their securities. I do not know whether his result is admitted in what may be regarded as the typical case, viz., that of he owner and his creditors being all insured together in one policy to the full eaurable value of the property and their interests; but it seems to me so clear hat I venture to assume it. In such a case let me assume that there is one reditor (or two creditors, the number is immaterial) prior and preferable to the others, and that the fire damage does not exceed his debt. Is it thought doubt- ful that he will take the whole of it to the exclusion of the others? And if he does, as he certainly will, is it true that the others—that is to say, the postponed creditors—take nothing by the policy? I should say that they take all that postponed creditors can take by insurance when the money value of the fire damage is exhausted by the claims of preferable creditors, viz., clearing the pro- perty of the preferable debts to that amount, the whole benefit of the clearance going to them. How does the principle of indemnity entitle them to more, unless, indeed, they are to be indemnified for more than the depreciation of their security by the damage covered by the policy? It may indeed, as I have shewn, be depreciated in excess of this damage (as by stoppage and destruction of busi-

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ness, whereby undoubtedly the property value of business premises may be depreciated), but that excess is not covered by the policy. The depreciation so covered is measured by the fire damage to the property, and if prior and preferable securities are reduced to that exact amount, the postponed creditors are fully indemnified so far as insurance law permits under a common fire policy on property. If they are to have more, a fund must be found out of which they are to get it—a fund consisting of money *ultra* or in excess of the fire damage to the property insured, and which they are to have as compensation for the depreciation of the property *ultra* or in excess of the fire damage to it. This is perplexing, and I must, with great respect to others who think differently, say extravagant.

I have dealt with the case of one policy whereby all (owner and creditors) are fully insured up to the insurable value of the property, and whereby the whole insurable interest of each insurer is comprehended. I must refer to what I have already said to shew that the rights and liabilities, *hinc inde*, of assured and insurers cannot be affected by the number of policies whereby the same property is insured in the same terms to the same amount, and to the same parties having the same insurable interests. It would be scandalous and a reproach to the law if it were true that while an insurance on property to its full value, for behoof of the owner and his creditors, will produce only the actual fire damage to the property if effected by one policy in one fire office, it will produce more if effected by two policies in two offices. And how, I should like to know, are you to measure the excess of productive power by this contrivance? You begin with the fire damage to the property, if you have one policy covering all interests up to the value of the property. If you are to increase this as you multiply policies with individual creditors named along with the owner in each, what is the rule for the increase?

I am aware that the learned Judges from whom I differ think that the Westminster Fire Office is not liable as a contributory for the fire damage paid to The Scottish Amicable, although the assured with them benefited, as I have shewn, by that payment. But have they not overlooked the circumstance that this office incurred the risk of having to pay the whole £900 insured by their policy? Had the fire damage exceeded, as it might, the sums insured to the Scottish Amicable, the Westminster would have been liable for the excess up to the £900 insured by them, of course within the limits which I have already specified, viz., 1st, the damage to the property specified in their policy, and 2d, the damage to the interest of those assured by them, which (the owner being assured) must have equalled the first. Their position with respect to liability is obviously the same as it would have been had their policy been to The Scottish Amicable and the Messrs Hay in reversion. In that case the amount of fire damage being what it was, the Westminster would simply have contributed with the other four offices to meet it, and would no doubt have been sued in the same action with these four offices. By the Westminster policy, taking it as it is, the insurance on the property (that is, the property specified in it) was increased by £900, and the fire and consequent damage might have been (although it happened not to be) extensive enough to require payment by them of the whole amount. In that case the five policies, producing enough to pay both the preferable and postponed creditors, the Glasgow Investment Society would have received this £900 as their share.

By the policy sued on fourteen distinct items are insured each for a specified sum, the total being £900. Eight of these only (including three items of rent)

are alleged to have been damaged by fire, and the pursuers' claim is therefore limited to them. We can take account of no others. The claim is distinctly stated in cond. 4, and the result of it is that the claim in respect of each item is the full sum insured on it, the total being £565, which accordingly is the sum sued for.

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It follows from what I have stated that if these items, or any of them, were damaged by the fire of 1st August 1882, beyond the amount insured on them respectively to the admittedly preferable creditors (The Scottish Amicable), such excess would, in my opinion, be recoverable under this policy. But with the exception of one item (of £5, which has been admitted and paid), it is conceded that the whole were individually insured to the preferable creditors to an amount exceeding the fire damage to them, singly and in the aggregate, the whole of which has accordingly been properly paid to the preferable creditors.

It will suffice to take one item, and I take the first and largest—the “barley-mill and counting-house”—which was insured by seven policies to the aggregate amount of £2390. By the fire it was admittedly damaged to the amount of £1610 exactly, so that the insurance was, as it happened, superfluous to the extent of £780. The insurance on this building to the prior creditor being in excess of the damage (it was so by £590), the whole was paid to the prior creditor. Was this proper and in accordance with the prior creditor's right? It admittedly was so. The prior creditor was not necessarily, and probably not in fact, indemnified in the popular sense by this payment, but it was all the indemnity he could get, although his insurance was for £590 more. It was, I think, suggested that he might have rebuilt or repaired the mill, but he certainly could not. He had an absolute right to the money, but none to rebuild or repair his debtor's mill, which might, and probably would, have been a foolish and ruinous proceeding for both. I am myself of opinion that the insurers by all the seven policies were and are liable to contribute proportionally this sum of £1610, and they are themselves quite agreed that they are. I think it clear that all the parties assured by these seven policies take benefit by the payment in exact proportion to the value of their respective insurable interests. The prior creditor gets his debt paid to that amount; the postponed creditors get the preferable security discharged to that amount; and the owner gets his debt paid and his property unburdened to the same amount. I do not doubt that this is exactly what was intended by all the parties, whether insurers or assured, and am not impressed by the view, which I think fanciful, that “it is just because a postponed creditor will take no benefit from the insurances of prior creditors except in one event (reinstatement), which may or may not happen, and which he has no power to bring about, that he takes the precaution of insuring separately for himself.” If “a postponed creditor” wishes to insure for himself in such terms, that if the insurers do not exercise their option to reinstate, but elect to pay the whole fire damage to the preferable creditors, he shall be dealt with, not merely as if he were one of them, which would only give him a *pari passu* share with the others, but as if he were the sole creditor, and as such entitled to the fire damage up to the amount of his insurance, I should require him to specify his meaning in his proposal, and should be surprised if any fire office accepted it.

I have taken this item of the barley-mill and counting-house as a specimen. The other items specified in cond. 4 (laying aside the three for rent) are similar, and subject to the same observations.

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vident Invest-
ment Society
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ster Fire
Office.

The majority of the learned Judges seem to think that the Investment Society's security, or the property over which it existed, is the subject insured by the policy, and that the question is, what loss they have suffered "by the damage done by fire to the subject of their security." And by "the subject of their security" I understand the learned Judges to mean the property specified in their bond to be ascertained by an inspection of it. They say,—“The subject of the insurance was the property—the particular building and machinery specified in the policy were all parts of the property, the machinery having been built into or permanently attached to the ground, and the value of the security depended on the unity of the subject—site, buildings, and machinery. The insurance was one over a composite subject, the sum insured being allocated over the particular buildings and machinery enumerated in the policy, and the injury to these by the fire, inasmuch as it not only destroyed the particular buildings and machinery, but greatly depreciated the composite subject, destroyed also the security for the protection of which the insurance was effected.”

I must, with all due respect, say that in my opinion all this is erroneous. I doubt if a creditor ever submitted a proposal for such an insurance as is here imagined (for it is quite imaginary), and I more than doubt if any fire office would accept such a proposal. It would involve a very special risk indeed, viz., of liability not only for the damage by fire to the property specified and insured, but for the consequential depreciation of a “composite subject” outside and beyond it, and not specified at all. If you are not to travel outside and beyond the specified and insured property, but confine your inquiry to the damage to it by the fire, it is obviously idle to refer to any other; and if you are to go beyond and inquire about other property, it must be with a view to extend the insurer's liability to the depreciation of property not insured by them, and which may very possibly (though this is immaterial) be the subject of insurance by other policies.

I must further respectfully observe that the insurance in question is not an insurance of the value of the Investment Society's security, but simply of (I quote from the policy) “the property described in the margin hereof” for the sums set opposite the respective items. The insurance office had no concern at all with any other property, and even with respect to that specified were not concerned to inquire (and probably did not) whether there was debt on it or not.

Nor are we in this action concerned with all the property described in the policy, but only with the eight items of it specified in cond. 4. Three of these are for rent (one of them paid), and so there are only five items of property, the insurance of which and the damage to which we have any occasion to inquire about, and with respect to them I venture to think that the case is simple and easily soluble on familiar principles of insurance law and familiar rules governing the relations of debtor and creditor and of creditors *inter se*.

What was the position of the owners (the Hays) with respect to these articles of property when they granted security over them to the Glasgow Investment Society? They had previously pledged them by a valid and subsisting preferable security to the Scottish Amicable Association, and insured them to that Association to the amount of £2575. What interest in them remained to themselves either to retain or bestow on the Glasgow Investment Society; or, if you please to put it so, what insurable interest remained to them in these five articles of property to retain or bestow? The answer is plain—the residue or reversion (if any) after satisfying the preferable claim of The Scottish Amicable. This

(or something within it) they bestowed on the Glasgow Investment Society, who accordingly, having no other author, can have nothing more. The Messrs Hay had no more to give, and the Investment Society certainly knew it. What in these circumstances was the purpose of the policy with the Westminster, which is for £430 over those five items, which were already insured for £2575. The only legitimate purpose, and therefore I assume the true purpose, was to cover a reasonably estimated excess of insurable value beyond £2575. In that view it was a prudent measure, and had the fire damage exceeded £2575, the excess up to £430 would all have been payable under this policy, by which alone it was covered. It in fact amounted to exactly £1654, 10s., and so the insurance with the Westminster turned out to be a superfluous precaution, just as the insurances by the policies to the Scottish Amicable were, as it happened, superfluous to the amount of £921, 10s. In other words, the fire damage to those five items fall short of the sums insured on them by £1351. Now, take their full market value on the eve of the fire at any sum you please, that value was reduced or depreciated by the fire (for I take no account of depreciation from any other cause) to the extent of £1654, 10s., the property so depreciated being left extant for whom it may concern, according to their legal rights in it. The property as it stood on the eve of the fire was of higher market value by £1654, 10s. exactly than the same property as it stood after the fire. That this is true is certain on the assumption that the damage to it by fire was rightly estimated, which is admitted. It follows that the Investment Society have sustained no damage by the fire. The residuary value, after satisfying the claims of the Scottish Amicable, is so far from being reached, that their preferable claim upon the property remains outstanding to a considerable amount. And as I have already pointed out, the depreciation of the property by the fire damage, and the reduction of the preferable security by the payment to the prior creditor, are exactly commensurate.

I hesitate to consume time by referring to the rent items, the insurance of which, according to established rule, and an express note on the policy before us, covers only "the payment of rent for such portion of the said term of one year as the foresaid buildings respectively may be actually untenanted in consequence of fire." This in the case of the "barley-mill and counting-house" was found to be nine months, and the Scottish Amicable were accordingly allowed the full rent of this building for that period, viz., £350. How is the Glasgow Investment Society to have £120 in addition? Is it because the untenanted condition of this building for nine months has "depreciated the composite subject" to that exact amount? I ought not perhaps to wonder if the answer is in the affirmative, for a great majority of the learned Judges to whom we appealed for aid have informed us distinctly that in their opinion depreciation of composite subject is relevant and fitting to be considered in deciding upon the pursuers' claim as specified in cond. 4, being the only claim before us, which seems to imply that we may and ought in respect of it to allow something upon each or some of the eight items of claim, and why not £120 upon the claim for rent of barley-mill and counting-house? This is no doubt as sensible as it is, on the same consideration of depreciation of composite subject, to allow £80 on a steam-boiler house which was admittedly not damaged at all, the fire not having reached it, or a like sum of £80 on a steam-boiler and connections which was admittedly damaged only to the extent of £15. It seems to me, although with such a weight of authority against me I speak with much diffidence, that

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No. 176. it is idle to speak of depreciation of "composite subject" unless you can somehow make it yield a definite sum of money, which can be judicially awarded to the pursuers under some or all of the eight heads of their claim. I have found it impossible without any materials whatever, and there certainly are none, to fix upon a sum as the depreciation of "composite subject," and if I try provisionally to surmount this preliminary difficulty by pitching upon any sum within the amount covered by the policy, I am utterly unable to divide it into parts to be awarded under all or any of the heads which I find in cond. 4—"The subjects and others undernamed were damaged by the said fire to the extent after mentioned, being the amount to which they were respectively insured." I cannot find room for depreciation of "composite subject," although with the opinion which I have that the idea is futile, I may very likely exaggerate the difficulties attending the practical application of it.

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After what I have said it is perhaps unnecessary to add that I altogether dissent from the views of the majority of the Judges to the effect that the insurers here will, on making payment to the Investment Society, be entitled "as an incident of the contract of indemnity" to demand an assignation of their debt against the Messrs Hay. They say—"This is the case explained by Lord J. Mellish in the *North British Insurance Company*, 5 Chan. Div. 583, in a passage of his opinion which appears to have been misunderstood." I have already noticed this case at some length, and it will be seen from what I have said that I also think it has been misunderstood. I think I understand that case, and also the case of *Simon v. Thomson*, 3 App. Ca. 279, and if I do they have no bearing on this.

According to the import and exigency of the policy, in my opinion, the insurer's liability is the same exactly whether the demand is made by the Investment Society or by the Messrs Hay. So that the former can demand no more in the first instance on their right to take *primo loco* than the latter would be entitled to receive if the right of the former were cancelled.

My opinion is that the whole fire damage to the property insured by the policy sued on having been properly paid to the Scottish Amicable Association, who had right thereto preferably to the pursuers, the pursuers have no right to recover anything in respect of that damage, for which they have been indemnified by the extinction, to the amount of it, of the preferable debt. I think no account can be taken in this action of any damage except damage by fire to the property specified in cond. 4 of the record, and in particular that no account can be taken of depreciation of the composite subject of the Glasgow Investment Society's security.

LORD CRAIGHILL.—I concur in the opinion delivered by your Lordship, and refer to it and to the opinions of the majority of the consulted Judges for the reasons for which, I think, the judgment proposed by your Lordship ought to be pronounced.

LORD RUTHERFURD CLARK.—I wish to give a short explanation with reference to my judgment in the former case. I concurred in the decision that was pronounced, and am glad to see that that decision has not been impeached. Indeed it was not disputed then, nor is it disputed now, that the pursuers were entitled to prevail. Nothing more was maintained than this,—(first) that the postponed bondholders should be called as parties; and (second) that the sum representing the amount of the loss should be brought into Court by the whole insuring

companies in order that it might be distributed in a multiplepinding. I did not think that it was necessary to call persons who were admittedly postponed bondholders, and whose claims were admittedly postponed to the claims of the prior bondholders. Nor did I think that the question of right should be tried in a multiplepinding raised by all the companies. For it appeared to me that this would put the prior bondholders to a disadvantage, inasmuch as it was, to say the least, doubtful whether they could claim the whole fund, seeing that it was to be contributed in part by companies with whom they had no contract. But be that as it may, it is very satisfactory to know that in this case it has not been maintained that our decision was wrong, or that the prior bondholders were not entitled to the sum for which they obtained decree.

In this case I agree with the minority of the consulted Judges and Lord Young.

The defenders stated that they did not desire an assignation.

THE COURT pronounced the following interlocutor:—"The Lords of the Second Division of the Court, along with and in presence of all the other Judges of the Court, having considered the minutes of debate for the parties and heard counsel thereon and on the whole cause, Find, in conformity with the opinions of the majority of the consulted Judges, that the defenders, the Westminster Fire Insurance Office, are bound under the policy of insurance libelled to pay to the pursuers, the Glasgow Provident Investment Company, the amount of loss sustained by the said pursuers by reason of the fire in the premises of the Messrs Hay founded on in the record: Find that the amount of such loss is £350: Find that the Messrs Hay are not entitled in respect of their consent and concurrence in this action to any separate or individual decree in their favour: Ordain the said defenders to make payment to the pursuers of the said sum of £350, with interest thereon from 31st August 1882 till paid: With these alterations, adhere to the interlocutor of the Lord Ordinary of 10th November 1885, and refuse the reclaiming note for the said defenders: Find the pursuer entitled to additional expenses; remit to the Auditor to tax the same, and to report, and decern."

SMITH & MASON, S.S.C.—H. B. & F. J. DEWAR, W.S.—Agents.

STEPHEN YOUTEN (Clerk to the Leven Police Commissioners), Pursuer
(Respondent).—*Gloag—W. Campbell.*

THOMAS JACKSON, Defender (Appellant).—*Rhind—Hay.*

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Youden v.
Jackson.

Road—Private Street—Notice—General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), secs. 150, 151, 394, and 397.—Section 150 of the General Police and Improvement Act, 1862, enacts with reference to private streets that "it shall be lawful for the Police Commissioners to cause any such street or part of a street . . . to be properly levelled, paved, or causewayed and flagged." Sec. 151 authorises the Commissioners to recover the cost from the proprietors of property fronting or abutting on the street, by private improvement assessment. Section 397 enacts, that the Commissioners shall "give notice of their intention to do or perform, or to authorise to be done or performed, such matter or thing either by public advertisement in some newspaper circulating in the burgh or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing to be transmitted through the post-office, or delivered personally, or at their

No. 177. dwelling-houses, to the individuals having interest, as the Commissioners shall think proper; and it shall be lawful for any person whose property shall be taken or affected, and who shall consider himself injured or aggrieved in respect of such other matters and things by this Act so directed to be done or performed and provided for, to appeal to the Sheriff from any order made or notice given by the Commissioners in respect of such matters or things," &c. The Act provides no special form for such notices.

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The Commissioners of a burgh put up a notice at the market cross, and at each end of a road which had long been used as a public road, intimating the intention of the Commissioners "to fix the level" of the road, "to make the roadway thereof, and a footpath on both sides, with kerb and gutters," but the notice did not state that the road was to be dealt with as a private street, and did not shew that the Commissioners intended to hold the owners of property fronting or abutting on the road liable for the cost.

In an action brought by the Commissioners against the owner of property abutting on the street for payment of a proportion of the cost, the defender pleaded (1) that the road was not a private street, and (2) that if it were a private street the Commissioners had not given sufficient notice under sec. 397.

The Court, after a proof, *held* (1) that the road was a private street, and (2) that the notice was sufficient.

2d Division.
Sheriff of Fife-
shire.

L.

In June 1880 the Police Commissioners of the Burgh of Leven, which had in 1867 adopted the General Police and Improvement (Scotland) Act, 1862, posted up at three places within the burgh notices in the following terms:—

"NOTICE IS HEREBY GIVEN

"That the Leven Police Commissioners, acting under 25 and 26 Vict. cap. 101, intend to fix the level of the road leading from Scoonie Place westwards by Blackwood Place to the Waggon Road, to make the roadway thereof, and a footpath on both sides, with kerb and gutter.

"Plan of the said intended works may be seen by all persons interested therein at the office of the Commissioners, Bank Street, Leven.

"Notice is hereby further given, that the Commissioners will meet in the Town Hall, Leven, on Thursday, the 1st day of July next, at ten o'clock A.M., when all persons so interested may be heard thereupon.

"S. YODEN,

"Clerk to the Commissioners.

"Leven, 2d June 1880."

The works of which notice was thus given were carried out, and the Commissioners assessed the cost on the owners of the properties fronting the street, on the footing that it was a private street, and consequently that these owners were liable under sections 150 and 151 of the General Police and Improvement Act, 1862.* Thomas Jackson, solicitor, Kirk-

* The following were the sections of the General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. cap. 101), referred to:—

Sec. 150.—"Whereas it would conduce to the convenience of the inhabitants, and be for the public advantage, if provision were made for the levelling, paving, or causewaying, and flagging of streets which have been laid out and formed by persons who have neglected to have the same properly levelled, paved, or causewayed and flagged, and for preventing such inconveniences in future: Be it therefore enacted that where any private street or part of a street is at the adoption of this Act formed or laid out, or shall at any time thereafter be formed or laid out, and is not, together with the footways thereof, sufficiently levelled, paved, or causewayed, and flagged to the satisfaction of the Commissioners, it shall be lawful for the Commissioners to cause any such street, or part of a street, and the footways thereof, to be freed from obstructions, and to be properly levelled, paved, or causewayed, and flagged and channelled in such way, and with such materials as to them shall seem most expedient; and no such

caldy, one of these owners, declined to pay the sum of £22, 6s. 3d., being his proportion of the total cost, and an action was accordingly raised against him in the Sheriff Court at Kirkcaldy, at the instance of the clerk to the Commissioners, for that sum.

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The questions raised sufficiently appear from Jackson's grounds of defence, which were (1) that the road in question was a public not a private street; (2) that even if it was a private street, the Commissioners had treated it as a public street by giving notice in the above terms, which, as the defender maintained, were those required by section 394 of the Police Act, 1882, the section relating to public streets, and not those of a notice under section 397—that dealing with private streets; (3) that in any case the notices had not been posted up "in conspicuous places as required by the Act." Of these grounds of defence it is necessary to consider the second alone here.

On 10th December 1886, the Sheriff-substitute (Gillespie), after a proof bearing on the first and third grounds of defence, pronounced this interlocutor:—"Finds in fact that, at the date of the adoption of the 'General Police and Improvement (Scotland) Act, 1862,' in Leven, and also at the date of the proceedings of the Police Commissioners of Leven, set forth in the fourth article of the pursuer's condescendence, the road in question was a private street within the meaning of the Act, which was not, with the footways thereof, sufficiently levelled, paved, or causewayed,

street shall be considered to have been sufficiently paved or causewayed and flagged unless the same shall be completed with kerbstones and gutters to the satisfaction of the Commissioners."

Sec. 151.—"The whole of the costs, charges, and expenses incurred by the Commissioners in respect of private streets shall be paid and reimbursed to them by the owners of lands or premises fronting or abutting on each street" proportionately to the frontages of their respective premises.

Sec. 394.—"Twenty-eight days at the least before fixing the level of any street which has not been theretofore levelled or paved, and before making any sewer where none was before, or altering the course or level of or abandoning or stopping any sewer, the Commissioners shall give notice of their intention by posting a printed or written notice in a conspicuous place at each end of every such street through or in which such work is to be undertaken, which notice shall set forth the name or situation of the street intended to be levelled or paved, and the names of the places through or near which it is intended that the new sewer shall pass, or the existing sewer be altered or stopped up, and also the places of the beginning and the end thereof, and shall refer to the plans of such intended work, and shall specify a place where such plans may be seen, and a time and place where all persons interested in such intended work may be heard thereupon."

Sec. 397.—"And in respect to appeal as to all other matters and things which the Commissioners are by the police provisions of this Act empowered to do or perform, or to authorise to be done or performed, and the cost attending which falls by this Act to be provided for by way of private improvement assessment, the Commissioners shall, when not otherwise hereby directed, give notice of their intention to do or perform, or to authorise to be done or performed such matter or thing, either by public advertisement in some newspaper circulating in the burgh or in the county in which the burgh is situated, or by posting hand-bills in conspicuous places in the burgh, or by notice in writing to be transmitted through the post-office or delivered personally, or at their dwelling-houses, to the individuals having interest, as the Commissioners shall think proper; and it shall be lawful for any person whose property shall be taken or affected, and who shall consider himself injured or aggrieved in respect of such other matters and things by this Act so directed to be done or performed and provided for, to appeal to the Sheriff from any order made or notice given by the Commissioners in respect of such matters or things," &c.

No. 177. and flagged to the satisfaction of the Police Commissioners ; but finds, in law, that the notice which the Police Commissioners gave of their intention, of which notice No. 58 of process is a copy, was not a sufficient notice of their intention to deal with the road as a private street; assolizes the defender.”

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On appeal, the Sheriff (Mackay) ordered additional proof (from which it appeared, *inter alia*, that the notices had been posted up, one at each end of the street in question, and the third on the door of a coal-cellar which was on or near the site of the old burgh cross, and was regarded as its equivalent), and thereafter pronounced an interlocutor finding in fact that, at the date of the Commissioners' proceedings, the street was a private street, that it was not at that date, together with the footways thereof, sufficiently levelled, paved, or causewayed, and flagged to the satisfaction of the Commissioners. “(3) That notice was given by the Commissioners, by posting handbills in the burgh of Leven, of the operations intended to be performed on the said street, which consisted in paving the roadway thereof, and a footway on both sides, with kerbs and gutters, and (4) that such operations were duly performed by them: Finds in law—(1) That these operations were of a kind which the Commissioners, under the said Act, were entitled to perform on a private street, and to assess for as private improvement assessment, under sections 397 and 150 of the said Act; (2) that the notice given of the Commissioners' intention to perform these operations was sufficient notice under the said Act, and was sufficiently published by posting handbills in conspicuous places in the burgh, one of the modes of notice authorised by section 397 of the said Act: Therefore grants decree in favour of the pursuer, in terms of the conclusions of the petition,” with modified expenses.

The defender appealed, and argued (on the second question);—*Campbell v. Leith Police Commissioners*¹ settled that the notice to be given in relation to a private street must be a notice under the 397th section of the Police Act 1862, and that a notice under the 394th section was ineffectual for that purpose. Here the notice was in every particular except one a notice in the form provided by the 394th section. It did not bear to relate to a private street, and in this respect the case was *a fortiori* of *Campbell's* case, where the notice which was rejected as being under the 394th section did so bear; it was posted up at each end of the street affected; it referred to a plan of the intended works, specifying a place where the plan might be seen; and it fixed a meeting for hearing persons interested at a date which was twenty days after the date of the notice, and lastly, and most important, the leading work of which notice was given was “fixing the level of the road,” which was an operation contemplated by the 394th section only. No one reading the notice, therefore, would have the least reason to suspect that it was intended as a notice under the 397th section, for although the operations of “making the roadway and a footpath on both sides, with kerb and gutter,” were not operations contemplated by that section, and were operations contemplated by the 397th section, their insertion in a notice intended to be under section 397 would not invalidate such a notice, and was, indeed, quite a natural and proper intimation to make of what the Commissioners proposed in fact to do.

Argued for the pursuer (on the second point);—It was a mistake to suppose that *Campbell's* case decided that a notice in terms similar to the present was a notice under the 394th section, and not under the 397th. That was indeed conceded throughout the whole course of the

¹ *Campbell v. Leith Police Commissioners*, June 21, 1866, 4 Macph. 853, 38 Scot. Jur. 445, rev. Feb. 28, 1870, 8 Macph. (H. L.) 31, 42 Scot. Jur. 310, L. R., Scot. & Div. App. 1.

case, but on what grounds did not appear. The notice itself was nowhere to be found, either in any of the reports or in the session papers, at least it was nowhere fully printed, if the statement by the Lord Ordinary¹ (Lord Ormisdale)—that it bore to be under the 394th section—was accurate in point of fact, but this statement was in no way corroborated. The question, therefore, whether the present notice was to be taken as under the 397th section or under the 394th was not foreclosed by *Campbell's* case, and treating the matter as an open one the notice was fairly to be taken under the 397th section. The steps of procedure pointed out by the notice were no doubt similar to those required by the 397th section, but then the 394th section enjoined no special form of notice or procedure, and it was therefore both natural and proper that the analogy of the 394th section should be followed in these matters. The only difficulty arose from the use of the words "fix the level" instead of "level," but that was too slender a ground on which to invalidate the notice as a notice under the 397th section, especially as there was as a set-off an intimation of the Commissioners' intention to make the roadway and a footpath, with kerb and gutter—which operations the 397th section alone contemplated.

At advising,—

LORD CRAIGHILL.—(After dealing with the other questions, and coming to the same conclusions on them as the Sheriff)—The next question is whether or not the notice which was given was such as was required by the statute. The terms of the notice and the terms of the 397th section of the statute under which, as the pursuer says, the notice was given, are quoted in the Sheriff's note. There is no form of notice prescribed in the 397th section. All that is enjoined is that the Commissioners shall give notice of their intention to do or to perform, and authorise to be done or performed, such matter or thing in one of the ways specified. Now, what was intimated was that the Commissioners "intend to fix the level of the road leading from Scoonie Place westwards by Blackwood Place to the Waggon-Road, to make the roadway thereof and a footpath on both sides, with kerb and gutter." These are within the works which are authorised by section 150, and therefore it appears to me, as it did to the Sheriff, that the notice was all that was necessary. The defender says that the notice, such as it was, is as applicable to operations on a public street as to operations on a private street; but on a comparison of the provisions of section 394 with those of section 150 it will be found that a part of the work of which intimation was given occur in and are authorised by sec. 150 only, which relates to private streets. I concur in the conclusion at which the Sheriff has arrived.

LORD YOUNG, LORD RUTHERFURD CLARK, and the LORD JUSTICE-CLERK concurred.

THE COURT pronounced the following interlocutor:—"Find in fact (1) that the piece of ground now called Blackwood Place was at the date of the proceedings set forth in the 4th article of the condescendence for the pursuer a private road within the meaning of the General Police and Improvement (Scotland) Act, 1862; (2) that the notice given by the Commissioners represented by the pursuer, of their intention to clear, level, macadamise, and form to their satisfaction the said piece of road was in terms of the said

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¹ See 4 Macph. at p. 1038.

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Act, and was published by handbills posted at the ends of Blackwood Place, and in a conspicuous place in the High Street of Leven: Find in law that the Commissioners of Police were entitled to execute the said operations, and that the notice thereof was duly given: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against; of new decern in terms of the conclusions of the petition: Find the pursuer entitled to expenses in this Court; remit," &c.

J. & J. GALLETTLY, S.S.C.—JAMES SKINNER, S.S.C.—Agents.

No. 178.

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Buckner v.
Jopp's Trustees.

MRS JANET BUCKNER AND SPOUSE, Pursuers (Reclaimers).—

Rhind—A. S. D. Thomson.

ANDREW JOPP AND ANOTHER (Alexander Jopp's Trustees) AND OTHERS, Defenders (Respondents).—*D.-F. Mackintosh—Murray—W. Campbell.*

Trust—Transaction between trustees and beneficiaries—Mora.—A testator died in 1844. By his settlement he left legacies to A and to other persons to the amount of £17,000, and liferent annuities amounting to £100 per annum, but he died intestate *quoad* residue. His heritable and moveable estates were large, but he had extensive liabilities undertaken for three trading and manufacturing concerns, whose estates were conveyed to trustees named by him in security of his advances. He was also liable for annuities to the extent of £350, which did not admit of valuation.

In the years 1846 and 1847 the trustees made payment to the legatees of one-half of their legacies, but delayed payment of the remainder. In 1849 A and other legatees employed two law-agents to attend to their respective interests.

The trust affairs being very complicated, by direction of the trustees the firm of J. & S., their law-agents, laid the trust-accounts before an accountant. The accountant's reports, after estimating unrealised assets and liabilities, shewed that probably the trust-funds would not be sufficient to pay the legacies and testamentary annuities in full.

On 2d September 1851 the trustees, through their law-agents, offered to compromise the claims of the legatees by payment of the legacies in full without interest, on condition that they obtained from the legatees an assignation of their claims and a discharge from the next of kin. On 20th September 1851 this offer was accepted by the law-agents for the legatees and next of kin. Subsequently the trustees having discovered another liability of the deceased for £1700, proposed to resile from the agreement, but the agents for the legatees threatened legal proceedings if it was not implemented. In February 1852 a deed was executed by A as one of the legatees, and also as one of the next of kin, and by the other legatees and next of kin, by which, in consideration of the legacies having been paid in full, they assigned their whole claims against the trust to a person as trustee for J. & S. J., one of the partners of J. & S., was one of the trustees.

In 1886 the representatives of A raised a reduction of the deed of assignation and discharge against the representatives of the trustees, based on general averments of fraud, misrepresentation, and concealment and an averment that the pursuers had been greatly prejudiced by the deed, and on the plea that as the transaction involved the purchase of the trust-estate by one of the trustees, it was illegal. At the date of the action nearly all those who had taken part in bringing about the arrangement were dead.

The Court *assolized* the defenders, holding that fraud had not been proved, and that, *quoad ultra*, the action had not been timeously raised,—Lord Young and Lord Craighill further holding that no relevant ground of action had been stated.

2D DIVISION.
Lord Lee.
M.

HARRY LEITH LUMSDEN of Auchindoir, Aberdeenshire, died on 27th March 1844, leaving a trust-disposition and settlement, by which he conveyed his whole estates, heritable and moveable, to his wife, Mrs Leith Lumsden, John Jopp, W.S., Edinburgh, Henry Paterson, manager

of the North of Scotland Bank at Aberdeen, and Alexander Jopp, advocate in Aberdeen, as trustees, nominating them also as his executors; in the first place, for payment of his debts, then to convey certain lands to persons named, and then for the payment of legacies to the amount of £17,000, and liferent annuities to the amount of £100 per annum, including a legacy to Mary Leith or Walker, one of his nieces, and her children, in the following terms:—"To Mary Leith, wife of John Walker, residing at Holburn, near Aberdeen, the sum of £750, to be secured to her in liferent, for alimentary use, and to be exclusive of her husband's *jus mariti* and right of administration, and to her family in fee, in such proportions as she may direct by any writing under her hand, and failing her leaving such writing, equally among them." The truster further directed his trustees to pay, divide, and dispose of the residue of his means and estate as he might appoint by any separate writing under his hand. The truster also left two codicils, but did not dispose of the residue of his estate. The testator, at the date of his death, was under obligation to pay annuities amounting to £350 per annum, which did not admit of valuation.

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Some years before Mr Lumsden's death three large trading firms in Aberdeen—Duffus & Company, iron-work manufacturers, James Forbes & Company, rope, sail, and twine manufacturers, and Forbes, Low, & Company, cotton-spinners and manufacturers—had got into difficulties, and Mr Lumsden, who was related to Mr James Forbes of Echt, a leading partner in each of the firms, agreed to interpose his credit and take the burden of the debts of the firms on himself, upon condition of trust-deeds being granted by each firm, and the partners thereof conveying their whole estates to trustees in security of his advances. Such deeds were accordingly granted, and Mr Lumsden had before his death made large advances in part implement of the obligations so undertaken by him, which advances were unpaid at his death.

The testamentary trustees, in 1846 and 1847, paid to the respective legatees one-half of their legacies, in all £8527, 2s. 6d., but delayed making payment of the remaining half, alleging that the extent of the obligations undertaken by the deceased to the firms just named being as yet uncertain, it was impossible to determine what the ultimate value of the estate left by him might be, but being pressed by the beneficiaries to have the trust closed, the trustees, in 1849, directed their agents, Messrs Jopp & Shand, advocates, Aberdeen (of which firm Mr Alexander Jopp, one of the trustees, was a partner), to send the whole accounts and vouchers of the testamentary trust, and of the three firm trusts, to Mr Donald Lindsay, accountant in Edinburgh, to be examined and audited. In consequence, Mr Lindsay prepared detailed reports, giving a statement of the affairs of the testamentary trust and of the three firm trusts, the former from the truster's death in 1844 to 1850, and the latter from their commencement in 1841 to 1850—both being ultimately continued down to 30th April 1851. These reports, in which an estimated value was put on the assets of the various trusts so far as unrealised, bore out, in the opinion of the testamentary trustees, their contention that it was not possible to make an immediate payment of the balance of the legacies out of the estate.

On 25th January 1851 Mr Lindsay's first report was sent to Mr Lachlan M'Kinnon junior, Aberdeen, who acted for a large number of the legatees and next of kin of the truster, and were examined by him and by his Edinburgh correspondent, Mr Charles Morton, W.S., and as the result of a meeting with the trustees in Edinburgh on 30th January, at which were present Messrs M'Kinnon and Morton, as well as several

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persons representing others interested in the testamentary trust, the whole accounts, vouchers, and reports connected with the various Lumsden trusts were sent to Mr M'Kinnon for detailed examination. He kept them in his hands till 28th April. On 2d May another meeting with the trustees was held, at which various objections to the reports were stated by Mr M'Kinnon and Mr Morton, and proposals for a settlement were suggested.

On 2d September Jopp & Johnston, W.S., the Edinburgh correspondents of Jopp & Shand, sent to Mr M'Kinnon, who had in the meanwhile been pressing the trustees to formulate their terms of settlement, and also to Mr John Duncan, advocate, Aberdeen, who represented certain others interested in the testamentary trust, a letter, in the following terms:—
“We are now authorised to submit to you the following proposal:—(1) That the legatees under the settlement of the late Mr Leith Lumsden shall, upon receiving payment of the balance of the capital of their legacies, assign their claims, and the next of kin, and parties who might be entitled to residue, if any, renounce and discharge their claims, and all exoner and discharge the trustees and executors of Mr Leith Lumsden, and approve of the states of the affairs prepared by Mr Lindsay; (2) the money to be payable within three weeks after all the legatees intimate their acceptance of the above terms. The acquiescence of all the legatees and next of kin is, of course, a condition of the arrangement. You will allow us to add, with reference to the time which has elapsed since a proposal was suggested, that both Messrs Jopp & Shand of Aberdeen and ourselves understood that a proposition to the above effect had already been made to Mr Morton through Mr Hunter. . . .”

On 4th September Mr M'Kinnon wrote to Mr Walker, the husband of the beneficiary specially referred to above, in these terms:—“I beg to enclose copy of a letter received by me yesterday from Messrs Jopp & Johnston of Edinburgh, proposing terms of settlement by the trustees to the legatees of the late Mr Leith Lumsden. From this letter you will observe that the trustees propose to pay to the legatees the balance of the capital of their legacies, on the condition that the latter and the nearest in kin forego their claim to interest and residue, abandon all objections to the management, and assign their rights in the estate to the trustees. It is a condition of this offer that all the legatees and nearest in kin accede to it. I beg to be favoured with your instructions in this matter. I have taken the liberty of recommending the acceptance of the proposal to others, and I think that all who are immediately benefited by it should accept it. There is much ground for dissatisfaction with the management, but I think the terms proposed are preferable to going into Court, and being subjected to the delay attending an action, the result of which, besides being distant, may be considered more or less uncertain. You will readily see that the parties who sacrifice most in assenting to the above terms are such of the nearest in kin as are not specially legatees under Mr Lumsden's deed of settlement, who thus renounced the whole of their interests, in order that others more favoured by Mr Lumsden may obtain payment of part of what was destined to them. It will be fortunate, if no obstacle be thrown in the way by the parties of whom I speak, in carrying out the arrangement proposed.” On 8th September Mr Walker replied:—“Received your letter upon the 6th. We are willing to do as the rest do, or what you think best. JOHN WALKER.”

On 20th September, Mr M'Kinnon having obtained the consent of the other legatees and next of kin, accepted Jopp & Johnston's offer of 2d September, but before the formal deed of assignation giving effect to the arrangement had been executed an additional liability affecting the trust-estate under a bond of caution for £1700 by Mr Lumsden, which had not

been taken account of in Mr Lindsay's reports, was discovered, and the trustees were in consequence desirous of having the arrangement modified. Messrs M'Kinnon and Duncan, however, threatened legal proceedings to enforce the arrangement, and in the end the trustees yielded.

The deed of assignation and discharge was dated January and February 1852. Its material provisions are given below.* By it the granters, who

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* The deed was granted by all the legatees and by the heir-at-law and the next of kin of the truster, bearing " . . . I, Mrs Mary Leith or Walker, wife of John Walker, residing lately at Holborn, near Aberdeen, now in Inverury, with the special advice and consent of my said husband ; and I, the said John Walker, for my right and interest, and taking burden on me for my said spouse. . . . all being legatees or beneficiaries," and " We . . . the said Mary Leith or Walker, with consent of my said husband," and the said John Walker for his own right and interest, " . . . the next of kin of the said deceased Harry Leith Lumsden." It narrated the trust-disposition and settlement, and the payments under it already made by the trustees, and continued,—“And [considering] that the said trustees and executors having, by two several minutes, dated respectively the 21st day of November 1849 and 30th day of January 1851, remitted to Donald Lindsay, accountant in Edinburgh, to examine and audit the accounts of the intromissions of Messrs Jopp & Shand, advocates in Aberdeen, the cashiers and agents of the said trustees and executors with the deceased's means and estate, and the accounts of the trusts of James Forbes, Esq. of Echt, deceased ; Messrs John Duffus & Company, James Forbes & Company, and Forbes, Low, & Company, on account of whom the said deceased Harry Leith Lumsden had prior to his death come under large obligations and engagements, and in which he and his trustees and executors are interested : And that the said Donald Lindsay, having examined and audited said accounts of the deceased's trust from the date of the deceased's death up to the 30th day of April 1851, and of the other trusts above mentioned from the dates of commencement of the same respectively to the said 30th day of April, framed reports wherein the payments or investments made on account of the legacies and provisions under the deceased's settlement and codicils are stated, a value is put on the outstanding debts due to the deceased's estate, and the other property still remaining unrealised, and by which reports it appears there will be a probable deficiency of trust-funds to meet the payment of the liabilities of the deceased, and to pay in full the legacies and provisions left and bequeathed by him, and make provision for the annuities above mentioned, which reports are dated respectively the 9th day of November 1850 and the 2d day of May 1851 : And considering also that a considerable length of time may yet elapse before the remainder of the deceased's means and estate can be realised, especially as it is necessary before this can be accomplished that the various trusts above referred to should be wound up, and that therefore it has been deemed expedient to settle with the legatees and those interested in the deceased's estate, in order to bring the trust to a speedier conclusion : And whereas, upon the suggestion of the said Messrs Jopp & Shand, a proposal has been made to the legatees offering to pay to them the balance of the capital of their legacies without interest, which proposal has been accepted by the legatees and beneficiaries under the deceased's settlement and codicils foresaid, and is to the following effect :—1st, That the legatees shall, upon receiving payment of the balance of the capital of their legacies, assign their claims, and the next of kin and parties who may be entitled to a residue, if any, renounce and discharge their claims, and all exoner and discharge the trustees and executors of the said deceased Harry Leith Lumsden, and approve of the estates of the affairs prepared by the said Donald Lindsay before referred to ; 2d, that the money shall be payable within three weeks after all the legatees intimate their acceptance of the above terms, the acceptance of all the legatees and next of kin being a condition of said arrangement : And whereas we, the parties hereto legatees and beneficiaries foresaid, have agreed to accept the said offer, and to grant the discharge, exoneration, and assignation under written ; and we, the next in kin of the deceased

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were the whole legatees, the heir-at-law and the next of kin of Mr Lumsden, discharged his testamentary trustees of their whole intromissions, on

and parties who would have been entitled to the residue, if any, have agreed to concur and join in said discharge, exoneration, and assignation: And whereas the annuities before mentioned and other annuities which the deceased was at the time of his death under obligation to pay or provide for have been secured by bond granted by Alexander Abercrombie, Esquire, residing in Aberdeen, and the said Messrs Jopp & Shand, as a company, and by Alexander Jopp and Robert Shand, both advocates in Aberdeen, the individual partners of that firm, as individuals, bearing date the

: And now, seeing that the said Messrs Jopp & Shand have, in terms of the foresaid arrangement, and in consideration of our granting these presents, instantly advanced and paid to us as follows, *videlicet*." The deed then set forth the payment of the various legacies, including the deposit in bank of a sum sufficient to meet the respective liferent and fee of Mrs Walker and her children; and continued:—"And seeing that the said trustees and executors have by the hands of the said Messrs Jopp & Shand thus implemented their part of the arrangement above narrated: Therefore we, the parties hereto who are legatees and beneficiaries under the foresaid trust-disposition and settlement and codicils, or representatives of legatees and beneficiaries, do hereby, in implement of our part of the arrangement above narrated, and for our respective rights and interests in the premises as legatees and beneficiaries foresaid, and with consents foresaid, exoner, acquit, and simpliciter discharge the said trustees and executors and all others, the representatives of the said deceased Harry Leith Lumsden, deceased, of the whole actings, transactions, intromissions, and management of the said trustees and executors, had by them or by their said cashiers and agents, or any of them, under or in consequence of the said trust, or in relation thereto, any manner of way, but under reservation always in favour of the said Alexander Abercrombie, our assignee, of all claim, right, and interest competent to him under the assignation hereinafter written." Then followed a similar renunciation and discharge by the truster's heir-at-law and next of kin (including Mrs Walker, with consent of her husband, and her husband for his own right and interest), of any claim competent to them "for the residue of his estate, heritable or moveable, if such there be, or should hereafter arise . . . And we, the whole parties hereto, do hereby, in so far as we are interested in the estates of the said deceased Harry Leith Lumsden under his said deed of settlement and codicils, or *ab intestato*, ratify, homologate, and approve of the foresaid reports and relative states by the said Donald Lindsay, and of the whole actings and intromissions of the said trustees and of their cashiers and agents, as well detailed as not detailed therein . . . And farther, in implement of our part of the said arrangement above narrated, and at the special request of the said Jopp & Shand, and with consent of said trustees and executors, we, . . . the said Isobel Leith or Hay, Mary Leith or Walker, Catherine Leith or Smith, now Hay, with advice and consent of our said husbands: And we, the said Peter Hay, John Walker, and Arthur Hay, for our respective rights and interests, and as taking burden on us for our said spouses respectively, at the special request of the said Messrs Jopp & Shand, and with consent of the said trustees and executors, do hereby make and constitute the said Alexander Abercrombie and his foresaids our cessioners and assignees, not only in and to the sums of money before mentioned appointed by said deed of settlement and codicils to be invested for behoof of us and of our said families, to the extent of the amounts now advanced by the said Messrs Jopp & Shand, and invested for behoof as aforesaid, with all claim competent to us respectively for arrears of annualrent upon the foresaid sums so advanced and invested from and after the period at which the same ought to have been invested for behoof foresaid, in terms of the said trust-disposition and settlement and codicils, but also in and to the said trust-disposition and settlement and codicils, whole clauses, tenor, and contents thereof, to the extent of the said sums advanced and invested as aforesaid, to the end and effect that the said Alexander Abercrombie

consideration of the legatees having received payment of the balance of their legacies from Jopp & Shand, the agents to the trust. The granters further assigned and conveyed their whole interests in the estate to Mr Alexander Abercrombie, who was an uncle of Alexander Jopp of Jopp & Shand, and who had become responsible for the payment of the balance of the legacies. The heir-at-law and the next of kin assigned their rights to the residue without receiving any pecuniary consideration therefor. The deed was signed for Mrs Walker by two notaries, their docquets bearing that they were authorised to subscribe for her "both as a legatee and one of the nearest in kin of the said deceased Harry Leith Lumsden." About the same date the trustees (who had signed as consenters to the assignation and discharge), on the narrative that Messrs Jopp & Shand "have agreed to relieve us of all outstanding claims against the trust, upon our conveying and assigning to them, or to a party to be named by them, the whole remaining trust property, claims, and assets," conveyed the whole assets to Mr Abercrombie. Thereafter, on 7th June 1858, Mr Abercrombie granted a back-bond in favour of Messrs Jopp & Shand, acknowledging that the said conveyance had been granted to him in trust for the following purposes, viz.—That the said assets should be realised at the sight of and according to the directions of Messrs Jopp & Shand, and the proceeds thereof applied by them—(1) in implementing the arrangement with the beneficiaries; (2) in paying all other claims against the trust-estate; (3) in relieving Mr Abercrombie of his obligations under the bond of 9th February 1852; and (4) for behoof of Messrs Jopp & Shand. Thereafter by disposition and assignation, dated 3d November 1866, Abercrombie divested himself of the whole property and assets, and conveyed the same to Alexander Jopp, then the sole surviving partner of Jopp & Shand, and at the same time Jopp granted to Abercrombie and his heirs a bond of relief from all the obligations which he had undertaken. In this way Alexander Jopp acquired from the body of trustees of which he was one, with the consent of the legatees and next of kin, the whole remaining trust property and assets in consideration of the assignation and discharge of 1852 and the payments therein recited. The payments which Jopp & Shand undertook to make were all duly made, including the deposit in bank of a sum to meet the liferent and fee of Mrs Walker and her family. On the death of Mrs Walker in 1871 her children, including Mrs Janet Walker or Buckner, received payment of the capital of the sum liferented by her, and granted a discharge in favour of the trustees therefor.

This was an action raised on 22d June 1886 at the instance of Mrs Janet Walker or Buckner as executor-dative of her father (to whom her mother's rights as one of Mr Lumsden's next of kin passed *jure mariti*), and his foresaids may recover payment of the foresaid sums respectively and arrears of annualrent thereon, out of and from the trust means and estate of the said deceased Harry Leith Lumsden . . . and we the said [next of kin] make, constitute, and appoint the said Alexander Abercrombie, his heirs, executors, and successors, our lawful cessioners and assignees, in and to all and whatever claims we or may be competent to us as next of kin of the said deceased Harry Leith Lumsden, whether arising out of the foresaid deed of settlement and codicils, or *ab intestato* by and through his death." The whole parties then surrogated and substituted Abercrombie and his foresaids in their full rights and place in the premises, with full power to him and them to expedite titles, to sue, and generally to do everything concerning the premises that the granters themselves might have done. The deed contained a declaration that the trustees and Mr Abercrombie "shall have no right or claim for repetition on us for any part of the said sums now paid to us or invested for our behoof on any ground whatever."

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No. 178. and Charles Buckner her husband, against the representatives of Mr Lumsden's trustees, for reduction of the assignation and discharge of 1852.
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The pursuers, after narrating the substance of Mr Lumsden's trust-disposition and settlement and of the deed under reduction, averred:—(Concl. 8) "It is believed and averred that the said [Lindsay's] reports were materially inaccurate, and proceeded upon information supplied by the trustees and Messrs Jopp & Shand to Mr Lindsay, in the full knowledge that it was erroneous, and with the intention of misleading him, and that, in place of the estate being unable to pay the liabilities and provisions before referred to, it was not only able to do so, but there was a large surplus, which fell to be divided among the next of kin. It is believed and averred that, as the said trustees and Messrs Jopp & Shand well knew, the only interest which the said Harry Leith Lumsden had in the estate of James Forbes, Duffus, & Co., James Forbes & Co., and Forbes, Low, & Co., was that of a creditor, whereas the said trustees, and Messrs Jopp & Shand, in the said discharge and assignation, and in the proceedings and communings preliminary to the same, falsely and fraudulently represented to the granters thereof that the estate was under heavy obligations and engagements for these parties, and thereby induced them, under essential error, to grant the same. In the inventory of the personal estate of the said Harry Leith Lumsden, given up by the said trustees, are included items amounting to about £10,000, as due by these parties to the deceased, and it is believed and averred that the deceased held ample security for payment thereof. The only interest which he had in their estates was in so far as he was a creditor for these sums. It is, further, believed and averred that the said trustees, or their law-agents, in place of devoting the estate of the said Harry Leith Lumsden, as they realised it, to the purposes of the trust, applied it to purposes not sanctioned by, and of a nature contrary to the terms of the trust. It is believed and averred that, if the estate shewed a deficiency at the dates of these reports, the deficiency arose from the improper and illegal actings of the trustees, or the said Messrs Jopp & Shand, or one or other of them. The investments of the said Harry Leith Lumsden were, for the greater part, of a first-class character, and the discharge and assignation and report bear that the whole, or nearly the whole, of the estate had, prior to its date, been realised. It is believed that Duffus & Co., James Forbes, Forbes & Co., and Forbes, Low, & Co. granted trust-deeds in favour of Mr Paterson and Mr Alexander Jopp prior to the death of Mr Leith Lumsden. In the accounts produced by the defenders the trustees take credit for the sum of £20,600, as having been paid by them in satisfaction of obligations alleged to have been undertaken by the deceased Mr Leith Lumsden to the creditors of Mr Forbes and the said firms. It is believed and averred that no such obligations had been undertaken by him, or, at all events, that they were not of such a nature as to warrant the trustees in continuing, after his death, to pay the said creditors, and that these payments were wrongfully and improperly included in the account. The defenders are called upon to produce the obligations in consequence of which these payments required to be made. Further, the said accounts include large business accounts and commissions charged by Messrs Jopp & Shand for services performed. These charges are illegal, as Mr Jopp was a trustee as well as law-agent, and no provision is made in the settlement of the deceased that a trustee shall be entitled to charge fees. Further, in the said accounts, a sum of £4925 is debited against the personal estate as the amount of claims for meliorations made by the tenants of the lands of the deceased. It is admitted in said reports that the same were then

disputed by the executor, and that no part thereof had been paid. It is averred that the personal estate was not liable for these claims, and it is also averred that no part thereof has ever been paid. The same were payable out of the lands of which the claimants were tenants. The testator held most of his lands in fee-simple. The defenders are called upon to state specifically what sums they allege to have been paid on these grounds. In the report, dated 2d May 1851, there is a statement made of the assets of the estate at that date, which are stated to be worth £14,542, 15s. 2d., but it is believed and averred that this list is grossly undervalued, and does not include all the assets of the estate. It is believed and averred that the assets detailed in that report yielded much more than the value put upon them. The defenders are called upon to lodge an account shewing the sums actually received by Messrs Jopp & Shand out of the estate conveyed to them, subsequent to the report by Mr Lindsay, dated 2d May 1851. There was no necessity for the said discharge and assignation, as the trustees had, at the date thereof, more cash on hand and available for the purpose of paying the grantors of the said discharge and assignation the sums due to them as legatees and next of kin than was required to pay the outstanding debts and balance of legacies, &c. The report of 2d May 1851 shews conclusively that there was a surplus. In that report the assets therein specified, though the whole were not included, and though they were grossly undervalued, are estimated to exceed the debts therein mentioned, which then formed the entire claims against the estate, with the exception of the balance of the legacies and annuities, by the sum of . . . £7,732 1 4

But there was wrongfully included in the accounts the following items:—

Payments made to tenants of estates for meliorations,	£535	11	1	
Sums claimed by the tenants, and unpaid,	4925	0	0	
Account for business performed by parties who were trustees,	2267	11	3	
				<hr/>
				7,728 2 4
				<hr/>
Total amount of assets,	£15,460	3	8	
The payments to be made were:—				
Balance of legacies,	£8238	7	6	
Payments to annuitants,	4070	0	0	
				<hr/>
				12,308 7 6
				<hr/>
Surplus,	£3,151	16	2	

If Mr Lachlan M'Kinnon, advocate, Aberdeen, attended on behalf of the female pursuer's father and mother before the reporter, Mr Lindsay, and stated objections to them, he failed in stating objections thereto of the most obvious nature. . . . The first report of Mr Lindsay was made before Mr M'Kinnon professed to examine the accounts."

The defenders answered;—(Ans. 8) "Admitted that Mr Lindsay's first report was prior in date to Mr M'Kinnon's examination of the accounts, and explained that the object of the trustees in remitting the accounts to Mr Lindsay was to obtain from a neutral accountant of acknowledged eminence a report which would enable them and all parties interested to form a judgment as to the actual position of the trust, and the course that ought to be pursued in the future. *Quoad ultra* denied. The pursuers are called on to state details as to the erroneous information alleged to have been supplied to Mr Lindsay, with the intention of misleading him,

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and to specify the particulars in which he was deceived. They are also called upon to give a specification of the alleged misapplication of funds by the trustees or their law-agents, and to specify the payments to creditors of Mr Forbes and his firms which they allege were improperly made. . . . Only a comparatively trifling portion of the liabilities so undertaken by Mr Leith Lumsden was extinguished during his lifetime, and the remainder (far exceeding in amount the sum of £20,600, which his trustees and executors were ultimately called upon to pay) constituted a valid claim against his trust-estate. The sum of £10,000, which appears in the inventory, represents merely the amount due, as at that date, to the testator by Mr Forbes or his firms, but does not represent the liabilities undertaken by him on their account, and which were enforceable against his estate. With reference to the claim for meliorations, it is explained that the trustees had been advised by eminent counsel that the trust-estate was liable therefor. The sums objected to by the pursuers as having been paid for meliorations were so paid in pursuance of decrees obtained against the trustees in the Court of Session and Sheriff Court. At the date of Mr Lindsay's second report, further claims to the amount of £3553 had been intimated to the trustees, and it was probable that others would emerge, raising the sum total to the amount estimated in the said report. With reference to Messrs Jopp & Shand's professional accounts, it is averred that the charges therein were reasonable in amount, and for work by which the estate had benefited, and that the accounts, after being audited by Mr Lindsay, were approved of by all the parties interested, and their legal advisers. It is further averred that Mr M'Kinnon stated and urged, on behalf of his clients (including Mr and Mrs Walker), every objection to the accounts suggested by his legal knowledge and experience. After mature deliberation, however, and a full examination of the accounts, he advised his clients not to insist upon these objections, as, in his opinion, it was more for their interests to agree to the compromise then under consideration. This opinion was well founded. It is specially denied that at the date of the said discharge and assignation the trustees were in a position to pay the balance of the legacies in full. On the contrary, at that date there was every prospect that years might elapse before this could be accomplished, if it ever could be accomplished. . . . It is averred that the unrealised assets are stated in Mr Lindsay's report at a fair and full estimate of their value at that date. The pursuers are called upon to specify the items which they allege to have been undervalued as at that date, and also the trust assets, to which they refer as having been wholly omitted. . . ."

The pursuers further averred;—(Cond. 9) "Messrs Jopp & Shand were the law-agents of the trust, and Mr Alexander Jopp, one of the partners of the firm, was one of the trustees. The terms of settlement to which the said Mary Leith or Walker and husband agreed were, as disclosed by the discharge and assignation, suggested by the said Jopp & Shand. The said discharge and assignation bears that the legacies, or balance of the legacies, were paid by Messrs Jopp & Shand, and that it was at their request that the said Mary Leith or Walker and husband assigned all their interests in the said estate to the said Alexander Abercrombie. The said Alexander Abercrombie was an uncle of the said Alexander Jopp, and in reality the assignation was one in favour of Jopp & Shand. . . . The said Mary Leith or Walker and John Walker were not represented by any law-agent; at anyrate, they were not represented by a neutral agent. Mr Lachlan M'Kinnon, who is alleged to have acted for them, acted for a great number of other parties who were simply

legatees, and whose interest conflicted with that of the pursuers' father and mother. They did not understand the meaning of the discharge and assignation, and the signature of Mrs Walker was adhibited notarially. The said discharge and assignation was impetrated from them by fraud, and granted by them on misrepresentations and under essential error. It was entered into by them on the footing that it applied only to the legacy, and they were not at its date aware that they were interested in the residue, or that there was or could be any residue. The position of the estate was not explained to them, and the accounts of the trust were not submitted to them for consideration. They were kept entirely in ignorance of their rights and of the true position of the estate. In point of fact the accounts of the trust were not submitted to them or their family until after the institution of the present proceedings, though the defenders had previously lodged three separate defences, and though, prior to the institution of the present proceedings, the pursuers offered to pay the law-agents of the defenders their fees for lending them the papers of the trust, and though the female pursuer has repeatedly, long prior to the present time, called upon the agents of the defenders for explanation regarding the estate. . . . The pretended purchase or acquisition was for a grossly inadequate consideration. It is believed and averred that the said Jopp & Shand realised a sum largely in excess of the sums they are alleged to have paid to the beneficiaries out of the estate assigned to them."

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The defenders answered,—(Ans. 9) "The discharge and assignation is referred to. Admitted that it bears that the terms of settlement had been suggested by Messrs Jopp & Shand; but explained that upon the emerging of the new cautionary liability, . . . they desired to resile from the offer which they had previously made, and would have done so if the legatees and next of kin (including Mr and Mrs Walker) had not insisted upon the proposal being carried out according to its terms, and threatening legal proceedings if this were not done. . . . Denied that the interest of Mr M'Kinnon's other clients conflicted with that of Mr and Mrs Walker. Mrs Walker was a legatee, and her interest was to obtain payment of her legacy, and without further delay; which, as she and her husband well knew, could be accomplished only by the proposed arrangement being carried out, and upon condition of the heir-at-law, who had right to so much of the residue as was heritable, and next of kin discharging their claim to the residue (if any). Mr M'Kinnon acted for the heir-at-law and for all the next of kin, of whom some were and some were not also legatees. . . ."

The pursuers pleaded;—(1) The said discharge and assignation having been granted truly in favour of one of the trustees, it is null and void. (2) The said discharge and assignation having been granted truly in favour of the law-agents of the trust, it is null and void. (3) The said discharge and assignation having been impetrated by fraud, misrepresentation, and concealment, decree of reduction ought to be granted as craved. (4) *Separatim*, The said discharge and assignation having been granted under essential error, decree of reduction ought to be pronounced.

The defenders pleaded;—(1) The pursuers have no title to sue, at least none such as is libelled. (2) The averments of the pursuers are not relevant or sufficient to entitle them to have the discharge and assignation of 1852 set aside. (3) In the circumstances, the action is barred by *mora* and *taciturnity*, and by the actings of the pursuers. (4) The pursuers are barred *personali exceptione* from pursuing this action, inasmuch as they participated in 1872 in the division of the £750 which was obtained as the price paid by Jopp & Shand to the female pursuer's mother and father

No. 178. for what they assigned to Mr Abercrombie in 1852. (5) The defenders are entitled to absolver, in respect that the pursuers' averments are unfounded in fact, and that the discharge and assignation in question was granted by Mr and Mrs Walker after complete information and investigation, in the full knowledge of their rights and of the nature of the transaction, with legal assistance and advice, and for a full and sufficient consideration. (6) So far as the trustees and executors of Mr Lumsden are concerned with the transaction, they became parties to it at the request of the beneficiaries, including the female pursuer's father and mother, and she cannot challenge their acts.

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A proof was allowed. The facts stated in the foregoing narrative appeared from the evidence. The only witness of those who had taken part in the negotiations which led to the assignation and discharge of 1852 was Mr M'Kinnon, who acted as law-agent for Mrs Walker and other legatees and next of kin. Portions of his evidence are given below.*

* Being asked in cross-examination "(Q.) Did you inquire whether the trustees had been applied to to fulfil that cautionary obligation?" Mr M'Kinnon deposed,—"(A.) My information was contained in the trust-accounts and Mr Lindsay's report. I assumed that Mr Lindsay's report accurately set forth the position of matters. I knew that Mr Lindsay had got his information entirely from Jopp & Johnston. . . . (Q.) Where did you understand the money was to come from that was to pay the legacies in full? (A.) It was for Mr Jopp to raise that. (Q.) Did you not think it a very extraordinary thing that trustees should raise funds on their own private responsibility to pay legatees? (A.) I don't know. Considering the state of the trust, I thought it was highly desirable that they should do so. (Q.) Unless the trustees had done something wrong, they were not bound to raise the money themselves? (A.) Very likely; but there had been something wrong, because the trust had been mismanaged; we saw that. (Q.) Mismanaged to the extent of making the trustees personally responsible? (A.) Well, we believed so. (Q.) In what respects? (A.) In many respects—not realising the assets in time, for one thing; that was the chief thing. (Q.) Was it not the case that you found that the trustees had realised the estate and had applied it improperly to their own purposes? (A.) I could not say that. . . . (Q.) Did you not think it was odd that a conveyance should be made to Mr Abercrombie by the residuary legatees, Mr Abercrombie paying nothing and the residuary legatees getting nothing? (A.) I thought there was nothing extraordinary in Mr Abercrombie being assignee at all. He was assisting Mr Jopp, as I thought and believed. Very likely he advanced the money for Mr Jopp; my belief was that he did, but I could not say that he did. (Q.) What was his interest in the matter? (A.) Just to assist his nephew, Mr Jopp, out of a scrape; that is as I read it at the time. (Q.) Had you and Mr Jopp any talk about the scrape into which he had fallen? (A.) I am calling it a scrape, but Mr Jopp never spoke of it in that way at all, nor did I either to Mr Jopp. . . . It was contemplated from the very first that if there was any residue it should go to Jopp & Shand. (Q.) Why to them? (A.) Because they were advancing the money for the trustees, as I understood it. (Q.) You mean Jopp & Shand? (A.) Or Mr Jopp, I should rather say. (Q.) Was it to go to Jopp & Shand personally, or to them as agents for the trustees? (A.) Personally, certainly; as they were advancing the money for the trustees, it was to reimburse them for the advances they were to make to us. . . . (Q.) Would it not have been well if you had made a provision that, if the estate had turned out more than sufficient to repay Jopp & Shand, the balance should go to the next of kin? (A.) If there had been any reasonable prospect to suppose that such a result could take place we would have done so, but neither I nor Mr Morton believed that they would get themselves what they were to give us. . . . (Q.) Did you ever tell John Walker that you did not believe there would be any reversion? (A.) I have no doubt I did; I told him

The import of the proof as to the value of the estate is given in the **No. 178.**
 Lord Ordinary's opinion.

On 14th April 1887 the Lord Ordinary (Lee) pronounced this interlocutor:—"Finds that the discharge and assignation in question was not obtained by fraud, misrepresentation, or concealment, and that the same was not granted under essential error: Finds that it was the result of a transaction to which the pursuers' authors were parties, acting under the advice of an independent law-agent, duly authorised to act on their behalf, and from whom no information regarding the trust-accounts was withheld: Finds that in said transaction no advantage was taken by the deceased Alexander Jopp, or by his firm of Jopp & Shand, of information acquired in a fiduciary character; and finds, further, that the said transaction was acted on and confirmed by the pursuers' authors: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuers liable in the expense of process," &c.*

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all; I had no concealment from anybody. (Q.) But did you tell him you thought there would be no reversion? (A.) I have not the least doubt of it. (Q.) It was in the belief that that was true that he signed the discharge? (A.) He took my advice. . . . (Q.) May I take it generally that you made a special examination, on the one side, of the assets and what they amounted to, and, on the other, of the amount of the estimated liabilities? (A.) To the best of our ability we did. (Q.) And the outstanding assets also? (A.) Certainly; they were a material point. (Q.) Did you consider these in the light of your local knowledge as a man of business in Aberdeen? (A.) I did, and I thought there would be more likely to be a deficiency than a surplus. . . . (Q.) To what extent did you go behind Mr Lindsay's reports in the way of examination? (A.) By checking his values of the unrealised assets simply. (Q.) What books or accounts did you examine other than Mr Lindsay's reports? (A.) None, as to the figures. (Q.) But as to anything? (A.) We checked the values which they gave us as representing the amount of the unrealised assets. (Q.) And that was the extent to which you went behind Mr Lindsay's reports? (A.) I suppose chiefly so. (Q.) When you say that you checked the estimates put on the unrealised assets by Mr Lindsay, do you mean simply that you went over them and estimated them for yourself? (A.) Simply, that is all I did. . . ."

* "OPINION.—This is a reduction of a discharge and assignation granted in 1852 by the legatees and next of kin of Harry Leith Lumsden, of Auchindoir, who died in the year 1844, leaving considerable means and estates, which, however, were deeply involved by reason of liabilities which he had contracted in connection with certain mercantile firms.

"By the deed in question the granters discharged Mr Lumsden's trustees of their whole intromissions, and, both as legatees and as next of kin entitled to the undisposed of residue, they also assigned and conveyed to Mr Alexander Abercrombie (the uncle of Mr Alexander Jopp, who was one of the trustees and also one of the agents for the trust) their whole interests in the trust-estate. The trustees were parties to the deed, and consented to a reservation in favour of Mr Abercrombie, notwithstanding the discharge of all claim and right competent to him under this assignation, 'to the end and effect that the said Alexander Abercrombie and his forebears may recover payment of the foresaid sums respectively, and arrears of annualrent thereon, out of and from the trust means and estate of the said deceased Harry Leith Lumsden.' Mr Abercrombie was also surrogated and substituted by the heir-at-law and next of kin in their full rights and place, with power to him to expedite titles, and to ask, crave, sue for, and uplift the sums of money, principal and interest, thereby assigned, 'and generally to do every other thing concerning the premises that we or any of us might have done ourselves before granting hereof.'

"Now, Mr Abercrombie, it is admitted, was a mere trustee for Messrs Jopp & Shand, who made, or undertook to make, the payments mentioned in the deed as the consideration for which it was granted, and for which he became

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The pursuers reclaimed, and argued;—The legatees and next of kin of Mr Lumsden had discharged his testamentary trustees, and no question

cautioner. The considerations mentioned as the cause of granting this deed are, that it appeared from a certain report by Mr Donald Lindsay upon the trust-accounts that there would be a probable deficiency of trust-funds to meet the payment of the liabilities of the deceased, and to pay in full the legacies and provisions left and bequeathed by him, and to make provision for certain annuities to which his estates were subject; also that a considerable length of time might yet elapse before the remainder of the deceased's means and estate could be realised, 'especially as it is necessary before this can be accomplished that the various trusts above referred to should be wound up, and that therefore it had been deemed expedient to settle with the legatees and those interested in the deceased's estate, in order to bring the trust to a speedier conclusion'; also that, upon the suggestion of the said Messrs Jopp & Shand, a proposal had been made and agreed to, whereby, upon payment to the legatees of the balance of the capital of their legacies, they should assign their claims 'and the next of kin and parties who may be entitled to a residue (if any) renounce and discharge their claims; and all exoner and discharge the trustees and executors of the said deceased Harry Leith Lumsden, and approve of the states of the affair prepared by the said Donald Lindsay before referred to'; and further, that Messrs Jopp & Shand had, in terms of the arrangement, made or provided for the stipulated payments.

"The result of the deed was, that Mr Abercrombie, in security of his claims of relief against Messrs Jopp & Shand, obtained a conveyance of the whole outstanding assets of the trust; and that subsequently, upon Mr Abercrombie's claims of relief being satisfied, these assets were conveyed by him, with the consent of Mr Shand's trustees, to Mr Alexander Jopp, then the sole surviving trustee of Mr Lumsden.—(See disposition and assignation of 1866, No. 144 of process.) It appears from the defenders' statement (art. 24) that Mr Abercrombie had previously obtained a conveyance from the trustees of the whole remaining trust-property, claims, and assets, in consideration of Jopp & Shand having relieved them of all outstanding claims against the trust.

"Mr Alexander Jopp thus acquired from the body of trustees, of which he was one, with the consent of the legatees and next of kin, the whole remaining trust-property and assets, in consideration of the discharge under reduction, and the payments therein recited. I think that such a transaction could not have been maintained in law as against any person interested who was not a party to it, or did not directly confirm it. For it is a well-settled and deeply-seated principle in the law of Scotland that a party in a fiduciary character cannot be *auctor in rem suam*. A tutor cannot buy from his ward, or from himself as tutor; and a trustee, whose duty it is to administer an estate for others, cannot enter into any contract, accruing to his own benefit, with the trust-estate. It is quite unnecessary to refer to authorities upon this point. The case of *The Aberdeen Railway Company v. Blaikie Brothers* (1 M'Queen, 461) is but an illustration of a principle previously well known in the law of Scotland. But it is equally well settled that such a transaction is not absolutely void, but only voidable. It might be taken out of the reach of challenge by the direct confirmation of the party interested to object to it, or by such homologation, or such acquiescence and lapse of time, as must be held equivalent to direct confirmation. This is illustrated by the case of *Fraser v. Hankey* (9 D. 415), and is not, I think, questioned in the opinions of the Judges in *Thorburn v. Martin* (15 D. 845). Indeed, it is expressly assumed to be law in the opinion of Lord Wood. In a recent case in the Second Division of the Court, it does not seem to have been doubted that even a conveyance by a client to his agent, for certain good causes and considerations, but without value given, might be put beyond the reach of challenge by confirmation.¹

"Now, in the present case, the only persons interested to challenge the deed

¹ See *Logan's Trustees v. Reid*, June 13, 1885, 12 R. 1094.

arose between them on that point; but they had also assigned their whole rights to Abercrombie, who was acting for Jopp, of Jopp & Shand, the

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were parties to it, and took benefit under it. The pursuer has no title or interest to sue, excepting only that of executor of one of them, viz., the testator's niece, Mrs Mary Leith or Walker, and her husband, Mr John Walker.

"The fact that Mr and Mrs Walker were parties to the transaction, and that the transaction was one by which an adequate consideration was obtained by them as beneficiaries under the trust, might not have been sufficient to exclude challenge at their instance. I think that, so long as matters were entire, they would have had an option to set aside the deed, at least in so far as in favour of Mr Jopp, unless it were made clear that all knowledge of the value of the property acquired by him was communicated to them. If, however, it does appear that the beneficiaries were dealt with at arm's length, and that there was a full disclosure to their agent of everything known to the trustees in respect of the property, and that the beneficiaries, with this knowledge, not only became parties to the deed, but acted on it, took the benefit of it, and allowed the trustees to act on it for a long period of years, and until it has become impossible to restore matters to the condition in which they were at the time of the transaction, then I think that the beneficiaries must be held to have confirmed the deed, and to have abandoned their option of setting it aside.

"There is, no doubt, serious difficulty in reconciling with principle the doctrine that a purchase by a trustee from himself of subjects which he holds in trust for others, and as to which the duty undertaken by him is that of realising them for the best advantage of the beneficiaries, may be validated by the beneficiaries' consent. It is very difficult to say that a transaction which was illegal in the sense of being against a general principle of jurisprudence cannot be questioned at any time by the person interested to challenge it. Beyond all question such challenge could not be excluded if the illegal character of the transaction was concealed, if the beneficiary had reason to believe that the purchase was by a third party, and was ignorant of the fact that that third party truly represented one of the trustees (which seems to have been the case in *Thorburn v. Martin*), or if the beneficiary was not represented by a separate agent having access to all necessary information. But, on the other hand, it is not less difficult to allow a party to set aside a transaction, who has by his own conduct made it impossible to restore matters to their original position, and who cannot say that he was unfairly dealt with. Perhaps it is a sufficient solution of these difficulties to say that the transaction may be maintained if the trustee can shew that everything was done with full knowledge on the part of the beneficiary, and provided it be ascertained that there was no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in that character.

"In the present case the deed under reduction contains so full a narrative of the circumstances in which it was granted that, unless there is error in that narrative, or fraud, the question whether the transaction can be maintained admits of being decided almost entirely upon the terms of the deed itself. A proof has been taken, the result of which, in my opinion, is to shew that the recital of the deed was substantially correct, and that the pursuers' allegations of fraud, misrepresentation, and concealment are unfounded. The attempt to repudiate or discredit the actings of Mr M'Kinnon, as agent for the pursuers' father and mother, has entirely failed. The genuineness of the letters written by John Walker on behalf of his wife to Mr M'Kinnon as such agent has been placed beyond a doubt, notwithstanding the somewhat unscrupulous endeavour of the female pursuer to dispute her father's handwriting. Mr M'Kinnon's evidence shews that no information was withheld from him. The reports of Mr Donald Lindsay on the trustees' accounts were fully before him, and were fully discussed by him and the other agents interested, including Mr Charles Morton, W.S., and Mr Alexander Hunter, W.S., of the firm of Hunter, Blair,

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& Cowan, than whom no more highly qualified advisers could be named. No doubt Mr Lindsay's reports were founded upon information obtained from Messrs Jopp & Shand, as agents and cashiers of the trust. But this appears on the face of them; and the beneficiaries' agents were thus invited, or at least prompted, to look behind these, and to test for themselves the statements they contain, and particularly the accuracy of the values placed upon the outstanding assets. I think that there can be no doubt upon the proof that they did so inquire into the accuracy of these reports; and that Mr M'Kinnon satisfied himself that they might be relied on as substantially correct, is clear from his own statement. But even if Mr M'Kinnon had neglected his duty as an agent, the defenders could not on that account be held responsible. He admits that everything was placed at his disposal which he required, and that he satisfied himself that the transaction was a good one for his clients, and one which, therefore, he insisted on being carried out when Jopp & Shand desired to withdraw from it, on the discovery of some additional liabilities.

"The letters of the Rev. Harry Leith, the brother of Mary Leith or Walker, the pursuer's author, prove that he believed and asserted that he had authority to employ Mr M'Kinnon on behalf of his sisters; and John Walker's letters prove that he and his wife knew and assented to such employment, and consented beforehand to the transaction.

"But it is said that there was an essential error in the deed, in so far as it proceeds on the narrative that there would be a probable deficiency of trust-funds to meet the liabilities and pay the legacies. I think that it may be taken as the result of the proof (although the matter is left extremely vague and uncertain) that the assets of the trust turned out on the whole somewhat better than was expected, and that Mr Jopp in the end proved to be a gainer and not a loser by the transaction. But it is certainly not proved that the beneficiaries would have got more than they obtained under this arrangement if they had insisted on their rights, and had made it necessary that the trustees should keep up the trust until all the annuities came to an end, and all the assets, including the complicated claims of the truster upon the estate of Mr Forbes of Echt, and the estates of Duffus & Company, James Forbes & Company, and Forbes, Low, & Company, had been adjusted and settled. They might have got more, but it cannot be said on the proof that there was no risk of their getting less. Even the capital of the legacies could not have been recovered without an expensive and troublesome litigation, the result of which must have been very doubtful.

"The case, therefore, as it appears to me upon the evidence, is not one of an unexpected surplus accruing in the hands of a trustee who, in order to facilitate a winding-up, and the payment of legacies, has agreed to buy the trust-estate. It would be very difficult to hold that a trustee could plead a discharge obtained in this way as entitling him to put in his own pocket, free from the obligations of the trust, an unexpected and unlooked for asset of the trust, or one which by some unforeseen accident proved to be of large value, instead of being of no value at all. That is not the kind of case, however, which is presented here. The case here is one where some of the assets no doubt appear to have yielded more than was expected, but where others yielded less; where some of the claims against the estate have not yet been established, but where others have turned out heavier or of longer continuance than was calculated. The proof does not shew distinctly on which side the balance will ultimately be.

"On the whole, I am of opinion that even as against the trustees of Mr Alexander Jopp, into whose hands the whole remaining trust-estates appear to have come, no right to set aside the transaction belonged to Mr or Mrs Walker at the time of their death. Mr Walker survived his wife Mary Leith, and died in 1872. His wife died in 1871, and after her death her children, including the pursuer Mrs Buckner, obtained payment of the capital sum of the legacy which she liferented, and the amount of which had been made up and

but the rule was an absolute one that a trustee could not put himself into such a position as would make his individual interests conflict with his duty to the trust, and could not make a profit to himself out of the trust.¹ Even if the rule were not absolute, the circumstances here warranted its application, for a very large profit had been made, with almost no risk, the estate having been realised in three or four years without Abercrombie having been called on to pay almost anything, and this profit had been made without any consideration having been given for the chance of making it. Certainly the next of kin had got nothing, and it was sufficiently obvious that the main motive of the transaction was as Mr M'Kinnon put it, to get Jopp out of the "scrape" of mixing up trust-funds with his own private speculations. It was out of the question that Jopp should be allowed thus to profit by his own misconduct. It was true that the pursuers were represented by a law-agent, Mr M'Kinnon, who had recommended the arrangement as the best in the whole circumstances; and the most formidable answer to the pursuers' demand was that they were precluded from setting aside the transaction, although unconscionable, because in entering into it they had been represented by a lawyer. That answer was unsound.² The disability of trustees to transact on their personal account with the estate was absolute. At least the trustees here were certainly so disabled, for assuming that independent legal advice might in certain circumstances be an answer, what the trustee making that answer had to shew was that the beneficiary had in point of fact had independent legal advice, and here Mr M'Kinnon's advice was not independent, inasmuch as it did not proceed on independent information as to the value of the estate obtained by Mr M'Kinnon himself. He had taken his information on trust from Jopp and Lindsay, Jopp's accountant. The plea of *mora* was bad. Mere lapse of time was insufficient. There must be positive proof of intention to confirm the invalid deed after the relation creating the invalidity had terminated.³ Here there was no such proof.

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settled in the way provided by the deed under reduction. But I am not prepared to say that the discharge which they granted for that sum precludes them from maintaining the present action, or involved any personal homologation by them of the transaction entered into by their parents. The question is, I think, whether John Walker, as in right *jure mariti* of any claim possessed by his wife Mary Leith, as one of Mr Lumsden's next of kin, was possessed at the time of his death of a right to set aside the transaction, or must be held to have confirmed it. This question I answer in the way already indicated.

"If I am right in holding that John Walker could not have set aside the transaction as against Mr Alexander Jopp, who was a trustee as well as one of the law-agents of the trust, it follows *a fortiori* that no such claim could have been maintained against the firm of Jopp & Shand, or against the other trustees, who were only concerned in the transaction as concurring with their co-trustee Mr Jopp."

¹ *Aberdeen Railway Co. v. Blaikie*, July 20, 1854, 17 D. (H. L.) 20, 1 Macq. 461, 26 Scot. Jur. 622; *Hamilton v. Wright*, March 2, 1842, 1 Bell's App. 574; *York Building Co. v. Mackenzie*, May 13, 1795, 3 Pat. App. 378; *Vaughton v. Noble*, May 23, 1861, 30 Beav. 34; *Snell's Eq.* 574.

² *M'Pherson's Trustees v. Watt*, Dec. 3, 1877, 5 R. (H. L.) 9, *per* Lord O'Hagan at p. 17; *Logan's Trustees v. Reid*, June 13, 1885, 12 R. 1094, *per* Lord Craighill at p. 1100.

³ *Seath v. Taylor*, Jan. 21, 1848, 10 D. 377, 20 Scot. Jur. 128; *Cunninghame v. Boswell*, May 29, 1868, 6 Macph. 890, *per* Lord Cowan, p. 895; *Mackenzie v. Catton's Trustees*, Dec. 14, 1879, 5 R. 313, *per* Lord Deas, 317; *C B v. A B*, March 5, 1885, 12 R. (H. L.) 36.

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Argued for the defenders;—The present was not a case of a conveyance of the trust-estate by the trustees to themselves as individuals—except technically as a mere matter of conveyancing—but a conveyance by the beneficiaries to the trustees; and a transaction of this latter sort at least was not void but voidable merely in the option of the beneficiaries if the trustees could not shew that the transaction was a fair one in the circumstances. The *onus* was on the trustees to shew that.¹ This option the beneficiaries might exercise either expressly or *rebus ipsis et factis*. Here the evidence established that in the opinion of all concerned at the time the transaction was an advantageous one for the beneficiaries, and a correspondingly disadvantageous one for the trustees, who took over the trust-estate, and the interest of the heir-at-law and the next of kin therein, not because they or anyone else at the time thought any profit was to be made out of it, but merely to save questions afterwards with the heir-at-law or the next of kin. So much was this the case, that while the trustees wished to resile from the arrangement, they were obliged to adhere to it under threat of legal proceedings. Then the evidence further shewed that the pursuers' authors were represented by a competent law-agent, who undoubtedly gave the matter his complete attention, as both his parole evidence and his books shewed. The case, in short, was in effect indistinguishable from the compromise of an action by beneficiaries against trustees on account of their maladministration, and nothing short of absolute fraud would be sufficient to warrant that being set aside. Then there was the long delay of thirty-five years in raising the action. That was not pleaded by the defenders as amounting to the extinction of a debt by *mora*, but rather as shewing that the beneficiaries had exercised their option, though not expressly, of declining to challenge a voidable transaction.

At advising.—

LORD JUSTICE-CLERK.—This case has caused very considerable anxiety to myself, and I believe to your Lordships also. The action, into the details of which I have no intention of entering, is at the instance of the representatives of one of the legatees and next of kin of Harry Leith Lumsden, a gentleman who died in 1844. The defenders are the representatives of the trustees under his settlement. The settlement is a detailed and somewhat complex instrument. In addition to the heritable estate it left a considerable amount of legacies to special legatees, and the residue fell as intestate succession to the testator's next of kin.

The allegation upon which the pursuers bring the action is that in 1851 and 1852, the trustees, or rather one of their number, Mr Jopp of Aberdeen, concluded an agreement with the beneficiaries under the settlement by which on the one hand provision was made for the immediate payment of the legacies, and on the other hand the residuary legatees handed over their whole rights in the residue substantially to Mr Jopp himself. The pursuers say that that itself on the face of it was a breach of trust—that a trustee has no right to acquire the estate of the trust even by an agreement of that kind, and that although a long time has elapsed since the transaction took place, they are still entitled to challenge it

¹ Fraser v. Hankey, Jan. 13, 1847, 9 D. 415, 19 Soot. Jur. 164; Luff v. Lord, Dec. 2, 1864, 34 Beav. 220, aff. 1 White & Tudor, 141; Coles v. Beclerick, Jan. 27, 1864, 9 Vesey, 234, per Lord Eldon, 246; Morse v. Royal, March 8, 1806, 12 Vesey, 355, per Lord Erskine, p. 373; M'Laren on Wills, p. 352; Lewin on Trusts, p. 487.

In point of fact they contend that the arrangement was not one for the furtherance of the trust purposes, but that after all the trust purposes had been fully completed the trustee made profit out of the residue which had been conveyed to him.

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The case thus made is, I must say, a sufficiently serious one. I have myself gone carefully over the proof and examined the agreement in question, and I am bound to say that upon the face of that agreement I think it raises the gravest possible question in regard to the duties and powers of trustees under such a settlement. As a general rule a trustee cannot acquire any part of the trust-estate for himself. The Dean of Faculty in his very powerful speech argued that this agreement after all involved no more than what happens when a trustee is found to have made a bad investment and to be liable to replace it. I think no cases can be more different. When a trustee is obliged to take over a security which he has improperly accepted on behalf of beneficiaries he restores to the estate what he improperly invested. But here, without any consideration to the residuary legatees so far as we can see on the face of the instrument—in return for the obligation to pay the specific legacies to the legatees—the trustee takes over what is substantially the whole of the residue for himself. I must own that if the transaction had been challenged within a reasonable time after it took place—I should have thought that the recipient of the residue—being himself one of the trustees under the deed, was at all events put upon his vindication. I do not go further than that, but I think he would have been put upon his vindication. On the face of it I am of opinion that the agreement discloses a transaction that was beyond his power. I will not say that in all cases beneficiaries and trustees may not bargain with each other, provided it be clear beyond all doubt that it is with a view to the benefit of the beneficiaries and of the trust-estate. I think, however, that that must be shewn by the trustee. I am further of opinion that the cases are very exceptional in which such bargaining would be allowed, and therefore although I am not prepared to lay down as an abstract proposition that in no case can a trustee interpose his own personal credit or become himself the purchaser of the trust-estate, I would put it that where he does so he must justify his action.

Now, this is a very singular transaction. It may have an explanation, but I must say that the explanation does not appear on the face of it. It is said that the legatees had become clamorous for their legacies, that the estate took a long time to wind up, that there was no ready-money to pay the legacies for which the legatees had become clamorous, and that therefore it was desirable that there should be some settlement come to by which payment could be made of the sums due to the legatees whatever might otherwise become of or be produced by the residue. That may be the nature of the case, but it is very insufficiently shewn in the proof. The legatees were impatient because seven years had elapsed since the death of the testator, and it seems to me that they were not unnaturally anxious for the payment of their money. There were questions also in regard to the personal liability of the trustee, and I daresay it was not unreasonable that they should have entertained doubts on the information they had, or on the representations made to them, regarding the financial stability of that gentleman. That might have given an aspect to the whole arrangement very far from favourable to the trustee, but upon that I do not think it is necessary to elaborate. I have made these remarks because I should be sorry to be understood to say that it is a light or trivial matter to make an arrangement of this

No. 178. kind. On the contrary, as I have already said, I think it calls for vindication. As far as the proof has gone I am not satisfied that any vindication has been established, but then what of that when we come to consider the lapse of time! Five-and-thirty years have elapsed since all this was done. The parties entered into the arrangement with full information and with full advice. They acted under the advice of a very able man of business. They were all of them consulted, and they all agreed to it. Therefore, while I say that the apparent aspect of the arrangement does require vindication, I do not on the other hand think there is any excuse for the parties having lain by for thirty-five years and allowed all the information that might have been available to be lost. Most of the parties are now dead, and no explanation can now be given by them upon a great many vital and important questions. It might have been otherwise but for that long delay. I will not say that five-and-thirty years would in all circumstances be a bar to an action of this kind, but seeing that the whole question depends on the nature and legality of the transaction itself, I am not in the meantime to pass any judgment in regard to the length of time which might be any such action. These are the general views I entertain of the case, and they are sufficient in my opinion to lead me to affirm the judgment of the Lord Ordinary.

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LORD YOUNG.—I concur in the result, and generally in the grounds which your Lordship has stated for reaching that result.

The deed sought to be set aside is a deed of discharge and assignation, dated so long ago as the year 1852. It was acted upon at the time and stood unchallenged until the year 1886—thirty-four years after its date, and long after it had been fully acted upon. Of course if that deed was subject to a legal objection the mere lapse of time would not bar the reduction of it. By being subject to a legal objection, I mean that had it been invalid *ab initio* it might be challenged within the period of the long prescription, and upon certain grounds even after that. But here it is not challenged upon any ground of that kind. It was the result of a transaction between testamentary trustees and beneficiaries who were dissatisfied with the conduct of those testamentary trustees. That was the nature of the transaction. The testator died in 1844, and in 1852 the legatees had got payment of only one-half of their legacies, and the residuary legatees had got nothing at all. They were not unnaturally dissatisfied, therefore, with the conduct of the testamentary trustees. It is pretty hard, I must own, to understand how it came about that what was understood to be a considerable estate had been so managed that only a half of the legacies was paid ten years after the testator's death. However, that collision between the dissatisfied beneficiaries and the trustees led to an arrangement. On both sides the parties were represented by men of business. The trustees themselves were men of business, that is to say, Mr Jopp was a member of a firm of law-agents in Aberdeen—Messrs Jopp & Shand, and the dissatisfied beneficiaries had the advice and assistance of Mr Mackinnon, a most respectable man of business. Well, the beneficiaries being dissatisfied with the trustees, and demanding what the trustees said they could not give, but what the beneficiaries thought they were entitled to, the position really amounted to this, that they must either come to a settlement or fight the matter out in a Court of law. It is generally the more prudent course to come to a settlement, and I should not say that there was *prima facie* anything wrong in a settlement between dissatisfied beneficiaries and trustees.

tees who are declaring their inability to give what the beneficiaries are demanding. If any fraud was practised on the one side or the other, and if that fraud was detected after the lapse of thirty-five or even forty years, I think the transaction might be set aside; but it could not at the time, any more than it could now, have been set aside merely because it was an amicable arrangement between dissatisfied beneficiaries and trustees. After they had come to terms, with the assistance of men of business on both sides, something occurred which induced the trustees to draw back from the arrangement which they had made. They said—"We have ascertained facts that make this a most imprudent arrangement for us, and we wish to be off as we have still *locus penitentiae*." The answer to that was—"No, we hold you bound, and unless you implement your engagement to settle, we will bring you into Court." The trustees then said—"Rather than that, we will carry out the arrangement, and you can have your settlement." But suppose that the trustees had declined to adhere to the arrangement and gone into Court, and that the beneficiaries, being *sui juris*, had got judgment enforcing the arrangement, such judgment could not have been set aside unless it was proved that there was fraud in the case. But they did not require the authority of the Court in any such matter as that. They were entitled to enter into an arrangement which they thought was obviously for the benefit of the beneficiaries.

The feature which gives interest and difficulty to this case is that which your Lordship has noticed, namely, that the settlement involved the purchase and acquisition of the trust-estate administered by these trustees. The acquisition by trustees of the trust-estate under their control has always been regarded by the Court with the greatest jealousy, and if it appears that the trustees have made a profit out of it, it will not be difficult, as a general rule, for the beneficiary, coming timeously into Court to have it set aside; although even if such challenge is timeously made the trustee would according to law, as I understand it, uphold an arrangement with the beneficiaries upon satisfying the Court that they had been quite fairly dealt with and had full information in regard to everything; and the case would be all the stronger if, besides having full information, the beneficiaries being *sui juris* desired the bargain which was made betwixt them and the trustees, the trustees taking no advantage of the position of the beneficiaries. That is all that the Court requires, and the burden of shewing that would be on the trustees, in order to uphold such a transaction betwixt them and beneficiaries *sui juris*. I quite agree that if the beneficiaries could have come forward at the time and said—"Well, we were misled into it; we did not understand the case as the trustees did. They had knowledge and we had not, and the result is that they are making a large sum of money, or a considerable sum of money, at our expense"—in that case I think—not upon mere rules of ordinary law, but upon equitable considerations which are indeed a part of our ordinary common law, and administered as such—we would or might have given relief. But when the beneficiaries, *sui juris*, who made the arrangement and threatened reluctant trustees with an action to enforce it if they would not sign the deed giving complete effect to the arrangement—I say when these beneficiaries take implement of the agreement and stand by it for thirty-five years—I should require a very special case indeed to be stated in order to induce me even to inquire into the transaction, and I agree with your Lordship that such a case is not proved here.

I desire to add that in my opinion, after the best consideration I have been

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able to give to the case, such a case as I have figured in these last sentences is not stated in this record. After carefully reading and considering the case, I should have been satisfied with a judgment assailing the defenders from the conclusions of the action upon the ground that no relevant grounds for reduction of this deed have been stated. I think that after five-and-thirty years it is too late to appeal to those equitable considerations which induce the Court to make minute inquiry as to the whole circumstances of a transaction between trustees and beneficiaries. There is equity and manifest good sense in that view. The original parties are all dead, and what the present defenders are called upon to do is to defend as quite fair the action of people who have been dead for many years by shewing that they acted fairly, and communicated to all parties all that they themselves knew.

As I have said, I agree in the result, and generally in the grounds for the result, which your Lordship has stated.

LORD CRAIGHILL.—I also think that the defenders are entitled to be assailed. My reasons for this opinion are those which have been explained by Lord Young. With him I doubt whether there is a relevant case set forth in the record. I doubt whether even if this action had been brought long before the present time, so far as anything appears in the record, judgment must not necessarily have been given in favour of the defenders. But it is an overwhelming consideration that the action has not been raised till the lapse of five-and-thirty years after the date of the arrangement which has been challenged. If such an action had been timeously raised it would necessarily have involved minute inquiry, and now that such a delay has taken place it is impossible to get the information which would then have been available.

LORD RUTHERFURD CLARK concurred.

THE COURT pronounced this interlocutor:—"Refuse the reclaiming note, and adhere to the interlocutor reclaimed against: Find the defenders entitled to additional expenses: Remit," &c.

WILLIAM OFFICER, S.S.C.—H. B. & F. J. DEWAR, W.S.—Agents.

No. 179. ROBERT THOMSON AND OTHERS, Pursuers (Reclaimers).—*D.-F. Mackintosh—Walton.*

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HENRY ANDERSON AND ANOTHER, Defenders (Respondents).—*Gloag—Low.*
THE SYNOD OF THE UNITED ORIGINAL SECESSION CHURCH AND OTHERS, Petitioners.—*D.-F. Mackintosh—Walton.*

HENRY ANDERSON AND OTHERS, Respondents.—*Gloag—Low.*

Church—Dissenting Church—Trust—Cy près.—Part of a congregation connected with the United Original Secession Church separated from that church with their minister, and formed a new congregation. In 1871 the congregation bought a place of worship, and a minister's house, taking the title in favour of certain members of the congregation, and such other persons as might thereafter be appointed by male members of the congregation, on condition that any trustee or member leaving the congregation and "worshipping elsewhere not in harmony with the principles contained in the Testimony (United Original Secession)," should be disqualified from acting or voting. In consequence of the minister falling into bad health the church was closed in 1878, and the trustees were authorised to sell the church. The church was not sold, but the premises were let and the rents applied in reduction of debt.

In 1886 a petition was presented by the Synod of the United Original Seceders, with the concurrence and consent of four persons describing themselves as members of the congregation "at the time of its dissolution," against

the two surviving trustees, praying the Court to ordain the trustees to pay over the trust-funds, and to convey the trust property to the petitioners for behoof of certain funds of the Synod, or to pay and convey the same for such purposes as the Court should deem most in accordance with the purposes of the trust, on the ground that the purposes of the trust had failed. No. 179.
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The trustees, in answer, stated that the rents of the buildings were being applied in reduction of the debt, and that when the debt was extinguished they hoped to get a new minister. *Held* that it had not been proved that the purposes of the trust had failed, and petition *dismissed*.

IN 1857 a congregation of the United Original Secession Church worshipped in a church in Adam Square, Edinburgh, under the pastoral charge of the Rev. Archibald Brown. The church was held by trustees for the use and behoof of the congregation, or of those members thereof who adhered to the principles of the Testimony.* In 1857 a difference arose between Mr Brown and the Synod, the supreme Court of the Church, on the subject of Sunday schools, he conceiving that the Synod had deviated to some extent from the Testimony on that matter. In consequence of some language used by him in this controversy, which he refused to retract, he was suspended by the Synod, who proceeded to direct another minister to declare the church in Adam Square vacant, but Mr Brown and that part of his congregation which agreed with him would not allow this to be done. That part of the congregation which agreed with the Synod then formed a new congregation of Original Seceders in Victoria Terrace, while Mr Brown and those who agreed with him remained in occupation of the church in Adam Square. In 1867 the Victoria Terrace congregation, for a payment of £50, renounced all right to the Adam Square buildings, and delivered up the titles to the congregation in possession. 2D DIVISION.
Lord Lea.
B.

In 1870 the Edinburgh Improvement Commissioners acquired the church in Adam Square. The congregation then purchased and fitted up as a new church and manse for Mr Brown, with the money obtained from the Improvement Commissioners, a hall and house in South Clerk Street. The title was taken to and in favour of "Charles Lyon, Thomas Dickson, Henry Anderson, and Charles Frater Lyon, and the survivors and survivor of them, and to such other person or persons as may be named by the male members of the congregation at a general meeting called for that purpose by intimation from the precentor's desk on the Sabbath before such meeting, as trustees and managers for the congregation of the United Original Seceders presently worshipping in Adam Square under the pastoral charge of the Reverend Archibald Brown, any three of said trustees, while more than three survive, and the majority while three only survive, being a quorum, and any four being a quorum of a meeting of the male members of the congregation, and under the condition that any trustee or member of the congregation leaving it and worshipping elsewhere not in harmony with the principles contained in the Testimony (United Original Secession), shall thereby be disqualified from acting as a trustee under this present conveyance, and from voting at meetings, or of having any say in the affairs of the congregation, and to the assignees and disponees whom-

* The principles of the religious body known as United Original Seceders are contained in a Testimony dated in 1842, which is substantially that drawn up in 1739 by those who formed a Secession Church after the Secession in 1733. Among other principles of the Testimony it is held that it is the duty of parents to give instruction to their children in the doctrine and duties of religion, and if they fail that the duty falls upon the minister and elders alone, and cannot be delegated to others not office-bearers of the church. Sunday schools taught by those not office-bearers of the church are therefore included among the "practical evils" enumerated by the Testimony.

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soever of the said trustees, heritably and irredeemably." Divine service continued to be observed till in consequence of Mr Brown's failing health, in 1876, he became unable to officiate, and prayer meetings were thereafter conducted by the elders. On 29th July 1878 a meeting of male members of the congregation was held, and it was resolved that the trustees should have power to sell the church and house, and to invest the proceeds "in such way and for such terms and for such period as they may deem proper." The parties to this action were at variance as to whether it was also resolved to dissolve the congregation, but the minute of meeting which was produced contained no such agreement. At the date when service ceased to be held there were in all, male and female, about fourteen members of the congregation. The property was once exposed, but did not sell. In the spring of 1879 Mr Brown died. No further service was held in the church, which, with the house, was let to another body. The trustees applied the rents in removing a debt upon the property.

In October 1886, an action was brought by Robert Thomson and his wife, and James Sinton and his wife, members of Mr Brown's congregation, against Henry Anderson and George Frater Lyon (also members of it) as only surviving trustees and managers for the congregation, for declarator that the church and house were held by them in trust for behoof of the pursuers and other remanent members of the congregation, for an accounting of their intromissions as trustees and managers with the subjects and the rents, and also for a decree ordaining them to convey the subjects and the rent and revenues of them "to the ministers and elders forming the kirk-session of the church of United Original Seceders in Victoria Terrace, Edinburgh, under the pastoral charge of the Rev. John Sturrock, in trust for behoof of the congregation of said church of United Original Seceders in Victoria Terrace, Edinburgh, or to the Synod of the United Original Secession denomination, or to such other persons, or for such other purposes, as our said Lords may consider most in accordance with the purposes of the said trust-disposition."

The four pursuers averred that the congregation had been finally dissolved; that they, after its dissolution, had joined the congregation in Victoria Terrace, which, they alleged, maintained the Testimony in all points; that of the members of the congregation at its dissolution in 1878 several were either dead or removed from Edinburgh, while the defender Lyon now attended the Free Church, and Anderson attended a church of Original Seceders, who were not United Original Seceders, in Lauriston Street.

The pursuers pleaded;—(1) The defenders, as trustees for the congregation of which the pursuers were members at the time of its dissolution, are bound to account for their intromissions as concluded for in the summons. (2) The defenders, as trustees foresaid, are bound to convey the trust properties and pay over the trust-funds in terms of one or other of the alternative conclusions of the summons.

The defenders denied that the congregation was ever dissolved, stated that they still hoped to get a minister for it, that the proposed sale was not necessary after Mr Brown's death, because the sole object of it was to provide funds for his sustenance, and that the pursuers by joining the Victoria Terrace congregation, which the defenders averred did not adhere to the Testimony in sundry particulars, had deprived themselves of the right of having any say in the affairs of the congregation.

The defenders pleaded;—(1) No title to sue. (2) The pursuers being a minority of the congregation to whom the property belonged, and, *separatim*, having joined a congregation which is not in harmony with the principles contained in the Testimony of the United Original Seceders, have no right or power to control the disposal of the said property. (3)

The defenders should be assoilzied, in respect that a majority of the surviving members and adherents of the congregation to whom the property belonged desire that it should be held by the defenders with the view of obtaining another minister and resuming public worship in the said church. (4) The trust under which the said property is held by the defenders, being solely a trust for the congregation, the pursuers are not entitled to decree that it should be made over to the Synod.

The Lord Ordinary (Lee) found "that the pursuers have set forth no sufficient title to sue the present action." *

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* "OPINION.—The pursuers are four persons who at one time (prior to October 1878) belonged to the congregation of Original Seceders, formerly worshipping in Adam Square under the pastoral charge of the Rev. Archibald Brown. In 1871, when the Adam Square Church was taken by the Improvement Trustees, that congregation acquired the subjects in Clerk Street described in the summons, the title being taken to 'Charles Lyon,' &c. [quoted *supra*].

"In July 1878 the church was closed in consequence of the illness of Mr Brown (who died in 1879); and the congregation, at a meeting of the male members, empowered the trustees to expose the church and house for sale, and to invest the proceeds 'in such way and for such terms and for such period as they may deem proper.' The subjects, however, did not find a purchaser. They are still in the hands of the surviving trustees, Mr Henry Anderson and Mr Charles Frater Lyon, who are the defenders in this action.

"The pursuers ask for decree of declarator that the subjects 'are held by the said defenders in trust for behoof of the pursuers and other remanent members of the said congregation of United Original Seceders'; further, for an account of the defender's intromissions, and also that the defenders should be decerned to convey the subjects, and to make payment of the rents, revenues, and others, 'to the minister and elders forming the kirk-session of the church of United Original Seceders in Victoria Terrace, Edinburgh, under the pastoral charge of the Reverend John Sturrock, in trust for behoof of the congregation of said church' (viz, the Victoria Terrace church), 'or to the Synod of the United Original Secession denomination; or to such other persons, or for such other purposes, as our said Lords may consider most in accordance with the purposes of the said trust-disposition.'

"The first question raised by the defences is, whether the pursuers have set forth any sufficient title to sue the present action? Have they, upon the averments made on record, any right or interest, under the titles to the property, by virtue of which they can insist in the conclusions or any of them?

"It is substantially settled by the case of *Couper v. Burn* (22 D. 129), where the terms of the title were very similar, that the trust created by such a title as here occurs is a trust for the congregation therein described, and not for the ecclesiastical body with which that congregation was in connection, nor for any different congregation in connection with that body. I did not understand this to be disputed; and the leading conclusion of the summons seems to assume that the title was of this character, and vested the beneficial interest in the members of a certain congregation.

"In this view of the title, if the action had arisen out of a split in the congregation, it might have been necessary, in order to dispose of competing claims to the property, to ascertain which party adhered to the principles upon which the congregation was formed.

"But the peculiarity of this case is that it has not originated in any alleged deviation on the part of the defenders from the principles of the Secession Testimony, or in any threatened misappropriation of the subjects to the use of a different body from that which is described in the title as the congregation of United Original Seceders worshipping in Adam Square. The defenders do not dispute that they hold the subjects in trust for that congregation. The sole ground of action is that the congregation has been dissolved. It would not seem to follow, even if the fact were so, that the property is to be taken out of the hands of the trustees. But, at all events, it is incumbent on those who make

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such a demand to shew that they possess a title and interest to vindicate the claims which they bring forward.

"With regard to the conclusions as directed to a conveyance of the property to the kirk-session of the Victoria Terrace congregation, or otherwise to the United Original Secession denomination, it appears to me that the pursuers' title is manifestly insufficient. Neither of these bodies is a party to the action; and the pursuers have not alleged any title to represent either the one or the other.

"Then how stands the pursuers' title to vindicate the property for the congregation formerly worshipping in Adam Square under the pastoral charge of Mr Brown?

"They do not profess now to belong to that congregation; for they admit that in October 1878 they became members of the Victoria Terrace congregation. That is not merely a different congregation, having a distinct organisation and separate existence, but it was so at the time when the Clerk Street subjects were bought, and the title taken as above set forth. Indeed, that congregation was formed in 1857, by a portion of Mr Brown's congregation, which separated itself from him upon grounds of difference which are not said to have afforded any pretence for depriving Mr Brown and his adherents of the right to the old church in Adam Square. It seems unnecessary, for the purpose of considering the pursuers' title to represent the congregation referred to in the title, to inquire minutely into the nature and origin of these differences. They were sufficient, in the view of the Victoria Terrace congregation, which the pursuers have joined, to justify a secession from Mr Brown and his congregation. The pursuers' statement is (in cond. 2), 'As a result of these dissensions, about half of the members of the Adam Square congregation seceded from it, and formed the congregation of United Original Seceders now meeting in Victoria Terrace, Edinburgh. Mr Brown's adherents remained with him, and kept possession of the church in Adam Square.' It is admitted, in answer to the defenders' statement of facts (art. 2), that in 1867 the titles of the Adam Square subjects were delivered up to the Adam Square congregation, and that a sum of £50 was then paid by them to the Victoria Terrace congregation, apparently for a renunciation of all claims to the church. It was after this that the Adam Square church was taken by the Improvement Trustees, and that the subjects in Clerk Street were acquired.

"I am of opinion that the circumstances set forth and admitted by the pursuers preclude them from claiming any connection with the congregation referred to in the title by which these subjects are held, and that they have no title to maintain any of the conclusions of the present action.

"Another question, however, has been raised, upon which I should wish to guard myself from being supposed to give any opinion. The pursuers allege that in 1878 the Clerk Street church was finally closed, and that Mr Brown's congregation was then dissolved. That may have been the result of the proceedings which then took place, though the defenders deny it, and plead that they are bound to hold the subjects, or the price obtained for them, in the hope of getting a minister for the congregation in room of Mr Brown, and of thus being able to carry out the trust according to its terms. But whether this be so or not is a question which, in my opinion, need not be decided in the present action. If an application should be made to the *nobile officium* of the Court upon the ground that the trust has failed, that matter will be duly considered. But in the meantime the property is in the hands of the survivors of the original trustees, who are not said to be making away with it, or to be otherwise than responsible persons. The allegations as to their having become disqualified by attendance at other churches, such as the Original Seceders' Church in Lauriston Street, or the Free Church, appear to me insufficient to warrant the intervention of the pursuers, at least in this form of action. The congregation is admittedly in a state of suspended animation, and the church is admittedly closed in the

presented a petition to the Inner-House, craving the Court in the exercise of its *nobile officium*, in respect it had become impossible, in consequence of the dissolution of the congregation, to carry out the trust in the original manner, to direct the funds consisting of the property and its rents to be placed at the disposal of the Synod of the Original Secession Church for its mutual assistance fund, its home mission fund, and its business and hall fund, or one or more of them.*

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Answers were lodged, in which the respondents, who were joined in their answers by several members of the congregation, took up the same position as in their defences.

The reclaiming note and petition were heard together, and the respondents being willing to produce accounts the Court, after hearing counsel, before answer, appointed the accounts to be produced. This was done, and the accounts shewed that there was a debt on the property which the respondents were paying off, and which would be paid off in four years or thereby. The petitioners did not offer any objection to the accuracy of these accounts.

Argued for the pursuers and petitioners;—It was clear on the admitted facts that the congregation was dissolved, and could not be resuscitated. It was idle to expect that when the debt was paid off a new minister would be got and a congregation formed. The pursuers were the only original members except the trustees, and the cause of the separation from the main body was a personal dispute between Mr Brown, who was now dead, and the main body of the Secession. It was impossible to execute the trust in the original manner, and the circumstances called for the application of the doctrine known as approximation or *cy près*.¹ It was said that there was no title to sue. But there was here an interest in a trust which the Court were bound to protect, and to do so by treating the trust as a charitable trust, and applying the funds to the maintenance of the testimony of the Secession Church. The case was one—(1) of trust, (2) of charitable trust, (3) of a failure in a charitable trust, the purpose of which could be fulfilled by an application of the funds to similar objects but with somewhat different machinery. The proposals of the petition for the application of it were consistent with the purpose of the trust, and they or such proposals were within the powers of the Court, and should be adopted.

Argued for the defenders (respondents in petition);—The question was not one of the law of trusts, but of patrimonial right. This was not a charity for which a scheme could be settled, because a donor's

meantime. So long as this is the case by an act to which the pursuers themselves were parties, the disqualifying clause cannot be fairly applied to the trustees merely in respect of their attendance at another church, and the pursuers can take no benefit from the fact of such attendance. The utmost that the pursuers can claim, in any view, is a right to see that the property is not misapplied; and I give no opinion against their title to make an application to the Court in the exercise of its *nobile officium*."

* By the first of those funds small stipends were supplemented, by the second missionary work was carried on in towns, and by the third professors' salaries were paid, weak congregations aided, and travelling expenses of ministers who supplied vacant congregations were paid.

¹ Clephane v. Magistrates of Edinburgh, Feb. 26, 1869, 1 Macq. 417 (Lord Westbury), 7 Macph. (H. L.) 7, 41 Scot. Jur. 306; M'Culloch v. Kirk-Session and Heritors of Dalry, July 20, 1876, 1182; Grant v. Macqueen, May 23, 1877, 4 R. 734 (Rothiemurchus case); Attorney-General v. Bunce, April 22, 1867, 6 L. R. Eq. 563; Stephens' Commentaries, iii. 80; Boyle's Law of Charities, 149; Jarman on Wills, i. 246, *et seq.*

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charitable intention was likely to fail for want of machinery to carry it out. It was a case in which people had subscribed funds and bought a piece of property for a particular purpose, and in such a case the Court would not treat the funds as if these were a donation which required a scheme for its management.¹ It was truly a question in the law of contract, not in the law of trusts.² In these cases of property bought for a congregation of Dissenters the true view, of which there were several examples in Scotland, was that the property was held not for the synodical body, but for the congregation holding the particular tenets.³ The title in *Couper v. Burn* was very analogous to the title in the present case. The trust, if trust there was, was for a continuing body, its present and future members. Now, here there might soon be future members entitled to use this property along with those still remaining, for it was contemplated to carry on the regular services of the congregation and get a new minister whenever the debt was paid off. It was shewn by the accounts, which were not criticised on the other side, that in four years the debt would be paid off, and this could be done. It would be time enough then for the Court to consider such a petition. In the *Rothiemurchus* case the Court let the matter stand over as was here proposed. The *Dalry* case (*supra*) was truly a question whether certain trustees had acted *ultra vires*. It was no authority for the petitioners. Even if the question were one in the law of trusts, the Court would not interfere, because it was not a case for *cy près*, which only applied where there was a general charitable purpose, while here the only purpose was the benefit of a particular congregation which might still be resuscitated.⁴ The schemes proposed were in no view similar to the objects of the original subscribers.

At advising,—

LORD JUSTICE-CLERK.—In this action and relative petition I am of opinion that the pursuers and petitioners have not shewn sufficient ground for our interference in present circumstances. Of the two proceedings the first is the action at the instance of certain parties who state that they are the members of this congregation. The other is an appeal to the *nobile officium* of the Court on behalf of the Synod of Original Seceders. The cause of the proceedings is simply this. In 1857 the minister of a congregation of Original Seceders who worshipped in Adam Square—Mr Brown—had a difference with the general body of Original Seceders. The result was that after some discussion of the difference the Synod suspended him. A large part of the congregation adhered to their minister, and they occupied the church from 1857 till 1870, when the church in Adam Square was taken by the Improvement Commissioners, the price being paid to the congregation which had remained in possession of the church.

With the money so obtained Mr Brown and the congregation bought the church now in dispute, taking the title to trustees for the congregation worshipping under Mr Brown. It was substantially a trust for the congregation, and was a valid title. The identity of the congregation being once ascertained,

¹ Mitchell v. Burness, June 19, 1878, 5 R. 954.

² Bain v. Black, Feb. 22, 1849, 6 Bell's Ap. 317.

³ Craigie v. Marshall, Jan. 25, 1850, 12 D. 523 (see *per* Lord Moncreiff, p. 541); Couper v. Burn, Dec. 2, 1859, 22 D. 120, 32 Scot. Jur. 46; and see Perth Hospital case, May 20, 1795; Bell's Folio Cases, 173.

⁴ Att.-Gen. v. Oglander, 1790, 3 Brown's Ch. Ca. 166, 18 Beavan (Lord Romilly); Clark v. Taylor, July 7, 1853 (Kindersley, V.-C.), 1 Drewry, 642.

the title is a good title for its behoof. Mr Brown became ill in 1876, and died No. 179. in 1879.

Now, I should have mentioned that at the time of the small disruption to which I have alluded certain members of the congregation formed another congregation in Victoria Terrace. By the time of Mr Brown's death there had been for more than two years no regular service in the church which those remaining with him attended, though there had been prayer meetings and Bible readings. After his death the existing trustees let the church and house for a rent, and from 1878 till now that has been the position of affairs, and the defenders in the action are two original trustees. The congregation has long disappeared, but there still remain, according to the defenders, fourteen of the members. How many have gone to other sects we do not know. Meantime there is a certain debt on the church and house, and these two trustees are, it is said, paying it off, and still hope when it is paid off to form a congregation again. In these circumstances the Synod of the Original Secession Church, together with four members of the congregation, came forward to assert that the purpose of the trust has failed, and that they have sufficient title to have the accounts produced (which has been done), and to invoke the interposition of the Court, as being the persons most near to those for whom the original trust was intended, and they ask us to find that the property of the congregation ought to be applied for the benefit of the denomination as the purpose nearest to that of the original trust. In the end we may be obliged to do that, but as matters stand at present I am of opinion that the purpose of the trust has not failed. The petitioners were, I think, entitled to call for the accounts, which are regular and correct, and shew that the trustees are going on paying off the debt. The original purpose may yet be subserved in the future, therefore in the meantime it would be premature to express an opinion, and I therefore say nothing further on the question whether the Original Secession Synod has a title, or the members of the church have a title, to set up a new trust. A question of difficulty may be there involved. Meantime it is enough to say that there is no such failure, either of the title or of the trust, as to induce us to sustain the contention of the pursuers and petitioners.

LORD YOUNG.—I am of the same opinion. The action is one of declarator and accounting, and concludes also for a decree to ordain the defenders to hand over the trust property to the Rev. John Sturrock and others in trust for certain purposes specified. In that action the trustees of the fund have exhibited accounts which I have examined, and which are simple and complete, and shew that the trustees are paying off the debt. They debit themselves with the rent received, and credit themselves with the local taxes and expenses and interest of debt. I think, too, that the pursuers are satisfied with these accounts, for they have said nothing against them. I do not think a process of count and reckoning was necessary to get these accounts.

As to the declarator that the church and house are held in trust according to the title, I think that too was quite unnecessary. I do not think, indeed, that there is any case for our interference, either under the ordinary action or under the petition. The church was acquired by the congregation worshipping in it under the pastoral care of the Rev. Archibald Brown. He did not keep his congregation together, and died, and the remnant of it disappeared, and the church was no longer used. The church and the house in which he had lived

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were the trust property, and as they were unoccupied, and there was a debt on them, what were the trustees to do? Plainly they were bound to make as much as they could of them to meet their obligations. Neither the church nor the house could then be used for the purposes for which they were originally intended, for there was no congregation and no minister. The trustees therefore let both, and there is no suggestion that in so doing they did not act in the discharge of their duty. There was no violation of it, no misapplication of the property. A time may come when we must inquire if they are to sell the property and apply the price in some particular way, but there is no occasion to consider that now on the statement of these two members of the congregation and their wives, or the Synod of the Original Secession Church. I think they have made out no case for our interference. Had there appeared to be any misappropriation or misapplication of that property, we should have restrained that, but there is none, and I think that the action should be dismissed, with expenses to the defenders, who are entirely in the right, and that the petition should also be dismissed, with expenses.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

In the action the Court pronounced this interlocutor:—"Refuse the reclaiming note, and adhere to the interlocutor reclaimed against: Find the defenders entitled to expenses."

In the petition the Court pronounced this interlocutor:—"Dismiss the petition: Find the respondents entitled to expenses."

THOMAS WHITE, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 180.
 July 19, 1887.
 Byars' Trustees v. Hay.

GEORGE PATON ALEXANDER AND ANOTHER (James Byars' Trustees),
 First Parties.—*Pearson—Law.*

JANE BYARS HAY, Second Party.—*Pearson—Law.*

CHARLES KEITH, Third Party.—*Gloag—Kennedy.*

Succession—Vesting—Destination over.—A truster directed his trustees to retain a share of the residue of his estate and invest the same in their own names for behoof of the children *nominatim* of his brother "equally between and among them in liferent and their lawful issues, born and to be born, equally among them in fee." In the event of the death of a child, payment was not to be made to his issue until the youngest attained majority. There was further a declaration that in the event of any of such issue "dying before the period fixed for division of their shares respectively leaving lawful issue, such issue shall come in place of the parent, and take and receive what the parent would have been entitled to if then in life." *Held* that the clause first above quoted imported an absolute gift to the issue of the children of the testator's brother, and that the subsequent clauses did not control the absolute character of that gift, and consequently that the fee of the shares vested in the issue of these children *a morte testatoris*.

2D DIVISION.
 M.

JAMES BYARS, Cherrybank, Forfar, died unmarried on 8th April 1867, leaving a trust-disposition and settlement dated 28th January 1867, by which he disposed his whole estate, heritable and moveable, to trustees. After directing payment of his debts, the truster, in the second place, appointed his trustees "to divide the free residue and remainder of my estate so soon as they find it expedient into two equal shares, which I direct and appoint them to dispose of as follows, viz.: One share thereof to be retained by my said trustees and invested by them in their own names for behoof of the children of my said brother, Andrew Byars, viz., Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars

or Hay, equally between and among them in liferent, and their lawful issues, born and to be born, equally among them in fee, and that *per stirpes* and not *per capita*, the half of my estate being thus destined or divided into four equal shares, one whereof shall descend to the said Robert Byars in liferent, and his lawful issue in fee, another to the said David Byars in liferent, and his lawful issue in fee, another to the said Jessie Byars or Simpson in liferent, and her lawful issue in fee, and the remaining share to the said Margaret Byars or Hay in liferent, and her lawful issue in fee ;

. . . Declaring, as it is hereby provided and declared, with reference to the share or half of my said estate destined to the children of my said brother, Andrew Byars, in liferent, and to their lawful issues, equally among them in fee as aforesaid, that, in the event of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, dying before his or her youngest child attaining the age of twenty-one years, the shares of the half of my said estate, respectively liferented by the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, shall not be payable to their children to whom they are destined in fee, until the youngest lawful child of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, so dying, shall have attained the age of twenty-one years, but on the youngest child of the family of any of them so dying attaining that age, my said trustees shall be bound to pay to and amongst that family the share above provided to them . . . And in the event of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, dying before the youngest of his or her family attaining the age of twenty-one years complete, then I authorise and empower my said trustees to pay or disburse for the board, education, and maintenance of such family, such sum or sums of money as they, my said trustees, may think proper, out of the interest, revenue, and profits, arising from the share destined in fee for that family : with power also to my said trustees to advance to any of the members of such family, out of the principal of the share falling to such family, such sums of money to account of his or her share of my means and estate as my trustees may resolve upon, for their education and maintenance, or for forwarding them in business or otherwise advancing their prospects in life, and that before the period appointed for division, and with regard to any surplus or reversion of the interests, revenues, and profits, arising upon each of the said shares after deduction of all expenses and necessary outgoings in connection with the same, and all payments made therefrom in terms of this deed, I direct and appoint that the same be accumulated along with the principal sum or share, and divided in the same way and manner as the said share itself.

. . . Declaring further, as it is hereby further provided and declared, that, in the event of any of the children of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, dying before the said period fixed for division of their shares respectively, leaving lawful issue, such issue shall come in place of the parent and take and receive what the parent would have been entitled to, if then in life."

Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, survived the testator. Margaret Byars or Hay had by her first marriage one child, Jane Byars Hay, born on 17th May 1866. Robert Hay, her first husband, died prior to the date of the said trust-disposition and settlement, viz., on 1st June 1866. She subsequently married Charles Keith, and by him had two children, Robert Wilson Keith, and James Simpson Keith, both of whom died in infancy, although the younger survived his mother for a few months. She herself died on 11th November 1877.

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Jane Byars Hay, the only surviving child of Margaret Byars or Hay, having attained the age of twenty-one on 17th May 1887, a special case was presented to determine to whom fell the share of residue left to the issue of her mother. James Byars' trustees were the first parties, Jane Byars Hay was the second party, and Charles Keith, her stepfather, was the third party. The total amount of the share in question was £830, 18s.

The second party maintained that no right or interest under the trust-disposition and settlement vested in her or the other children of Margaret Byars or Hay until the period of distribution mentioned in the deed, viz., when the youngest child of Margaret Byars or Hay attained the age of twenty-one years, and that the brothers uterine of the second party, Robert Wilson Keith and James Simpson Keith, having died without issue, she, as the only surviving child of her mother, was entitled to the whole £830, 18s.

The third party maintained that vesting took place in the children of his late wife, Margaret Byars or Hay, *a morte testatoris*, or at least at the birth of each child, and that one-third share of the one-eighth share of the residue liferented by their mother was vested in each of his two children, Robert Wilson Keith and James Simpson Keith, prior to the dates of their respective deaths, and that he, as their father and next of kin, was entitled, on being confirmed executor to them, to receive payment of the shares so vested in them respectively.

The questions of law were:—“(1) Is the second party entitled to the whole of the said sum of £830, 18s.? or (2) Is the third party, on confirming as aforesaid, entitled to receive two one-third shares of the said sum of £830, 18s., or any portion thereof?”¹

At advising,—

LORD RUTHERFURD CLARK.—The question in this special case is, whether a certain legacy left by the settlement of the late James Byars vested *a morte testatoris*, or did not vest until the period of distribution mentioned in the deed, namely, when the youngest child of Mrs Hay attained the age of twenty-one? After a consideration of all the clauses in the deed, I have come to be of opinion that the legacy vested *a morte testatoris*, and therefore that we are bound to answer the second question in favour of the third parties.

By the clause in the trust-deed with which we have to deal the trustor directs that after his death his estate shall be divided into two equal shares, and regarding one share the direction is as follows:—“One share thereof to be retained by my said trustees and invested by them in their own names for behoof of the children of my said brother Andrew Byars, viz., Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, equally between and

¹ *Authorities* (cited by the second party).—*Laing v. Barclay*, July 20, 1865, 5 Macph. 1143, *per* Lord Kinloch, p. 1147; *Taylor v. Gilbert's Trustees*, Nov. 3, 1877, 5 R. 49, *rev.* July 12, 1878, 5 R. (H. L.) 217, L. R., 3 App. Cas. 1287; *Waters' Trustees v. Waters*, Dec. 6, 1884, 12 R. 253. (Cited by third party).—*Wallace*, Jan. 28, 1868, M. voce Clause, App. No. 6; *Miller v. Finlay's Trustees*, Feb. 25, 1875, 2 R. (H. L.) 1; *Jackson v. M'Millan*, March 18, 1876, 3 R. 627; *Wilson's Trustees v. Quick*, Feb. 28, 1878, 5 R. 697; *Snell's Trustees v. Morrison*, March 20, 1877, 4 R. 709; *Lindsay's Trustees v. Lindsay*, Dec. 14, 1880, 8 R. 281; *Fraser v. Fraser's Trustees*, Nov. 27, 1883, 11 R. 196; *Ross' Trustees*, Dec. 18, 1884, 12 R. 378; *Peacock's Trustees v. Peacock*, March 20, 1885, 12 R. 878.

among them in liferent, and their lawful issues, born or to be born, equally among them in fee, and that *per stirpes* and not *per capita*, the half of my estate being thus destined or divided into four equal shares, one whereof shall descend to the said Robert Byars in liferent and his lawful issue in fee, another to the said David Byars in liferent and his lawful issue in fee, another to the said Jessie Byars or Simpson in liferent and her lawful issue in fee, and the remaining share to the said Margaret Byars or Hay in liferent and her lawful issue in fee." Now, there is thus created in the most distinct manner rights of liferent and of fee in Margaret Byars and her children respectively, and of course if there is nothing in the rest of the deed to control this clause there can be no doubt that the issue of Margaret took a right to the fee *a morte testatoris*, but it is said that there are certain later clauses in the deed which qualify this right, and shew it to have been the intention of the truster to postpone vesting. But I take leave to say with respect to these clauses that they do not postpone the gift—they do not relate to the gift at all—they relate entirely to the period of division or payment. The first of these clauses declares,—“As it is hereby provided and declared, with reference to the share or half of my said estate destined to the children of my said brother Andrew Byars, in liferent, and to their lawful issues equally among them in fee as aforesaid, that in the event of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, dying before his or her youngest child attaining the age of twenty-one years, the shares of the half of my said estate, respectively liferented by the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, shall not be payable to their children, to whom they are destined in fee, until the youngest lawful child of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, so dying, shall have attained the age of twenty-one years.” Even here there is no clause providing for any survivorship or destination over, but there is a clause further on which is said to introduce that element. That clause provides—“In the event of any of the children of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, dying before the said period fixed for division of their shares respectively, leaving lawful issue, such issue shall come in place of the parent, and take and receive what the parent would have been entitled to if then in life.” That is the clause which creates the only difficulty which this deed presents, and I do not say that it does not occasion some difficulty. But in the first place, as I have said, it is a clause which is applicable to the period of division, and does not affect the words by which the gift is conveyed in the first instance. The words of gift confer an absolute fee on the objects of the gift, and do so at once, and I confess I would require very strong and unequivocal language indeed before I could accept it as detracting from the absolute nature of the gift, and say that not an absolute but only a conditional fee is given. In the second place, I think it has been commonly said with respect to such a clause, which merely substitutes children for their parents, that it has very little effect on the question of vesting, as being merely an expression of what the law itself would imply. In the next place, I should be inclined to say that this clause may possibly be referable to the division of the estate which the testator directed to be made immediately after his death, but if not to that, then that it is a clause which provides for the divestiture of the beneficiaries if in point of fact the case should happen which would make such divestiture necessary. That case does not occur here, and therefore I have no occasion to consider the

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No. 180. clause further. I have only to consider it with reference to the question, at what period did the shares vest?

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The view therefore which, on the whole, I am inclined to take is this: I find that by a very express clause the fee of the capital is given to certain persons—the children of Margaret Byars; that that fee is given without qualification or condition; and creating as it does a right in these beneficiaries at the moment of the trustor's death, I do not see that that right has been taken away or in any way limited by what occurs in the subsequent parts of the deed so as to make one prefer a later period of vesting to that which is the natural or presumed period of vesting, namely, the death of the trustor.

LORD CRAIGHILL and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

THE COURT pronounced this interlocutor:—"Answer the first of the questions therein stated in the negative, and the second in the affirmative: Find and declare accordingly: Find neither of the parties entitled to expenses, and decern."

MACRAE, FLETT, & RENNIE, W.S.—ROBERT FINLAY, S.S.C.—Agents.

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July 19, 1887.
M'Kercher v.
M'Quarrie.

REV. PETER M'KERCHER, Pursuer (Appellant).—*Rhind.*
ALEXANDER M'QUARRIE, Defender (Respondent).—*M'Kechrie.*

Expenses—Counsel in Sheriff Court—A. S., 4th December 1878.

2ND DIVISION.
I.

IN an action in the Sheriff Court of Argyllshire at Inveraray, at the instance of the Rev. Peter M'Kercher, parish minister of Kilmore and Kilbride, against Alexander M'Quarrie, baker, Loch Awe, near Dalmally, both parties appeared by counsel at the proof and debate thereon. The Sheriff-substitute (Campion) having assoilized the defender, with expenses, the pursuer appealed to the Court of Session. The Court affirmed the judgment, and remitted the defender's account of expenses to the Auditor. At the taxation on 8th July 1887 the Auditor disallowed charges in the account for instructing counsel in the Sheriff Court, because no application had been made to the Sheriff-substitute while the case was in the Sheriff Court, either for authority to employ counsel, or for approval of their employment. After the taxation the agent for the defender presented to the Auditor a certificate by the Sheriff-substitute, dated 7th July 1887, stating that counsel were employed with his approval. The Auditor was of opinion that the certificate was too late, in respect it was not applied for till after the action had been finally decided in the Sheriff Court, and been appealed to the Supreme Court and there decided. He reported the point to the Court. The "Table of Fees for General Business in Sheriff Courts," fixed by A. S., 4th December 1878 (for regulating the fees of agents practising in Sheriff Courts), provides for charges for "instructing counsel where the employment of counsel is authorised or subsequently sanctioned."

The Court found "that the sum mentioned falls to be added to the amount of the defender's expenses as taxed and reported upon by the Auditor," and *quoad ultra* approved of the report.

W. OFFICER, S.S.C.—W. B. GLEN, S.S.C.—Agents.

MICHAEL M'QUADE, Pursuer (Appellant).—*A. S. D. Thomson.*
 WILLIAM DIXON, LIMITED, Defenders (Respondents).—*Jameson.*

No. 182.

July 19, 1887.

Reparation—Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. c. 42), sec. 1—Defect in condition of way.—In an action brought by a miner against his employer for damages at common law or under the Employers Liability Act, the pursuer averred that when attending a horse in the mine he was knocked down by it, and that he was seriously injured by falling on a sleeper with a nail protruding from it, which had been left on the roadway through the fault of the roadsman. *Held* that there was no relevant averment that the road was in a defective condition, or that the accident was caused by the fault of the defender.

M'Quade v. Wm. Dixon, Limited.

MICHAEL M'QUADE who had for some time prior to 5th February 1885 been in the employment of William Dixon, Limited, as a pony driver in a colliery at Blantyre, brought this action against them in the Sheriff Court of Lanarkshire, averring that on that day he had brought his horse for water to a trough in the pit, that while the horse was standing there "the bottomer pulled down the gates and the noise startled the horse, so that it wheeled round and knocked the pursuer down. He fell on a sleeper which had been left lying on the road unknown to him, and in this sleeper there was a large spike nail which penetrated the pursuer's right knee." He then set forth that his leg had required to be amputated, that in consequence he had been permanently injured, and that the accident was caused through the fault and negligence of the defenders, or of their oversman, roadsman, and bottomer, for each and all of whose faults or negligence the defenders were responsible under the Employers Liability Act, 1880. "It was the duty of the roadsman to see that the road was perfectly clear and safe. Had he been attending to his duty the sleeper on which pursuer was thrown ought not to have been there. The bottomer also, knowing that horses were close to him, ought to have given warning before he shut the gates down, so that the pursuer might have been prepared to see that his horse remained steady. Besides it was the duty of the oversman to see that the said roadsman discharged his duties, and the oversman was aware of the sleeper being placed on said road, and of the danger in consequence to anyone using said road."

2nd DIVISION.
 Sheriff of
 Lanarkshire.
 I.

The pursuer pleaded;—(1) The pursuer having suffered loss, injury, and damage through the fault or negligence of the defenders, or of those for whom they are responsible, is entitled to reparation therefor. (2) The defenders being bound to keep the roads clear of all obstructions, and having failed to do so, are liable to the pursuer in damages. (3) Or otherwise, the pursuer having been injured while in the employment of the defenders as a workman through the fault or negligence of the defenders, or of those for whom they are responsible, are liable to the pursuer in damages, and decree should be pronounced in terms of the second conclusion of the petition, under the "Employers Liability Act, 1880," section 1, subsections 1, 2, and 3.*

* The Employers Liability Act, 1880 (43 and 44 Vict. c. 42), enacts, sec. 1,—"Where, after the commencement of this Act, personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, . . . the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

Sec. 2.—"A workman shall not be entitled under this Act to any right of

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The defenders pleaded that the action was irrelevant.

The Sheriff (Spens) before answer allowed a proof.

The pursuer appealed for jury trial, and proposed an issue for the trial of the cause.

The defenders argued that the action was irrelevant. The proximate cause of the accident was that the horse started because a gate slammed, but there was no fault in the bottomer in letting it shut. The fact that a gate had been allowed to swing to, and so caused an accident, did not infer fault.¹ The mere fact that a sleeper was allowed to lie at the roadside out of the way of ordinary traffic till it should be removed for repair in due course, was not a defect in the condition of a way in the sense of the Employers Liability Act.

Argued for the pursuer;—The bottomer should not have carelessly allowed the gate to slam, and frightened a horse which he had reason to know was close to him. But, in any view, the fact that a sleeper with a projecting nail was left on the roadway was a defect in the condition of the way which was due to the negligence of the roadman.²

LOED JUSTICE-CLERK.—These cases are often troublesome, and sometimes painful, as this is. The pursuer, through no fault of his, was so injured that his leg had to be amputated. The result would, I think, probably command itself to the sympathy of his employers.

But the question we have now to consider is a question entirely of the relevancy of the statement here. I am of opinion it is not relevant. Apparently the nature of the occurrence was that the pursuer was leading a horse along a passage of the mine close to one of the gates, the trough to which he was leading the horse being beside the gate which shut off the shaft from the coal-work. The horse was startled by the falling of the gate, which in the course of the working of the pit was allowed to shut, and he backed against the pursuer, who fell upon the roadway. It happened that a sleeper was lying on the road, and there was a spike in it which entered the knee of the pursuer. The first question is, Is there any liability arising from the bottomer letting the gate fall which it is said startled the horse? If there is no liability on that ground, then is the master, under the Employers Act, responsible because this piece of sleeper was put alongside the wall, or was put upon the roadway, against which or on which the man fell and thereby got that very serious injury?

Now, as to the first question, I am quite satisfied that it was a contingency for which nobody was responsible, for the bottomer was only doing his duty in letting the gate fall. He did not expect the horse to be startled, and neither did the driver of the horse. It was startled, and thereupon the event happened, for which, in my view, no blame is attributable to any of the persons concerned. The unfortunate man was knocked over by the horse backing, and he fell upon this bit of wood, and the spike entered his knee. My opinion is that the injury

compensation or remedy against the employer in any of the following cases—that is to say, (1) under sub-section 1 of section 1, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer, or of a person in his employment, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

¹ *Mitchell v. Pattullo*, Dec. 9, 1885, 23 S. L. R. 207.

² *Mitchell v. Coats Iron Co.*, Nov. 6, 1885, 23 S. L. R. 108.

arose from a misadventure for which nobody is responsible. It may be said, No. 182. no doubt, that somebody was responsible for placing the sleeper where it was, but nobody could possibly have expected that this man could be knocked over by a horse in the way he was, and besides, the sleeper was laid down in a place where it could be found again in conducting the operations of the mine. From all of which I draw simply the conclusion that it is an unfortunate misadventure, to which persons are always liable, and that it would be a straining of the law of liability to an extravagant extent to make the master liable for an accident—as it may be properly called—of this kind. I am of opinion that there is no relevant matter on the record.

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LORD YOUNG.—I am of the same opinion. I sympathise very much with the observation that your Lordship made, that as the pursuer here met with an accident in consequence of which he lost his leg, without any blame on his part, while in the defenders' service, the defender might well make him some compensation. I hope that that may be considered even now.

But upon the relevancy of this record, as a ground of action on the footing that the master was to blame, or that some other was to blame for whom the master is responsible under the Employers Liability Act, I entirely agree. I think no blame is imputable to the master, or to anyone for whom the master is responsible, for the shutting of the gate, whereby the horse was startled and knocked the pursuer down. There was no neglect of the duties of an ordinarily good master, neither was there any fault on the part of anyone for whom he was responsible under the Employers Liability Act, 1880. Then it is said that the fall would have been harmless had the sleeper with a nail protruding from it not been lying on the roadway. That was a calamity; but the question is, whether it was the master's fault that the sleeper with the nail in it was there? It was certainly not directly his fault. He did not fail in anything he did, nor in employing fit servants, but it is said that he is responsible because the overman who picked up the broken sleeper should have taken it away, and not simply put it aside. Well, the effect of the Act is that a master is to be responsible to the person injured although he is his workman, and though the injury was done by a fellow-workman, just as if he had been not a workman but a stranger lawfully on the premises. In short, he is not to be entitled to plead the law which he could plead before, that a master is not responsible to one servant for the fault of another. I take the case so, and as there are few strangers who could be said to be lawfully on the roadway of a mine, I take the case of an ordinary road leading to a man's house or farm. The owner or someone else has, I will suppose, picked up something lying on the road, and placed it on one side. A stranger passing along is thrown from his horse, and striking against this thing, picked up the minute before, is much hurt by it. Is there any liability *ex culpa* to the stranger? It is one of the things which happen in the ordinary course of life that such a thing found impeding the road should be put on one side, and it does not occur to me that any such action would lie. Since, therefore, I do not think that in such a case there would be any liability to a stranger—and we are to deal with the case as if it happened to a stranger—I think the action irrelevant. I may add that I do not like sending a case of this kind to a jury unless there is a distinctly relevant case set out on record, since there would be a risk of their taking the view that this poor man had lost his leg, and that his employers, who were well able to pay, should just have to pay for it.

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LORD CRAIGHILL.—I agree with your Lordship and Lord Young. It does not appear to me that in any reasonable view of the facts of the case fault is ascribable to the defenders or to anyone in the defenders' employment. In regard to what really led up to the accident—I mean the letting down of the gates—it is quite plain that no fault is imputable to the person whose duty it was to let down the gates, which was quite a common operation in the mine, and therefore one which had been performed repeatedly, and, so far as we know, without any accident ever having occurred. That being so, it is impossible to conclude that there could have been any expectation of its startling the horse upon this occasion in question. What was done was done in the ordinary course of the working of the pit.

With regard to the other alleged ground of liability—I mean the placing of the sleeper in the position in which it caused injury to this man—I also think that the pursuer has failed to set forth a relevant case. I do not think the person who picked it up was in fault in placing it where it was found, even although there was a spike in it. The sleeper was to be replaced. There was no need to take it away. It was only put aside in order that it might be repaired and then replaced. It was reasonable to put it where it was, and but for the unfortunate startling of the horse nothing but convenience could have resulted from putting it where it was. There was certainly no recklessness nor want of due care or consideration for anybody in putting it where it was. When the oversman, whose duty it was to see that the road was clear, went his rounds he saw where the sleeper was lying, and the conclusion was a just one to which he came—that the sleeper was placed there for the purpose of convenience, and that it would be reinstated in its former position when the proper time arrived. I cannot therefore impute fault upon that ground. The most plausible view urged against the defenders upon this part of the case is, "Oh, this is a defect in the road." Now, I do not think there was any defect by reason of the presence of the sleeper that contributed to the occurrence of this accident. There was no obstruction in the road whether in going one way or in going another. Anybody could pass where it was without the least obstacle. The sleeper presented nothing like obstruction. It is a trite remark to say that the unexpected is the thing that does occur; but I do not infer from the occurrence of this accident and the serious consequence to this man that in any reasonable sense, even if he had gone upon the theory of the unexpected happening, that fault could be imputed to the man who placed the sleeper in that position. Therefore, in my opinion, there is no defect here covered by the sections of the statute upon which Mr Thomson rested his case. There was no obstruction of the road by reason of the sleeper being placed where it was. It was placed there, having regard to its ordinary use, and, as I have said, with the view of its speedy replacement. On the whole matter, therefore, I agree with your Lordships.

LORD RUTHERFURD CLARK.—I am of the same opinion. I think to make a relevant case the pursuer ought to have been much more distinct in his averments.

THE COURT found that "the facts alleged by the pursuer are not relevant to support the conclusions of the action: Therefore dismiss the action, and decern."

ROBERT WISEMAN (Scott's Trustee), Pursuer (Respondent).—*Darling—* No. 183.
W. C. Smith.

WILLIAM SCOTT JUNIOR AND CURATOR AD LITEM, Defender (Reclaimers).—*July 19, 1887.*
Gloag—Kennedy. Scott's Trustee v. Scott.

Tutor—Ultra vires.—A bond granted by a tutor over his ward's heritable estate is null.

Bankruptcy—Recompense—Improvements on a pupil's estate by his father without authority.—A pupil having succeeded to heritage, his father, as his administrator-in-law, proceeded to execute improvements on it, and borrowed money for the purpose, granting, "as tutor-at-law," a bond and disposition in security primarily over the pupil's lands, and secondarily and collaterally over lands belonging to himself, declaring that in the event of his making payment he should be entitled to relief from the pupil's lands and the proprietor thereof. The bond narrated the purpose to which the loan was to be applied. The father having become bankrupt some years afterwards, the trustee upon his sequestrated estate paid up the loan, taking an assignation to the security, including the right of relief, and then sued the son for £500, the amount to which it was admitted he was *lucratus* by his father's expenditure. The son pleaded that he was entitled to set off the rents of his estate (amounting to £310), which were in his father's hands at the date of the sequestration unaccounted for, against the £500.

Held that the bond was invalid *quoad* the pupil, and that the only obligation upon him was to recompense his father for the sum beneficially expended by him upon the estate, and that this was a debt due to the father at the date of his sequestration against which the pupil was entitled to set the rents then due to him by his father (*dict.* Lord Shand, who held that the history of the transaction shewed that the true creditor in the improvement expenditure was the granter of the loan, and that the pursuer having obtained an assignation thereto after the sequestration was entitled to full payment of the £500, leaving the son to rank as a creditor on his father's estate for the rents).

WILLIAM SCOTT junior, who was born on 18th July 1870, succeeded, 1st Division.
 on the death of his mother in 1874, to the lands of Summerhouse, Lord M'Laren.
 Stirlingshire, extending to 102 acres. Mrs Scott was not infeft in the B.
 lands, and consequently her surviving husband, William Scott senior, had no right of courtesy therein.

Certain improvements being necessary in the view of William Scott senior, as his son's administrator-in-law, he borrowed a sum of £1500 in 1879 in order to carry them out. The lender was Mr Matthew Cleland, merchant, Cambusnethan.

In security of the loan Scott senior granted Cleland a bond and disposition in security, which was in the following terms, as narrated in article 3 of the pursuer's condescendence in the present action*:—(Cond. 3) "By the said bond and disposition in security, which proceeds on the narrative that the said William Scott had deemed it right to borrow the said sum with a view to the improvement of the said lands, and for the purpose of defraying the expense of erecting a suitable steading thereon, the said William Scott, therein described as 'merchant in Strathaven, in the county of Lanark, tutor-at-law to my son, William Scott jun.,' *inter alia*, granted him, as tutor-at-law foresaid, to have instantly borrowed and received from Matthew Cleland, merchant, Cambusnethan, in the county of Lanark, the sum of £1500 sterling, which sum he bound the said William Scott junior, and himself as tutor-at-law foresaid, and also him-

* The bond was not printed, but both parties admitted that its terms were correctly set forth in the condescendence.

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self as an individual, and their respective heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the said Matthew Cleland and his heirs, executors, or assignees whomsoever, at the term of Whitsunday 1879, within the Sheriff-clerk's office in Glasgow, and in security of the personal obligation therein before written, in the first place, he, as tutor-at-law foresaid, disposed to and in favour of the said Matthew Cleland and his forebears, heritably but redeemably as thereafter mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Whole the said lands of Summerhouse, therein particularly described; and, in the second place, he, for himself, disposed to and in favour of the said Matthew Cleland and his forebears, heritably but redeemably, as thereafter mentioned, yet irredeemably in the event of a sale by virtue thereof, All and Hail these six and eight penny lands of Graynes, in the parish of Avondale and county of Lanark, therein particularly described, belonging to the said William Scott himself; and whereas the said sum of money had been borrowed only for the purpose of making the said improvements on the said lands of Summerhouse, and was intended by him to form a charge thereupon, and upon his said son as proprietor thereof, and his personal obligation therefor had only been granted, and the said lands of Graynes had only been disposed as an additional security to the said Matthew Cleland, therefore the said William Scott did thereby declare that the said sum should be and was thereby constituted primarily a burden upon the said lands of Summerhouse and proprietor thereof, and only secondarily a burden upon the said lands of Graynes, and proprietor thereof, and that in the event of himself or his successors in the said lands of Graynes paying the said sum, or interest thereon, they should be entitled to relief from the said lands of Summerhouse and proprietor thereof, and for the purpose of operating such relief, they should, if they requested it, be entitled to an assignation of the said bond and disposition in security from the said Matthew Cleland (said assignation bearing, however, warrantice from fact and deed only), declaring, however, that the said provision should not be held in any way to limit the right of the said Matthew Cleland, in the event of failure to pay the said principal sum, interest, or consequences, to operate against all or any of the subjects thereby disposed without discussing them in the above order."

The estates of William Scott senior were sequestrated in February 1885, and Robert Wiseman was appointed trustee. The present action was shortly thereafter brought by the trustee against William Scott junior and Cleland. The summons (as amended before the Lord Ordinary's interlocutor was pronounced) concluded for declarator that the sum of £1500 contained in the bond, or such other sum as should be ascertained, "was properly expended by the said William Scott in improving the said lands of Summerhouse belonging to the defender William Scott junior; and that the said expenditure did to the extent of £1500, or such other sum aforesaid, permanently improve the said lands as at the date of said bond and disposition in security; and that the defender William Scott junior was thereby *lucratus* to the extent aforesaid, and that to the extent aforesaid the pursuer is entitled to require the defender Matthew Cleland, being the creditor in said bond and disposition in security, to proceed thereunder in the first place against the said William Scott junior and his estate, and that to the extent aforesaid the said William Scott junior is bound to free and relieve the pursuer, as trustee foresaid, and the said William Scott and his estate, of all obligations undertaken by the said William Scott in said bond and disposition in security, and of all sums paid

by the said William Scott or the pursuer to the creditor in said bond and disposition in security"; and for declarator that the bond and disposition in security formed a good and valid security over the lands of Summerhouse for the £1500, or at least to the extent to which the defender William Scott junior was *lucratus* by the expenditure thereof. There was added a conclusion against William Scott junior for payment of the £1500, or of so much of it as had been paid by the pursuer to Cleland in discharge of the bond and disposition in security.

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The pursuer averred;—(Cond. 4) "The said William Scott proceeded to expend the money so obtained in improving the said lands of Summerhouse, and particularly in the erection of a steading and in fencing and draining. The steading (including house) was appropriate to the size of the farm. The said lands have been greatly improved in value by the said expenditure, which was absolutely necessary for the proper cultivation thereof, and the defender William Scott junior, as proprietor thereof, is *lucratus* by the said expenditure to the full extent of the sum borrowed, or, at all events, to the extent of £1152, 13s. 2d. The rent of the said lands in 1874 was £57, and this rent could not have been maintained if the expenditure had not been made, but in 1878 the lands were let on a lease for nineteen years at a rent of £85, rising in 1886 to £105 per annum." This further averment was afterwards added,—“Since the date of closing this record the pursuer has paid the sum of £1500 contained in said bond and disposition in security to the said Matthew Cleland, and has obtained from him an assignation to said bond and disposition in security, dated 11th November 1885, which is produced and referred to.”

The defender William Scott junior (to whom a *curator ad litem* was appointed) alone appeared to defend the action. He denied that the bond and disposition in security in any way bound him, or that his father had had any authority to enter into the transaction, he having been a pupil at the time. He further averred,—“Explained that this defender's father was solvent at and for a considerable time after the execution of the said bond, and that he has drawn the whole rents of this defender's lands since the succession opened in 1874, amounting to £750 or thereby. He has never accounted to this defender, but it is believed and averred that he received rents and other funds, belonging to the estate of this defender, more than sufficient to extinguish the amount to which this defender's estate was increased in value by the expenditure on his lands, and this would be made to appear on a proper balancing of accounts between them. These funds were not kept separate and distinct from his proper individual estate. At least this defender is not liable to make payment of the amount by which it may be held that the value of his estate was increased as aforesaid except under deduction, *pro tanto*, of the sums so due to him by his father's estate.”

The pursuer's pleas as amended, *inter alia*, were;—(2) The money borrowed under the said bond and disposition in security having been expended on the lands of Summerhouse, belonging to the defender, William Scott junior, and the said expenditure having been necessary and reasonable, the pursuer is entitled to decree that the said bond forms a good and valid security over the said lands, at all events to the extent to which the said defender is *lucratus* thereby. (3) The defender, William Scott junior, being *lucratus* by the said expenditure, and the obligations undertaken in said bond and disposition in security by the said William Scott and his estate being those of a cautioner only, the pursuer is entitled to the other decrees of declarator concluded for. (4) The pursuer, having paid the sums contained in the said bond and disposition in

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security, is entitled to decree for payment thereof to the extent to which the defender, W. Scott jr., was *lucratus* thereby.

The defender pleaded, *inter alia*;—(3) The said bond and disposition in security not having been executed by this defender, or anyone authorised to borrow money on the security of his heritage, does not form a good and valid security over the lands of this defender, and he ought to be assoilzied, with expenses. (4) The said transaction not having been reasonable and necessary in the administration of this defender's estate, this defender ought to be assoilzied, with expenses. (5) As the claim now made in respect of this defender having been *lucratus* by the expenditure libelled on has been extinguished, this defender ought to be assoilzied, or, at least, the pursuer is not entitled to have the said claim sustained except to the extent of the balance ascertained to be due by this defender to his father's estate.

To obviate proof, a joint minute was put in for the parties in which they stated that they had agreed "(first), that the expenditure referred to in condescendence 4 of the record, by this defender's father, William Scott senior, should be held as having improved this defender's lands of Summerhouse in value (both at the date of said expenditure and at the present time) to the extent of £500; (second), that the said expenditure, but only to the extent of the said £500, and interest thereon at £4 per centum per annum, from the 15th day of May 1879, forms a proper item of charge against the estate of this defender, in the accounting between this defender and the estate of his said father, William Scott senior; and (third), that the balance due by this defender upon an accounting between him and the pursuer, as trustee upon the sequestrated estate of the said William Scott, amounts to the sum of £190 sterling as at the date hereof, and they accordingly craved the Lord Ordinary to pronounce an interlocutor disposing of the cause, and to find neither party liable in expenses."

The Lord Ordinary (M'Laren), on 26th February 1887, pronounced this interlocutor:—"Finds that Matthew Cleland, therein designed, advanced to the minor defender, William Scott junior, £1500 on the receipt and obligation of the minor's father, and that to the extent of £500 the estate of the minor is permanently improved and increased in value by the expenditure of a part of said advanced money upon it, and that to this extent the said William Scott junior is liable in repayment of the said advance: Finds that the pursuer has acquired, by assignation, the right of the creditor in said advance, and that said right is not subject to compensation by any claim arising on the accounts between the said William Scott junior and his father, the bankrupt: Therefore decerns against the said William Scott junior for payment of the said sum of £500, with interest thereon at the rate of 5 per centum per annum from the date of citation until payment, but that only upon the pursuer executing and delivering to the defender, the said William Scott junior, a valid and sufficient discharge of the said bond and disposition in security, in so far as the same binds, or purports to bind, the said William Scott junior, and his said lands of Summerhouse: Finds no expenses due." *

* "OPINION.—I think I am now fully in possession of the facts of the case, and the views that have been respectively maintained. The question here relates to the extent to which it is possible to render the estate of a minor liable for money expended in its improvement. In the circumstances set forth in the condescendence, the pupil's father resolved to execute improvements on his son's estate, for which he borrowed in the son's name the sum of £1500 from Matthew Cleland. But in consequence of the difficulties which the law interposes towards

The defender reclaimed, and argued ;—The discussion fell to be taken on the footing that the security in so far as granted over the defender's estate

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transactions that may affect a minor's heritable estate, Cleland took care to keep himself safe by getting a collateral security from William Scott, the father, over his lands of Graynes, a different estate, of course, from the pupil's estate—the pupil's estate being derived from his mother. It appears that the father's heritable estate affords a sufficient security for the borrowed money. But he has become bankrupt; and, in the interests of creditors, the trustee on the father's sequestrated estate contends that the debt contracted to Matthew Cleland should, in the first instance, be paid out of the son's estate, in so far as the money can be shewn to have been beneficially employed in the improvement of that estate. He admits his liability, of course, for the balance that arises upon his collateral security—security given in express contemplation of such a result. Now, to obviate a proof, the parties have agreed that it may be taken that the money was applied beneficially to the extent of £500. To that extent the son is *lucratus*; and I suppose it follows that if he pays the £500 he has suffered no lesion from the transaction which his father entered into on his behalf. But upon the account between father and son with reference to the rents of the son's estate there arises a balance against the father of £310, which, if it could be set against the £500 to which I have referred, would reduce the sum due to £190. It is contended on the son's behalf, first, that the son ought not to be called on to pay anything; and, secondly, that at all events he is only to pay the £190, which is the nett benefit he has got out of the transaction, if you can identify the father with Cleland, the person who advanced the money at his request. On the first point, I am disposed to think it is not necessary, for the purposes of this action, to consider whether a bond granted by a tutor over the ward's heritable estate is a good security over the estate. That question could only arise here if the son's estate were insufficient to meet his obligations. But there is no question about the solvency of the son's estate, and therefore I do not need to consider the value of the bond as a security. But what I must consider is, in view of the fact that the son's estate has been benefited by the *bona fide* expenditure of money to the extent of £500, whether there is not an equitable obligation on the part of the son to repay the money so expended. I am clearly of opinion that the minor is liable to fulfil these equitable obligations founded on the law of recompense, which would attach to any person *sui juris* in the same circumstances. The disability of the minor only arises in regard to matters in which it is necessary that he should form an independent opinion and act upon it, because he is not supposed to be capable of protecting his own interests. But there are other matters as to which there is no difference between the case of a minor and of a person *sui juris*. The claim of recompense is a claim that does not arise in consequence of anything that the party benefited has done, or is called upon to do; but in consequence of something that has been done for his benefit without his consent. I am therefore of opinion that Mr Cleland has a good claim against William Scott junior to the extent of £500; and I am farther of opinion that the trustee of William Scott senior has the right to require Cleland to proceed against the son for that sum; because William Scott senior is only a cautioner, and it is the right of every cautioner at common law to call upon the creditor first to discuss the principal debtor. That is the benefit of discussion which is not said to have been excluded in this case, and about which no question has been raised.

“But now let me consider the second point, which is this, seeing that the trustee is the party who has raised the question, whether he ought to be affected by his constituent's obligation to account for the rents. Now, if William Scott, the father, before he became insolvent, had acquired right to the creditor's claim of recompense by making payment in terms of his collateral obligation, I am inclined to think that compensation would have taken effect *ipso jure*, and that William Scott junior would have been entitled to set off his claim for the rents against the father's claim upon the bond. But the result is not necessarily the same when the trustee for creditors acquires the bond. I am not aware that

No. 183. was wholly bad.¹ He was a pupil at the time of the transaction, and his father had no authority to enter into it. Further, the Lord Ordinary was wrong in supposing that the bankrupt would have been entitled to call upon Cleland to discuss the principal debtor before he could be called upon to meet the debt. That right had been abolished, when not expressly stipulated for, by the Mercantile Amendment Act, 1856. So that the case was reduced to the short question whether compensation was pleadable by the defender against the pursuer. That question really resolved itself into this,—who was the defender's proper creditor in the £1500,—the father or Cleland? Cleland could not have recovered it from the pupil upon the terms of the bond. It was money spent on his son's estate by the father,—and it was a mere accident that the father had had to borrow it. The defender had nothing to do with Cleland in the transaction. The reason for setting forth in the bond the object to which the money was to be applied was in order to define the relations of the father and his son. It was not for Cleland's benefit that this was done. The right to be relieved was no new right which the trustee had acquired. It existed in the father prior to his sequestration. The claim of the son for the rents also existed prior to that date. The one clearly fell to be set off against the other, *i.e.* the £310 against the £500, and the sum for which the defender should be held liable was only £190.

Argued for the respondent;—It was not clear that the bond was invalid,² and even if it were invalid as a security over the defender's estate, still Cleland was a creditor of the son in so far as the money was applied for his benefit. On principle there was no difference between this case and that of *Paterson*,³ although at first sight that case appeared to be adverse. Cleland was not the actual hand which expended the money, but looking to the terms of the bond, and to the history of the transaction, he had a title to see that the money he advanced was expended upon the pupil's estate. The pursuer, having

he has acquired it. What he is here asking under the summons is that Cleland should discuss the principal debtor, and if the principal debtor is discussed and payment obtained there never could be compensation, because there never was the same creditor and same debtor in the two transactions. But supposing that the trustee has provisionally paid the debt, reserving his right of relief, then I am of opinion that in this case compensation does not take place. No doubt under the rule of the balancing of accounts in bankruptcy, the trustee cannot exact full payment from a debtor to the sequestered estate, and at the same time require the other to take payment of a dividend upon a counter claim. But this doctrine only applies where the two claims have arisen before the bankruptcy. If the trustee, for the convenience of the trust, makes a payment whereby he acquires a right of credit against a third party, that is an asset which he holds for the benefit of creditors independently of the bankruptcy, and which he is entitled to realise in full, the debtor's claim being only a claim in bankruptcy, and inferring a right to a dividend. And therefore upon both points which have been argued, my judgment is in favour of the pursuer.

"I think it will be necessary that the conclusions of the summons should be modified, or that I should only give decree in qualified terms. I cannot hold that the bond and disposition in security formed a good security over the lands, but I may hold that a debt to the extent of £500 was incurred by William Scott junior to Cleland."

¹ Davidson v. Mackenzie, May 31, 1826, 4 S. 640; Dickson v. Torrie, Elchies, *voce* Tutor, 15; i. Ball's Comm. 132-134; Stair, i. 6, 18.

² Fraser on Parent and Child, 252, 256.

³ Paterson v. Greig, July 18, 1862, 24 D. 1370, 34 Scot. Jur. 692.

paid Cleland's debt, stood in his shoes, and had a good claim against the defender.¹ The assignation was in favour of the trustee for the benefit of the estate, and it was he who had made the creditor's right effectual. That of course was subsequent to the sequestration. The father was a mere cautioner in the transaction in relation to the defender.² The claim for rents collected by the father was available against the father only; the trustee did not acquire his right through the father, but as a purchaser for the benefit of the estate. There was therefore no *concursum debiti et crediti*. The Lord Ordinary's interlocutor was therefore right.

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At advising,—

LORD PRESIDENT.—This is an action at the instance of the trustee upon the sequestrated estate of William Scott, merchant, Strathaven, the object of which is to recover from the bankrupt's son a sum of £1500 said to have been expended by the father as administrator-in-law for his son in improvements on a heritable estate belonging to the latter. The son was born in 1870, and on his mother's death in 1874 he succeeded as her heir to the estate in question, named Summerhouse. The mother was not infeft in the property, and consequently her husband had no right of courtesy over it. The effect of the son's succession was that not only did he become immediate fiar, but that the rents of the estate also belonged to him. His father, as his administrator-in-law, was of opinion that it was desirable to expend money in improving the estate, which was a small one of about 100 acres. It is said he expended about £1500 in these operations,—particularly in the erection of a steading, and in fencing and draining,—and all without the authority of the Court. In order to meet the expenditure so incurred, he borrowed a sum of £1500 from a Mr Cleland, in security of which he granted the bond which is set forth in the condescendence.

The bond proceeds upon the narrative that the father had deemed it right to borrow the sum of £1500 with a view to the improvement of his son's lands, and in order to defray the expense of a steading, and he acknowledges to have borrowed and received that sum from Matthew Cleland, "which sum he bound the said William Scott junior, and himself as tutor-at-law foresaid, and also himself as an individual, and their respective heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to repay to the said Matthew Cleland, . . . and in security of the personal obligation therein before written, in the first place, he, as tutor-at-law foresaid, disposed to and in favour of the said Matthew Cleland and his foresaids, . . . All and Whole the said lands of Summerhouse, therein particularly described; and, in the second place, he, for himself, disposed to and in favour of the said Matthew Cleland and his foresaids," certain lands called Graynes in the county of Lanark. Then the bond proceeds,—“And whereas the said sum of money had been borrowed only for the purpose of making the said improvements on the said lands of Summerhouse, and was intended by him to form a charge thereupon, and upon his said son as proprietor thereof, and his personal obligation therefor had only been granted, and the said lands of Graynes had only been disposed as an additional security to the said Matthew Cleland, therefore

¹ Bell's Comms. ii. 123.

² Bell's Princ. 538; Stewart's Trustees v. Stewart, Nov. 8, 1878, 6 R. 145.

No. 183. the said William Scott did thereby declare that the said sum should be and was thereby constituted primarily a burden upon the said lands of Summerhouse and proprietor thereof, and only secondarily a burden upon the said lands of Graynes, and proprietor thereof, and that in the event of himself or his successors in the said lands of Graynes paying the said sum, or interest thereon, they should be entitled to relief from the said lands of Summerhouse and proprietor thereof, and for the purpose of operating such relief they should, if they requested it, be entitled to an assignation of the said bond and disposition in security from the said Matthew Cleland,"—that is, of that part of the bond and disposition in security which affected the pupil. It is averred that the £1500 was expended beneficially on the pupil's estate, and that supposing the bond is not effectual as a security against that estate there is ground for demanding repayment of the £1500 on the plea of recompense, because the father, as his son's administrator-in-law, beneficially expended that sum on the estate. The 4th article of the condescendence shews how the money was expended. On the other hand, there is an averment by the defenders in answer to the 5th article of the condescendence to the effect that,—“Explained that this defender's father was solvent at and for a considerable time after the execution of the said bond, and that he has drawn the whole rents of this defender's lands since the succession opened in 1874, amounting to £750 or thereby. He has never accounted to this defender, but it is believed and averred that he received rents and other funds, belonging to the estate of this defender, more than sufficient to extinguish the amount to which this defender's estate was increased in value by the expenditure on his lands, and this would be made to appear on a proper balancing of accounts between them. These funds were not kept separate and distinct from his proper individual estate. At least this defender is not liable to make payment of the amount by which it may be held that the value of his estate was increased as aforesaid except under deduction, *pro tanto*, of the sums so due to him by his father's estate.”

That being the state of the averments, it would have been necessary to have a proof; in the first place, in order to see how far the expenditure was beneficial, and in the second, to see the amount of the rents which were uplifted by the father. But the necessity for a proof has been obviated by a joint minute which has been lodged by the parties, to the terms of which it is necessary very particularly to attend. It is stated that the parties had agreed, “first, that the expenditure referred to in condescendence 4 of the record, by this defender's father, William Scott senior, should be held as having improved this defender's lands of Summerhouse in value (both at the date of said expenditure, and at the present time) to the extent of £500; second, that the said expenditure, but only to the extent of the said £500, and interest thereon at £4 per centum per annum, from the 15th day of May 1879, forms a proper item of charge against the estate of this defender, in the accounting between this defender and the estate of his said father, William Scott senior; and third, that the balance due by this defender upon an accounting between him and the pursuer, as trustee upon the sequestrated estate of the said William Scott, amounts to the sum of £190 sterling, as at the date hereof, and they accordingly craved the Lord Ordinary to pronounce an interlocutor disposing of the cause, and to find neither party liable in expenses.” I must say it appears to me that this minute amounts to a settlement of the case. The trustee is seeking on the one hand to recover

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from the minor defender the amount which has been beneficially expended by the father on the estate, and that is fixed by the minute at £500. On the other hand, the son is claiming to set off the amount of rents which have been drawn by his father and not accounted for by him during his administration. That is ascertained to amount to £310, the balance thus being £190. If I had had this joint minute laid before me as Lord Ordinary, I should have given decree against the defender for £190, and there would have been an end of the case. But it appears that the parties did not intend such a result, and they accordingly left the Lord Ordinary to dispose of what they call the law of the case. I am very averse to force against parties the meaning of a joint minute which they are unwilling to accept and which they did not intend, and I am the less disposed to do so because I think the joint minute affords very fair grounds for a judgment.

In the first place, it cannot be disputed that the bond, so far as the minor's estate is concerned, is invalid and goes for nothing. In the second place, it must be observed that the whole expenditure that was made upon the minor's estate was made by the father as his administrator-in-law. Hence it is very clear that the only person who can claim recompense is the father, because he is the only person who made the expenditure, and I never heard of anyone claiming recompense except the person who made the expenditure. The claim of £500, as now restricted, was a claim undoubtedly due to the father before his sequestration, which did not occur until February 1885. On the other hand, it is equally clear that the rents uplifted by the father and amounting to £310, were all uplifted before his sequestration, and therefore there was before the sequestration a debt of £500 due by the son to the father, and a debt of £310 due by the father to the son. If we apply to this state of the facts the usual and well-known rule for balancing accounts in bankruptcy, we have just the result which is brought out in the joint minute. There is no occasion for inquiry whether both sums are presently payable or are both liquid or not. That might be very important in an ordinary case of compensation, but in balancing accounts in bankruptcy the ordinary rules do not apply. It is very well known that in balancing accounts in bankruptcy a future debt can be set off against a present debt, and an illiquid claim against a liquid claim. The rules in bankruptcy differ entirely from the ordinary rules of the common law, and I can see no difficulty in applying the former to the present case, and in setting off the mutual claims—the one against the other—in common form.

It seems to be thought that there is a peculiarity here, arising from the circumstance that the money expended on the improvements was borrowed money, and that on the face of the bond it was made clear to what purpose the money was to be devoted. This does not appear to me to affect the case. It was not the creditor who made the expenditure, and accordingly the creditor is not in a position in which he can make a claim for recompense. The claim can only be made at the instance of the father and his trustee, and the case in my opinion is of the simplest description. The trustee has paid the amount of the bond to the creditor, and has thought fit to take an assignation to the security over the pupil's estate, but if the security is good for nothing I do not see what advantage is to be gained by the assignation. What has taken place is, that the creditor has been paid the amount of the security out of the lands belonging to the bankrupt, and he is therefore out of the case with the interest he represented.

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No. 183. So that there is no party here except the father and his trustee upon the one side, and the minor pupil upon the other.

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In these circumstances I think the Lord Ordinary's interlocutor is wrong, and the sum to which alone the trustee is entitled is the balance ascertained according to the ordinary rules of bankruptcy.

LORD MURE.—I have come to the same conclusion upon the admitted facts as they are stated in the joint minute, and assuming that it is still open to us to inquire whether the claim of set off can be made good. I think that we are dealing substantially with a case of bankruptcy, and that Mr William Scott senior, the father, must alone be regarded as the creditor. If we were to go further and to inquire where he got the money which he expended upon his son's property, and thereby to introduce collateral rights, it would lead to an invasion of the rule which regulates the balancing of accounts in bankruptcy, and which has been found so beneficial in practice. Without going further into the delicate questions which have been argued, I shall only state that I agree with your Lordship in thinking that the case is one in which that rule applies; and that the pursuer cannot exact full payment from the defender, and at the same time require him to accept a dividend only upon his counter claim for the rents uplifted by the bankrupt. The reasons which the Lord Ordinary assigns for giving effect to the collateral right which existed in Mr Cleland, and has now been assigned to the pursuer, are not, in my opinion, sufficient to entitle the pursuer to ask us to depart from the rule that, at the date of the bankruptcy, the relative position of the debtor and creditor was fixed, and that the trustee must take the right of the bankrupt *tantum et tale* as it existed in him. I therefore think that the Lord Ordinary's interlocutor should be recalled, and that we should give decree for £190 as brought out in the minute.

LORD SHAND.—I am of opinion, differing from your Lordships, that the interlocutor of the Lord Ordinary is sound, and ought to be adhered to. If the joint minute for the parties were to be read in the narrow view which has been suggested, there would at once be an end of the case. For in that view of its terms it settles that the balance due by the defender on the accounting between him and the pursuer shall be held to amount to £190, and craves that the Lord Ordinary shall pronounce an interlocutor disposing of the cause, and finding neither party liable in expenses. But I think both parties made it clear that neither of them intended that the minute should be so read, and that it was prepared and given in solely for the purpose of saving inquiry, and admitting certain facts which would enable the Lord Ordinary to give judgment. That the defender did not consider that the minute was to be read in the way suggested, or that it exhausted the cause so as to leave nothing for determination, is clear from the fact mentioned by the Lord Ordinary in his note, that it was contended on the son's behalf, "first, that the son ought not to be called on to pay anything; and secondly, that at all events he is only to pay the £190." The true object of the minute was to fix, as is done in its third branch, the amount of the son's indebtedness to his father on an accounting between them, on the assumption that the defender is to be held entitled to set off the rents referred to in answer 5 against the pursuer's claim, and on that assumption

the balance is fixed at £190, and proof is thereby obviated. But the question No. 183. whether compensation can be maintained is for the Court to decide, and I accordingly hold that we must proceed to deal with that question.

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It is to be observed at the outset that the action as originally raised was limited to this, that the pursuer asked for decree of declarator that the bond and disposition in security of 23d April 1879 formed a good security over the lands of Summerhouse. That conclusion was rested on the view that a tutor acting for his pupil son was entitled to borrow upon the security of the pupil's estate, and had power to grant an effectual security. I must express my entire concurrence in the views which have been stated by your Lordship in the chair in regard to the validity of the bond. If the case had stood there, I should have been clearly of opinion that it did not form a good charge upon the pupil's estate, because it was undoubtedly *ultra vires* of the tutor to grant it. On that view of the case I am quite against the pursuer.

But before the discussion came on before the Lord Ordinary the parties stated that they were desirous of making the action available for the purpose of having all questions between them decided, and agreed that the summons and pleadings should be amended for this purpose. Accordingly the pursuer introduced an amendment, which represents his case as founded not on the bond and disposition in security only, but while he uses the bond and refers to it as giving a history of the transaction, he now pleads that the sum of £1500 was an advance by Cleland made for the purpose of improving the pupil's estate, and expressly made for that purpose. In this view the advance is said to have been a loan given for a specific purpose, and specially with a view to the money being expended in a particular way, viz., in benefiting the ward's estate, and it is said that this is made clear by the terms of the bond as a record of the transaction. It is further maintained that *de facto* the money was so employed. The contention of Scott's trustee, the pursuer, is that although Mr Scott senior was liable under the obligation of relief contained in the bond, he was practically only in the position of cautioner for a debt which fell primarily to be paid out of the pupil's estate, and that Cleland, when he lent the money, looked to the liability of the owner of the estate, and that the father was merely a cautioner.

What then are the facts? I am of opinion that the pursuer has made out his case upon these. There is this vital difference in the view I take of the case from that which your Lordships have taken. I do not think that Mr Scott senior was the proper creditor of his son for this advance. I think that Cleland became the direct creditor. The bond and disposition in security expressly bears that the money was asked for the purpose of improving the lands in question, and defraying the expense of erecting a suitable steading. The money was advanced upon that footing. It is provided that whereas the money was borrowed only for the purpose of making improvements on the lands of Summerhouse, and was intended to form a charge upon these lands and their proprietor in the first place, yet the father guaranteed the repayment, but subject to the condition that if called upon to pay the loan he should have relief from the lands of Summerhouse. It is not clear whether the money was all applied to Summerhouse, but in condescendence 4 it is stated that Mr Scott senior "proceeded to expend the money so obtained in improving the lands of Summerhouse," and in the joint minute it is admitted "that the expenditure referred

No. 183. to in condensation 4 . . . should be held as having improved the
 July 19, 1887. defender's lands of Summerhouse in value (both at the date of said expenditure
 Scott's Trust- and at the present time) to the extent of £500."

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I entirely lay aside the bond as a bond and disposition in security. But suppose the case of a factor borrowing money and granting a receipt to the effect that it was borrowed expressly for the purpose of improving his principal's estate, and suppose the creditor took the receipt upon that footing,—looking for recompense to the ward's estate,—who is the creditor? I think the person who gave the advance is the creditor. I am far from saying that if the money was advanced on the factor's own personal security without any stipulation or condition as to its employment, and then expended on improvements like the present, that any obligation against the estate would be created. For instance, if Mr Scott senior had borrowed £1500 and had then happened to lay it out upon the estate, I think the case would be different. But where, as here, the lender takes every precaution, and there was a clear arrangement between the parties that it was given on the one hand and borrowed on the other for the purpose of being expended in improvements, and when further the money to the extent of £500 was so expended, I think the lender is the primary creditor of the owner of the estate in the claim of recompense, and not the person who held the fund and through whose hands it passed. This is doubly clear from the circumstance that the person who got the money granted an obligation personally, qualified with the condition that he should have the true lender's right of recovery.

The cardinal point on which I differ from your Lordships is that I look upon the transaction as a money advance, no doubt, to Mr Scott senior,—but to him as his son's tutor-at-law, and so practically to the son,—the father being in the position of mere cautioner. It appears to me, looking at the bond merely as a record of the footing on which the money was lent, that the lender with a view to the validity of his claim of recompense was entitled to require the money to be expended on permanent improvements on the lands of Summerhouse, and could by interdict have restrained the use of the money in any other way. If this be the correct view of the case, which I take in common with the Lord Ordinary, and £500 was applied as stipulated for, what are the rights of parties, seeing that Mr Scott senior has become bankrupt?

Cleland being the creditor, if the father had paid him in terms of his obligation before bankruptcy, the son would have been entitled to say that his claim for rents in the father's hands must be deducted from the father's claim under the bond, for there would have arisen a proper case of *concursum debiti et crediti*. The father's trustee, however, since the bankruptcy has had to pay Cleland. He has paid him the sum of £1500, and Cleland the creditor's rights against his son are thereby acquired for the bankrupt estate. It is settled that if a trustee in bankruptcy acquires a claim after the sequestration has come into existence, the debtor in that claim cannot plead compensation as against the bankrupt's estate. The Lord Ordinary has put this proposition in a way to which none of your Lordships can take exception,—“If the trustee for the convenience of the trust makes a payment whereby he acquires a right of credit against a third party, that is an asset which he holds for the benefit of creditors independently of the bankrupt, and which he is entitled to realise in full, the debtor's claim being only a claim in bankruptcy, and inferring a right to a

dividend." It is of no consequence that the third party is himself a creditor of the estate. He cannot plead compensation against a debt so acquired. Accordingly, it appears to me that the doctrine of *tantum et tale* is quite inapplicable here. If the bankrupt had paid Cleland before the date of his bankruptcy, he would then have been a creditor on his son's estate, and the latter would have been entitled to set off the claim for rents against his father. Since the date of the bankruptcy the trustee has acquired the rights of Mr Cleland, the creditor. Mr Cleland could have followed up and demanded his debt from Scott junior on the ground of recompense. Equally so can the trustee. Accordingly I am of opinion that the proposition to set off a claim for rents against the claim by the trustee for the £500 is not warranted, and on the whole matter I agree with the Lord Ordinary, and think his interlocutor should be adhered to.

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LORD ADAM.—If the parties who framed the joint minute in this case did not intend that it should dispose of the questions raised in the case, I do not think more unfortunate language could well have been used. But we are told that this was not its object, and that the object was to ascertain the sum due upon the one side or the other, leaving the question of law open; and, accordingly, the question which we have to consider is, whether or not the defender is entitled to set off the £310—the amount of the rents which have been collected by his father—against the £500 which is ascertained by the minute to have been the amount to which his estate was *lucratus* by the father's expenditure.

I think that question must be solved by the answer to this one, whether the defender was debtor to Cleland in the sum of £500. Before we can ascertain that, we must look to the terms of the bond and disposition in security. We are all of opinion that the bond is invalid, because it is *ultra vires* of a tutor-at-law to dispose the lands of his pupil ward, whether absolutely or in security, and there is no personal liability. Accordingly, *prima facie*, it would appear that there was no relation of debtor and creditor between the son, who is the defender here, and Cleland. But then it is said that the £500 was *de facto* beneficially expended on the estate, and that, therefore, there is a liability on the defender's part to repay it. I am of opinion that that is so, but then the question remains, To whom is there that liability?

I am decidedly of opinion that there never was any liability as between the defender and Cleland. It does not appear to me that Cleland had anything to do with the expenditure of the money. He lent upon the security specified in the bond, and upon no other. The bond no doubt sets forth that the object of the loan was the improvement of the ward's estate. But that was only, in my opinion, in order to shew clearly what the relation of the two *ex facie* debtors under the bond was; and I do not think that Cleland had anything to do with that narrative of the history of the transaction, or that it was introduced into the deed with reference to his rights. He does not appear to me to have had any right to interfere with the expenditure of the money. Is it conceivable that it was the intention of parties that Cleland might come forward and say, "You shall expend the money you have borrowed from me in this way or in that"? In that view he would have had a right to be consulted as to the improvements proposed to be executed, and to judge whether they were likely to be beneficial or not. He would have been entitled to say whether the funds were to be devoted to the erection of a steading or not. There is no intention on the face

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of this bond to confer such a right. Yet that is the result of Lord Shand's opinion, in my view. No case is more common than that of a creditor who has a right to regulate the expenditure of funds which he has advanced, and we know the provisions which are made to meet the case—such as consigning the money, and so on. It is a matter of everyday experience in connection with building transactions. But there is not a trace of that here, so far as I can judge. I think it is altogether to misrepresent Cleland's position to say that he had a right under this bond to direct how and when the money which he had lent should be expended, or to look to the mode of expenditure as an additional security. I do not think there was the least intention that he should have any further rights in regard to the disposal of the money than an ordinary creditor has—and all that is said in regard to that matter in the bond was introduced for the purpose of describing the relations between the debtors in the bond, and not with a view to Cleland's interest.

The result shews that Cleland's interests were quite safe. He has got payment of his money, and has got it from the only true debtor in the bond. When the £1500 originally came into the father's hands, I think he could have spent it, as far as Cleland was concerned, in any way he pleased. If this is the true view of the position of the parties, there is an end of the case. The tutor before the date of the bankruptcy was indebted to his ward in the £310, and by the rules of accounting in bankruptcy the ward is entitled to set off that sum against the £500, which it has been found by the minute he is due the pursuer. I agree with the majority of your Lordships that the Lord Ordinary's interlocutor ought to be recalled.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find that William Scott senior, as administrator-in-law for his pupil son William Scott junior, expended on his son's heritable estate a sum of £1500, and that to the extent of £500 the money was beneficially expended and the pupil was *lucratus*: Find that *quoad ultra* the amount of said expenditure is not a good claim against the pupil or his estate: Find that said expenditure was made entirely before the date of the said William Scott senior's sequestration: Find that before the sequestration the said William Scott senior uplifted rents of the pupil's estate to which he had no right, and for which he has not accounted, to the extent of £310: Find in law that in balancing accounts between the pupil and his administrator-in-law the sum of £310 falls to be set against the sum of £500, and that the balance due by the pupil to the pursuer as trustee in his father's sequestration is £190: Therefore decern against the defender William Scott junior, who has now attained the age of puberty, for payment to the pursuer of the sum of £190 sterling, with interest thereon at the rate of five per centum per annum from the date of citation until payment: Find the defenders William Scott junior and his curator *ad litem* entitled to expenses since the date of the Lord Ordinary's interlocutor," &c.

TODD, MURRAY, & JAMIESON, W.S.—D. LISTER SHAND, W.S.—Agents.

JOHN BEATON, Pursuer (Reclaiming).—*J. C. Thomson—W. Campbell.*
W. IVORY, Defender (Respondent).—*D.-F. Mackintosh—Jameson.*

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JOHN MACPHERSON, Pursuer (Reclaiming).—*J. C. Thomson—W. Campbell.*
JOSHUA M'LENNAN, Defender (Respondent).—*D.-F. Mackintosh—
M' Lennan.*

Reparation—Wrongful apprehension—Public officer—Malice.—In order to found a relevant action of damages against a public officer for a wrongous official act, it is not enough to aver malice in general terms, but facts and circumstances must be set forth from which the Court or a jury may legitimately infer that the defender was not acting in the discharge of his duty, but from a malicious motive.

Observed that there may be cases between private individuals where a general averment of malice will be sufficient.

Observations on Scott v. Turnbull, 11 R. 1131.

Public officer—Powers of magistrate.—*Observations* upon the powers of magistrates to make apprehensions without written warrant.

JOHN BEATON, residing at Herbista, Skye, and cowherd for the neighbouring township of Peingown, brought an action of damages for wrongful apprehension against William Ivory, Sheriff of Inverness, Elgin, and Nairn. His averments were:—(Cond. 2) "On or about 27th October 1886 the pursuer was engaged in his ordinary occupation of herding cattle on the said pasture ground when he was accosted by two police-constables, one of whom was constable Grant of Edinbane, near Portree, who demanded his name, which the pursuer gave. Grant then apprehended the pursuer and marched him down to the township of Herbista, where he gave the pursuer in charge of a body of marines. The pursuer asked Grant the reason of his arrest, but got no reply. The pursuer was then marched (in custody of the marines) three miles to Duntulbin Bay, put on board the gunboat 'Seahorse,' and conveyed as a prisoner to Portree, where he arrived about 11 P.M., and was taken to the prison and confined in a cell. Next day he was brought before Sheriff-substitute Hamilton and questioned by the procurator-fiscal for more than an hour. He was not again taken before the Sheriff, but was detained in prison until the following Saturday, October 30th, when he was liberated without any explanation for his arrest. No document was served upon the pursuer shewing why he was arrested and detained in custody, nor have any further proceedings been taken against him." (Cond. 3) "Grant possessed no warrant for arresting the pursuer, nor had any information been received either by him or by the defender, or by any of the authorities, charging the pursuer with the commission of a crime. Grant arrested the pursuer in obedience to general instructions given to the police by the defender, who was personally present at the township of Herbista, where he had come with a large body of police and marines for the purpose of apprehending the parties who had (as was alleged) deorced a sheriff-officer near Herbista two days before. The instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deorcement took place. . . . The said instructions were illegal and oppressive, and the apprehension of the pursuer in pursuance hereof was wrongful, and was moreover malicious and without probable cause on the part of the defender. The defender had no probable cause or believing that the pursuer had been concerned in the alleged deorcement. In point of fact the pursuer was not present at the deorcement,

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but was more than a mile away at the time repairing the roof of his house. Both the pursuer and his wife and others informed the defender of these facts shortly after the pursuer's apprehension; but the defender nevertheless persisted in detaining him in custody."

The defender in his answers referred to the criminal proceedings in the case, and explained that he took no part in them, but confined himself to the execution of his duty as executive officer in charge of the expedition which the Government had found it necessary to send to Skye. The answer to cond. 3 was,—“Admitted that on the occasion in question the defender, in pursuance of instructions received from the Lord Advocate and Secretary for Scotland, and in the discharge of his duty as the executive officer responsible for the execution of the law in the island of Skye, had accompanied a force of police and marines which had been despatched to the district in question in order to effect arrests in connection with the recent deforcement of Alexander Macdonald, the officer of the law mentioned in the preceding answer. Believed to be true that in the course of the said expedition the pursuer was arrested by the constable mentioned as a person who was suspected to be among those guilty of the said deforcement, and explained that at the time he was taken into custody he was identified by the said Alexander Macdonald as one of the members of the crowd who had taken part in the said deforcement. *Quoad ultra* denied. The expedition was accompanied by the Sheriff-substitute, the sheriff-clerk, and the procurator-fiscal, and the defender took no concern with the particular arrests, but confined himself strictly to his duty as the magistrate in charge of the expedition."

The pursuer pleaded;—The pursuer having been wrongfully arrested and detained in prison by the instructions of the defender, and, *separatim*, the defender having acted maliciously and without probable cause, the pursuer is entitled to decree as concluded for.

The defender pleaded, *inter alia*, that the pursuer's averments were not relevant.

The Lord Ordinary (Fraser), on 28th May 1887, held that the action was not relevant, and dismissed it.*

* “OPINION.—The claim in this case is for damages against the Sheriff of the county of Inverness, because it is alleged that he wrongfully arrested and detained in prison, maliciously, and without probable cause, the pursuer of this action.

“The circumstances, as appearing from the record, are these: The pursuer, who is a herd, was apprehended on the 27th of October 1886, taken to Portree and detained there for three days, when he was liberated. The person by whose orders the pursuer was apprehended and detained was the defender, the Sheriff of the county of Inverness. In this county, and especially in the island of Skye, there had occurred tumultuary proceedings; meetings were held at which resolutions were passed of a very illegal character—pointing to the resistance of payment to the landlords of their rents. The law had been set at defiance by the deforcement of an officer of the law, and it was found necessary to supplement the ordinary executive officers of the law by additional police force and Royal Marines in order that judgments of Courts of law should be carried out. At the head of this force of police and marines was the Sheriff of the county, and along with him there came the officer of the law (Alexander Macdonald, a messenger-at-arms), who had been deforced. The Sheriff gave verbal instructions to the police to apprehend all those who could be identified as persons who had been guilty of this deforcement; and Macdonald identified the pursuer as one of these persons, and he was immediately taken into custody and carried to Portree.

“At Portree the pursuer was brought before the Sheriff-substitute upon the

The pursuer reclaimed, and argued;—(1) The Lord Ordinary had taken a very unusual course when dealing with a question of relevancy, for he had accepted as true the statements made in the defender's answers, even where these were in direct contradiction to the pursuer's averments. And he had further looked at the documents produced by the defender, viz., a signed information and petition, which he was not entitled to do at this stage. The pursuer's case was that he was apprehended simply because he was found in the locality. The Lord Ordinary assumed, which he had no right to do, that there had been an identification of the pursuer by Macdonald prior to the apprehension. It would be extravagant to argue that a written warrant was necessary in every case of apprehension, but if an apprehension was ordered, it must be because the person to be apprehended had been seen in the act of committing a crime, or there was reasonable ground for believing that he had com-

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charge of mobbing and rioting, and of obstructing and deforming the messenger-at-arms in the execution of his duty; but after consideration of the matters laid before him, the Sheriff-substitute found that there was not sufficient evidence to justify a committal for trial, and the pursuer was liberated.

"Everything here was regularly gone about in usual course, with one exception. There was no written warrant for the apprehension of the pursuer, and consequently the apprehension, it is said, was illegal.

"Now, this proposition is untenable. A magistrate, according to the law of Scotland, is entitled, if he sees a crime committed, at once, himself, to apprehend the delinquent, or to give a verbal order to any policeman or citizen to do so. Nay, although he does not himself see the crime committed, but is informed upon credible authority that it has been committed, he may give a verbal order to pursue and apprehend the suspected person. Baron Hume states that in such a case it 'is a sufficient justification of a verbal order to the informer and others, to pursue and take the individual, thus positively charged, who might escape through the delay of waiting for a written warrant,'—(II. Hume, 75). The messenger in the present case was deformed by a mob of people, the names of whom he did not know, but the faces of whom he remembered. The deforcement took place on the 25th of October 1886. The Sheriff, with the police and marines came to the ground on the 27th of October, and the police received orders from the Sheriff to apprehend any person identified by the deformed messenger, and upon these general instructions the pursuer was apprehended. What the Sheriff here did was entirely within his power. He met an assemblage of people, but had then no means of ascertaining the names of the persons who were the wrongdoers, except by getting them pointed out on the spot by the deformed messenger. Written warrants were out of the question in such circumstances. Before a formal complaint and warrant could be written out the wrongdoer would have been away over the hills.

"It would be idle to send this case for trial in any view, seeing that malice must be proved. Now, to say that the action of the Sheriff was malicious is to contradict the statement upon the record to the effect that the pursuer was apprehended under 'general instructions'—unless, indeed, it be meant to be averred that the Sheriff had malice against the whole population of crofters. In what he did in this case the Sheriff evinced firmness and resolution, and if he had not done so he would not have done his duty. If the chief magistrate of a county, responsible for its peace, were to lie under the threat of actions of damages for what he did in the *bona fide* execution of his duty, the result would be that his powers to quash tumult and insurrection would be altogether paralysed. It seems to be forgotten that the freedom from responsibility for damages—the absolute privilege that is given to the chief magistrate endeavouring to do his duty—is given to him not for his own sake, but for the sake of the public, whose servant he is, and for the advancement of justice. Upon this ground the Lord Ordinary is of opinion that no relevant case has been stated for the pursuer, and that the action must be dismissed."

No. 184. mitted a crime. But a general order to apprehend all persons in a locality was very different. There was therefore a *prima facie* case for an issue of this kind, viz., whether the pursuer was apprehended by order of the defender wrongfully and illegally given. (2) It was not necessary to aver or prove personal malice. If a reckless disregard of the rights and liberties of others was proved, that was enough. What was done here by the defender was in itself illegal. If it had been legal, but carried out in a harsh and oppressive way, then no doubt the pursuer would have been obliged to take an issue of malice, and facts must have been averred from which to deduce the malice.¹

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The respondent argued;—(1) No case of damages for wrongful apprehension by a public officer could be cited where malice and want of probable cause were not both held to be necessary. A general averment of malice was not enough; there must be averments of facts and circumstances from which malice could be inferred.² A case of judicial slander—*e.g.*, *Scott v. Turnbull*²—was the strongest case for presuming the absence of malice, but a case of the nature of the present, against a public officer, was only second to it. It was said that there were averments in this case shewing such recklessness in the character of the orders given by the pursuer as to reasonably imply malice. But, even upon that footing, the statements made were vague and ambiguous. It might have been quite proper for the Sheriff to order all the grown-up people in the locality or township to be apprehended, as he had information that they were all guilty. That was in his discretion. And, accordingly, while something short of personal ill-will might be sufficient, it was not enough to prove the mere absence of probable cause, or that the defender had not sufficient grounds for suspecting that the whole inhabitants of the township had been art and part in the deforcement. Both malice and want of probable cause required to be put in issue. (2) The pursuer's general averments of malice and want of probable cause were negatived by the official documents produced, which were part of the record, viz., the signed information by the deforced officer, and the petition and warrant. The absence of a warrant was not very material here, because the names of the persons engaged in the deforcement might not be known until they were brought up for identification. The documents were not perhaps evidence, but were part of the *res gestæ*. The pursuer had had an opportunity of making any explanation he chose about them at adjustment of the record, but he had not done so.

LORD PRESIDENT.—I think the whole question now under consideration depends upon the terms of the third article of the condescendence, in which the pursuer avers that Grant, the police-officer who apprehended the pursuer, "possessed no warrant, nor had any information been received either by him or by the defender, or by any of the authorities, charging the pursuer with the commission of a crime. Grant arrested the pursuer in obedience to general instructions given to the police by the defender, who was personally present at the

¹ *Denholm v. Thomson*, Oct. 22, 1880, 8 R. 31; *Bayne v. Macgregor*, March 14, 1863, 1 Macph. 615, 35 Scot. Jur. 368; *Urquhart v. Dick*, June 10, 1865, 3 Macph. 932; *Cameron v. Hamilton*, Jan. 31, 1856, 18 D. 423 (Lord Deas, p. 426), 28 Scot. Jur. 179; *Arbuckle v. Taylor*, May 1, 1815, 3 Dow's Appa. 160; *Rae v. Linton*, March 20, 1875, 2 R. 669; *Craig v. Peebles*, Feb. 16, 1876, 3 R. 441; *Urquhart v. Grigor*, Dec. 21, 1864, 3 Macph. 283, 37 Scot. Jur. 134; *Hassan v. Paterson*, June 26, 1885, 12 R. 1164.

² *M'Murphy v. Campbell*, May 21, 1887, *supra*, 725; *Scott v. Turnbull*, July 18, 1884, 11 R. 1131; *Urquhart v. Grigor*, Dec. 21, 1864, 3 Macph. 283, 37 Scot. Jur. 134.

township of Herbista, where he had come with a large body of police and marines for the purpose of apprehending the parties who had (as was alleged) deforced a sheriff-officer near Herbista two days before. The instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place." No. 184.
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Now, the allegation that general instructions were given to apprehend persons who were suspected of having been engaged in deforcing the officer two days before is not in any respect relevant. I think that was a very proper course to pursue upon the face of it, because the averment of the pursuer impliedly admits that there had been a deforcement at Herbista two days before, and that it had been found necessary—for all that is implied also—to assemble a large body of police as well as of marines for the purpose of ensuring the apprehension of the persons who had been engaged in the riotous proceedings. It is said, however, "that the instructions referred to were that the police should search for, apprehend, and convey to prison every person whom they could find in the locality where the alleged deforcement took place." Now, that is undoubtedly the strongest averment made by the pursuer, and *prima facie*, there is a kind of recklessness about an order such as that, viz., that everybody in a locality should be apprehended. But one cannot help knowing—indeed it is patent upon the face of this record—that Herbista is a small township, the inhabitants of which cannot be very numerous; and that the rioting two days before had been of a very serious character, probably involving almost all, if not all, the inhabitants of this township. There must have been a large number of rioters, because it was found necessary to assemble so large a force as the pursuer himself admits.

If it had not been that the pursuer is under an obligation to aver and prove malice as the condition of his succeeding in his case against the defender, I should have been of opinion that we could not have disregarded that averment made as it is, and must have sent the case to trial. But I think there is a very special protection surrounding the defender in the execution of his duty as Sheriff of the county, and so responsible for the peace of the county. That protection extends to this, that he will not be liable for anything that he does in the performance of that duty unless it can be shewn that he was actuated by a malicious motive of some kind. The mere use of the word "malice" in a case of this description is, I think, quite insufficient to fulfil the condition upon which alone such an action can be entertained. The presumption in favour of a public officer that he is doing no more than his duty, and doing it honestly and *bona fide*, is a very strong one, and certainly ought not to be overcome by the simple use of the word "malice." I think the duty of the pursuer in a case of this kind is to aver facts and circumstances, from which the Court or a jury may legitimately infer that the defender was not acting in the ordinary discharge of his duty, but from an improper or malicious motive. I must not be supposed as enouncing the proposition that in every case where malice requires to be libelled it is necessary to be so specific as I say the present pursuer must be. There are cases where I think an averment of malice in general terms may be sufficient as between private individuals; but I do not know of any case in which an action has been sustained against a public officer in the execution of his duty where the presumption of a proper motive has been held to be displaced by a mere general averment of malice, and I should think it

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most unfortunate if any such rule were to be introduced into practice. It is for the benefit of the public, and for the interests of justice and good government that public officers acting in the execution of their duty should be surrounded by a very considerable protection. The circumstances brought out in the third article of the condescendence I need hardly say are not such as to warrant any inference of malicious motive, and therefore in that respect I conceive the record to be irrelevant.

I am very much inclined to adopt the opinions which were delivered by the Second Division in the recent case of *M'Murphy v. Campbell*, *supra*, p. 725, referred to in the course of the discussion, and I only desire to say in regard to the opinion of one of the Judges there that I think he has a little misapprehended an observation which I made in the case of *Scott v. Turnbull*, 11 R. 1131. In matters of this kind it is very desirable that one should never be misunderstood without correcting the misunderstanding, and that must be my apology for bringing this personal observation into the case. Lord Rutherford Clark, in referring to the case of *Scott v. Turnbull* (*ante*, p. 729 and 24 S. L. R. 516), in support of the view he took in *M'Murphy's* case, said,—"Although I cannot say that I altogether agree with the rule so broadly stated,"—that is to say, so broadly stated as it was by me in *Scott v. Turnbull*. I think his Lordship can hardly have adverted to the fact that that was a case of judicial slander, and it was a case of judicial slander in which the averment complained of was an averment strictly relevant to the case in which it was made. And it is in reference to such a case as that, and such a case only, that I made the observations which are contained in the report, and certainly I never intended to lay down a general rule in such terms as applicable to all cases. I think a case of judicial slander a very special case indeed, because there is a very strong presumption in such a case that if a man makes an averment which, whether it be irrelevant or not, is at least pertinent to the case, he must be presumed to have made it from an honest motive, with a view to urging everything that he knows of in support of his case. That is a perfectly justifiable and proper motive, and it will protect the party making it against the consequences of any injury that he may have done by that statement to a third party. Now, this becomes all the more strong if the averment is not only pertinent to the case, but is a perfectly relevant averment, for then it becomes the duty of the party to himself and to his advisers and to the Court to make the averment. The case would not be complete, and would not be ripe for judgment, unless the averment were made, and therefore the presumption in favour of proper motive in such a case is stronger than in almost any other case of slander.

I think it right to make these observations, because I have always considered a case of judicial slander to be a very special one, and in like manner I consider a case of a public officer to be a very special one, although upon totally different grounds. There is a very high privilege both in the one case and in the other, but they are totally different kinds of privilege.

I am of opinion that this record is irrelevant, because there are no facts and circumstances averred from which a malicious motive upon the part of the Sheriff can be inferred.

LORD MURR concurred.

LORD SHAND.—If this question had arisen entirely with reference to the first ground upon which the Lord Ordinary proceeded, I should have had some difficulty in concurring with his Lordship. I doubt whether, at least in a record

made up as this has been, without any revisal and therefore without having the pursuer's answers, whether admissions, explanations, or, it might be, merely evasive replies, the defences and the documents there founded on ought to be taken into account and acted on in a question of relevancy.

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But I entirely agree with your Lordship upon the other ground, with reference to which the Lord Ordinary says,—“It would be idle to send this case for trial in any view, seeing that malice must be proved.” It is said by the pursuer that general instructions were given by the defender that the police should search for, apprehend, and convey to prison every person whom they could find “in the locality” where the deforcement took place, and that from this malice may be inferred. The very statement of the generality of the order seems to negative the proposition that the defender acted from malice towards the pursuer. Malice has no meaning except as applied to individuals. It is of the utmost importance for the public benefit that an official in the position in which the defender was should have the fullest protection in the discharge of his public duty. A very strong force was admittedly required in order to seize the persons guilty of the deforcement, and prompt and decisive action was required, and if we were to entertain actions of this kind,—founded upon the assumption that an order of apprehension was given which may have been injudicious or imprudent, and, in the opinion of some, even somewhat reckless, where there was no feeling of malice against the individual,—it would paralyse those who are engaged in the execution of a public duty, and deter them from doing what they thought was right and proper, and what might even be necessary for the vindication of the law in the circumstances. I think there should be such a shield put round public officials in the performance of such duties as will prevent their feeling that they will be liable for actions of this kind for an error in judgment.

I agree with your Lordships in thinking that in order to make an action of this kind relevant there must be averments which will shew, if proved, that the defender acted from improper motives, such as can be characterised as malicious. In the absence of such averments, I think this record is irrelevant.

LORD ADAM concurred.

THE COURT adhered.

The following case came next in the roll to that of *Beaton v. Ivory*, and was heard immediately after it :—

JOHN MACPHERSON, crofter, Glendale, Skye, brought an action of damages for wrongous apprehension against Joshua M'Lennan, Procurator-fiscal of the Sheriff Court of the Skye district of Inverness-shire, under the following circumstances as averred by him.

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On 10th November 1886, the defender presented a petition to the Sheriff for a warrant to apprehend the pursuer and the Rev. D. M'Callum, minister of Waternish, on certain charges of having promoted an unlawful agitation against paying rents and taxes and for resisting the execution of legal warrants for the recovery of these, and of having incited the inhabitants to resist and obstruct the officers of the law in enforcing these warrants and decrees by attending and speaking at certain public meetings, and otherwise, as set forth in the petition. The pursuer further averred ;—“(Cond. 3) Upon the petition being presented to him, Mr Sheriff-substitute Hamilton granted a warrant in the following or similar terms :—‘ . . . The Sheriff-substitute grants warrant to search for, seize, and apprehend John Macpherson and Donald M'Callum complained

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upon, and to bring them up for examination; and also to search and to cite for precognition, all as craved J. GUY HAMILTON.' The defender then caused a large body of police and marines to proceed to Glendale, and to surround the pursuer's house at a very early hour in the morning of Saturday, November 13, 1886. A number of the police then entered the house, and the superintendent in charge of the party of police stated the offence with which the pursuer was charged, and of which he then heard for the first time. The pursuer asserted (and it was the fact), that he was innocent, and that he would at any time have gone to Portree, if the authorities had intimated by letter or telegram that they desired his presence. The police nevertheless proceeded to apprehend the pursuer, to search his house, and to remove him as a prisoner on board the gunboat 'Jackal.' The pursuer submitted quietly, but he had much difficulty in inducing his wife to allow him to be taken away, as she was in delicate health, and was greatly agitated by the proceedings of the police, as were also the other members of his family." "(Cond. 4) The pursuer was conveyed to Portree on board the 'Jackal,' and detained in the police-office there for about two hours, until about 8 P.M. on the same day. He was then taken before the Sheriff-substitute (Hamilton). Upon the defender reading the charge against him, the pursuer again protested that he was innocent, and as shewing that he did not advocate a policy of 'no rent,' he stated that he had shortly before paid a year's rent for hiscroft. The defender then applied for, and the Sheriff-substitute granted, warrant to commit the pursuer to prison, 'to be detained for further examination.'

Bail to any amount was tendered for the pursuer, but the defender refused to consent to his liberation." "(Cond. 5) The pursuer was then taken to the prison of Portree, where he was searched and deprived of everything except the clothes he was wearing, and detained till about 10 P.M. on Saturday, November 20, a period of seven days. During all this time he was kept in close confinement, and not allowed to communicate with anyone. He sent several messages to the defender requesting to see him, but the defender took no notice of these applications, and refused to consent to the pursuer's liberation, though offers of bail were repeatedly made to him. The pursuer was liberated without any explanation or apology. As he wished to set at rest the anxiety of his family, the pursuer, the same night on which he was liberated, started to walk to Glendale, and reached his house (a distance of 35 miles) about 10 A.M. on the following morning. No further proceedings have been taken against the pursuer." "(Cond. 6) The whole of the proceedings above detailed were taken by the defender against the pursuer in reckless disregard of the rights and liberty of the pursuer, and were oppressive, malicious, and without probable cause. The petition presented to the Sheriff by the defender bears to proceed upon 'information received'; but the pursuer believes and avers that the only information which the defender had received on the subject consisted of an erroneous report of the proceedings at the meetings referred to in the petition which had appeared in certain newspapers. It was the duty of the defender to inquire into the accuracy of the said reports before he instituted the said proceedings against the pursuer; and if he had made the slightest inquiry he would easily have ascertained that the reports in question were incorrect, and that there was no ground for the charges set forth in the petition. Instead of following this course the defender recklessly and maliciously began by causing the pursuer to be apprehended and imprisoned, and then proceeded to make the necessary inquiries. The defender had no justification in applying for a warrant of apprehension. The offences charged against the pursuer were not alleged to have been committed *de recenti*, and the

defender had no reason to suppose that the pursuer, who was a householder resident in the district, would disobey a warrant of citation, or seek to evade criminal proceedings by flight." No. 185.

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The defender stated, *inter alia*;—"The proceedings taken by the defender were adopted upon information received by him officially as procurator-fiscal; they were taken solely in the public interest, in good faith, and with probable cause. Explained that the pursuer had for some years been a prominent leader in an agrarian agitation conducted in Skye, and in particular in the district of Glendale, where the pursuer resides, and that various acts of lawlessness had occurred in connection with said agitation, in some of which the pursuer had taken part . . . Explained that in these circumstances, the defender received official information as to violent and inflammatory language and resolutions, used and passed at the meetings mentioned in the summons, at which meetings the pursuer presided or was present. He had also before him reports of the said meetings which had appeared in the newspapers, and precognitions, all appearing to verify the correctness of said reports. He was also aware that the pursuer, although knowing the terms of said reports (which had excited public attention, and were much canvassed) had taken no steps to repudiate their correctness. Acting upon the information thus before him, the defender conceived it to be his duty to take the proceedings complained of, which were followed out in all respects in ordinary course. The defender did not consider himself justified in citing in place of apprehending the pursuer. He did not believe that the pursuer would obey a citation. On considering the precognitions taken, and the pursuer's declaration, the Sheriff-substitute considered it proper to commit the pursuer to prison for further inquiry, and further inquiry was accordingly at once made—more particularly with reference to the pursuer's denial, made for the first time in his declaration, of the correctness of the newspaper reports of the meetings in question. The result was that owing to the difficulty of obtaining trustworthy evidence, and in particular owing to the denial by witnesses of statements previously made by them, the defender found that the charges could not be exhausted without a protracted and delicate inquiry." The Sheriff-substitute thereafter found that there was not sufficient evidence to justify a committal, and the pursuer was liberated.

The issue proposed by the pursuer was:—"Whether on or about the 13th day of November 1886, the defender maliciously, and without probable cause, caused the pursuer to be apprehended and imprisoned in the prison at Portree, to his loss, injury, and damage? Damages laid at £500 sterling."

The Lord Ordinary (Fraser), on 28th May, found that the pursuer's statements were not relevant, and dismissed the action.*

* "OPINION.—The proceedings in this case have been entirely regular and in usual form. The defender presents a petition to the Sheriff setting forth various alleged offences by the pursuer, and prays for warrant to apprehend him. The warrant for apprehension is granted, and under this warrant the pursuer is apprehended and carried to Portree, and there imprisoned during a period of seven days, while his case was under consideration. The defender avers that he had received official information as to the crimes charged against the pursuer; that he had seen reports of meetings in the newspapers at which the pursuer had attended, and had taken or seen precognitions appearing to verify the correctness of the reports. The resolutions referred to were of a very violent character, to the effect of refusing to pay rents, and to resist the officers of the law in case of eviction. It turns out in the result that the defender, the procurator-fiscal, was under a mistake in supposing that the pursuer was one of the delinquents; at

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The pursuer reclaimed, and argued;—In this case there were facts and circumstances set forth which clearly inferred malice on the defender's part. The defender had set the machinery of the law in motion, relying only on newspaper reports, which were incorrect; whenever he made proper inquiry he found that the charges were groundless. There was harshness and oppression on the face of the proceedings. Besides the newspaper reports, which were the only justification for the defender's action, ought not to be taken into account in a question of relevancy.

The respondent argued;—(1) That there were no averments inferring malice; and (2) that the Lord Ordinary was wrong in holding that there was an absence of probable cause. A procurator-fiscal, finding reports in four different newspapers uncontradicted by the pursuer for three weeks, was quite justified in taking the action he did.

LORD PRESIDENT.—I do not think it is possible to sustain the relevancy of this case, according to the opinions expressed in the former action. No doubt the pursuer was apprehended upon the application of the procurator-fiscal. Perhaps it might have been sufficient that he should have been cited, but that is a matter so entirely in the discretion of this public officer that it would be a very dangerous thing to interfere in it.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

THE COURT adhered.

J. & J. GALLETLY, S.S.C.—J. & A. PEDDIE & IVORY, W.S.—
GORDON FRINGLE, DALLAS, & Co., W.S.—Agents.

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Steedman v.
Steedman.

WILLIAM STEEDMAN, Pursuer (Respondent).—*C. S. Dickson—Forsyth.*
MRS MAGDALENE BROWN OR STEEDMAN, Defender (Reclaimer).—*Hay.*

Husband and Wife—Divorce—Adultery—Pater est quem nuptiae demonstrant—Strength of presumption.—The presumption *pater est quem nuptiae demonstrant* may be rebutted by evidence which satisfies the Court that the husband was not the father.

all events, he did not go on with the prosecution, and the pursuer was accordingly liberated.

“The precognitions which the defender says he had got have not been produced, but the reports of the meetings as reported in the newspapers which the pursuer attended have been so. The Lord Ordinary cannot find anything in the conduct of the procurator-fiscal of such a character as to subject him to damages. No doubt he might have prayed for the citation, instead of the apprehension, of the pursuer; but then the crave for apprehension is not a relevant ground of complaint. It was open to the Sheriff, instead of granting that warrant of apprehension, to have granted a warrant of citation. Probably what influenced him in granting the warrant he did was the certainty that a warrant of citation would have been disobeyed. Then as regards the complaint of the refusal of bail, the answer to this is, that bail cannot be accepted or demanded until the accused is committed for trial, which was not done in the present case.

“As regards probable cause, the Lord Ordinary is of opinion that the defender was not entitled to crave warrant for the apprehension of the pursuer merely because of reports in newspapers. If the matter had stood upon this defence the case must have gone to trial, but, as the Lord Ordinary is of opinion that a merely general allegation of malice against a public officer like the fiscal is not sufficient, without some special averment of malice, he has thought it right to dismiss this action.”

Circumstances in which the Court *held* that the presumption was rebutted, No. 186.
although the husband and wife at the time of the child's conception resided in
the same village.

July 20, 1887.
Steedman v.
Steedman.

WILLIAM STEEDMAN, master mason and quarryman, Lochgelly, and his
wife were married in November 1865. About six weeks after their
marriage they quarrelled and separated, Steedman returning to live in his
father's house next door to his wife; but he continued to visit her up to
the winter of 1868. She thereafter removed to another house in Loch-
gelly, aliment being paid her by her husband. There were then two
children of the marriage, one born on 3d April 1866, and the other on
29th July 1869.

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Lord M'Laren.
M.

In October 1885, Mrs Steedman bore another child, and this action of
divorce for adultery was forthwith brought by her husband, who alleged
that the child was the fruit of adulterous intercourse with some man or
men unknown.

The pursuer averred that since some time previous to the birth of their
second child, he had not visited or had intercourse with the defender, nor
had he been in her house or spoken to her except on two occasions in
1869, when he was arranging the terms of an agreement to pay her
aliment.

The defender in answer stated;—"The pursuer continued to visit the
defender in the evenings up to November 1869, and he again commenced
visiting the defender in the beginning of October 1884, and continued
these visits down to the beginning of March 1885. These visits were
generally in the evenings between seven and nine o'clock, but he never
remained all night with the defender. In consequence of the intercourse
with the pursuer the defender was again delivered of a third child on 4th
October 1885 named William."

At the proof the defender deponed that her statement on record was
incorrect, and that she had had meetings with the pursuer between 1869
and 1884.* No one spoke to having seen pursuer and defender together
during that period, and the defender's case was entirely uncorroborated.
On the other hand, there was no evidence of adultery or even of intimacy
between the defender and any other man. Otherwise the purport of the
evidence sufficiently appears from the opinions of the Judges.

The Lord Ordinary (M'Laren), on 17th November 1886, granted decree
of divorce.†

* She deponed;—"The statement in the answers to this case, that pursuer
continued to visit me till November 1869, and that he again commenced visiting
me in October 1884, is not correct. Between 1869 and 1884 he wanted me to
leave for a foreign country. I did not tell that to my agent. I neglected it.
It was in the evening between 8 and 10 o'clock that my husband visited me.
He did not come on any particular day of the week—towards the end of the
week. He did not visit me in the summer, only in winter, when it was dark.
He always came at night, for fear any person would see him. I suppose he was
afraid of his sisters and brother. He did not see anyone in my house when he
visited me. My daughter was often at the singing when he came. She is 17
years of age."

† "OPINION.—This is a narrow case, but, after taking time to consider the
evidence, I have come to the conclusion that the pursuer is not the father of the
child to which the defender gave birth on 4th October 1885, and, therefore,
that the charge of adultery is proved.

"The parties were married in November 1865, and about six weeks after the
marriage they separated, in consequence, apparently, of differences about money
matters. The wife (defender) continued for a time to reside in the married
home, and the husband went to live with his father, brother, and sister in the

No. 186. The defender reclaimed.¹
At advising,—

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LORD MURE.—This is a somewhat special and, as the Lord Ordinary has remarked, narrow case. It is an action of divorce by a husband who has been living separate from his wife for a great many years, but in the same town, and who alleges that since the end of 1869 he has never been in the same house

same street of Lochgelly in which his wife resided. About three years later the defender brought an action for aliment against her husband, which, in February 1870, was settled by a minute of agreement. Since then, the parties have continued to live apart, in Lochgelly, in different quarters of the town.

"The case of the defender is that her husband, during the period of the separation, made clandestine visits at her house in the evenings, and that he is the father of the child. The pursuer admits that he occasionally visited the defender during the first three years after the marriage; but he states that since 1870 he has never seen his wife, giving as his reason that he suspected her of improper intimacy with men.

"So far as the case depends on direct evidence, we have nothing but the statement of the husband, contradicted by that of the wife. The wife is entitled to have it remembered in her favour that she has borne a good character, has brought up her children respectably, and is not proved to have been unduly intimate with other men.

"It appears to me, however, that the wife's story is intrinsically incredible. I can understand that she should receive visits from her husband after their separation; but such visits would not naturally be of a clandestine character; and if they were continued, as the wife says they were, I think it is quite certain that the fact must have come to be known to some person or persons other than the defender herself. Farther, when the defender became pregnant, if her story were true, she certainly would have informed her husband of the fact, and would probably, for the sake of her own reputation, have mentioned the circumstance of her husband's visits to her family and friends. She admits that she did not inform the pursuer of her pregnancy, and she is unable to bring forward any witness to prove that her husband had been seen visiting her house since the separation. I may add that none of the husband's family profess to have any knowledge of the alleged visits.

"A very remarkable, and, to my mind, conclusive piece of circumstantial evidence has now to be noticed. Since the separation of the parties, a large tumour or wen has appeared on the pursuer's forehead. It is, I need hardly say, a very noticeable feature of the pursuer's face, and one which could not fail to attract his wife's attention if she had ever seen him after it appeared; yet, when under examination, she was unable to say that any change had taken place in her husband's face since she knew him, and she seemed very much surprised when her husband entered the Court-room, and, with the growth on his face, was presented to her for identification.

"In all the circumstances, I shall find the adultery proved, and grant decree of divorce."

¹ *Reclaimers' Authorities*.—Stair's Inst. iii. 3, 42; Bankton, i. 2, 3 and 4; Erskine's Inst. i. 6, 49; Routledge v. Carruthers, May 19, 1812, F.C.; Innes v. Innes, July 7, 1835, 7 Scot. Jur. 470, H. L. 2 Shaw & Maccl's Appa. 417; Sandy v. Sandy, July 4, 1823, 2 S. 453; Jobson v. Reid, Jan. 19, 1830, 8 S. 343; Mackay v. Mackay, Feb. 24, 1855, 17 D. 494; Walker v. Walker, Jan. 23, 1857, 19 D. 290; Tulloh v. Tulloh, Feb. 28, 1861, 23 D. 639; Brodie v. Dyce, Nov. 29, 1872, 11 Macph. 142; Gardner v. Gardner, May 30, 1876, 3 R. 695, H. L. 4 R. 56; Reid v. Milne, Feb. 8, 1879, 6 R. 659; Montgomery v. Montgomery, Jan. 21, 1881, 8 R. 403.

Respondent's Authorities.—Morris v. Davies, 1837, 5 Clark & Fin's Repa. 242; Tait on Evidence, 490.

with the defender, or had intercourse or communication of any kind with her, No. 186. and the action is raised on the ground that the defender committed adultery in the years 1884-5 with some person or persons unknown to the pursuer, which resulted in her giving birth to a child in October 1885, of which the pursuer was not the father. July 20, 1887.
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The fact of the birth of this child is not disputed, but the adultery is denied, and it is alleged that the pursuer is himself the father of the child, having, as the defender alleges, visited and had intercourse with her occasionally in 1884 and 1885; and one peculiarity of the case is, that the parties, after their separation in 1866, had intercourse with each other in the defender's house, which resulted in the birth of their second child in 1869; and the defender's allegation on record in this case is that this clandestine kind of intercourse was renewed and continued for some time in the year 1884. Upon the admitted facts of the case as set out in the record it is clear that there was no intercourse of any kind between the parties for fifteen years prior to the alleged visits in 1884.

In that state of matters your Lordships have to decide whether the present pursuer can be held to have established his case, especially looking to the circumstances that he and his wife lived near each other and in the same village. The state of the law does not admit of any dispute. In the last case which came before this Division on this branch of the law I appear to have given the opinion of the Court, and to have said this (*Montgomery*, 8 R. 403)—“Whatever difficulty there may have been some years ago in laying down the law relative to the application of the rule *pater est quem nuptiæ demonstrant*, in circumstances such as those which here occur it may, I apprehend, be held as now authoritatively settled, both in this country and in England, that the rule may be met by direct or even circumstantial evidence sufficient to negative the presumption, and that in dealing with such a case the question to be disposed of is one of fact, viz., whether the circumstances disclosed in evidence are such as to satisfy the Court that no sexual intercourse took place between the parties at the period when it is alleged that it occurred.” And then I refer to the case of *Patterson*, 11 Macph. 142, and to the opinions expressed by Lords Lyndhurst and Cottenham in the English case of *Morris v. Davies*, 5 Clark and Fin. 242, as corroborating the view I had expressed.

That being the law upon the subject, I have to say that after anxious consideration I have come to the same conclusion as the Lord Ordinary. I think the child is not the result of intercourse between the pursuer and defender. There is no evidence in the case to shew that they have ever met during the last fifteen years, or that the pursuer has ever seen the defender during that time. The pursuer's evidence is quite distinct, and completely negatives the allegation that he was in the defender's house in 1884. It is, further, of the greatest importance in the case that the parties admittedly lived separate for fifteen years, and that the pursuer is not proved to have been seen with the defender or at her house during that period. These facts are strongly confirmatory of the pursuer's case that he never was there, and taken along with the other fact of the birth of the child, they go a long way to shake the presumption of law to which I have referred. But that would not be sufficient if the defender's story was a credible one.

The question accordingly turns upon the relative credibility of the pursuer and defender. I see nothing which leads me to doubt the truth of what the pursuer says, and, as I have mentioned, what he says is confirmed by the other

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evidence. But the defender is in this position—that while she alleges on record that the pursuer continued to visit her till November 1869, and that he did not again visit her till October 1884, when she is examined she gives a different account, for she states that he visited her frequently during the interval, and that he wanted her to go to a foreign country. This evidence is directly contradictory of her admissions on record. But in addition I agree with the Lord Ordinary that it is impossible to suppose the pursuer would not have been seen by someone if he had been coming about her house between October 1884 and March 1885. Then there was, further, a total concealment on the defender's part of the fact that the pursuer was coming about her, and also that she was with child. One woman is examined who seems to have taxed her with being in the family-way, but she did not say that the pursuer was the father. Indeed she never seems to have even hinted that to any of her friends.

These are all very remarkable circumstances, and I see nothing in the defender's case which at all shakes the credibility of the pursuer. His case is clear and consistent throughout, and is confirmed by the other evidence. I therefore agree with the Lord Ordinary in thinking that we can come to no other conclusion than that the pursuer was not the father of this child.

The Lord Ordinary has referred to a circumstance which struck him as a remarkable feature in the case. A wen has grown on the pursuer's forehead during recent years, and the Lord Ordinary thinks it would be impossible for the defender to have been visited by the pursuer, as she says she was, during 1884-85 without seeing this. I am of the same opinion.

The case is a narrow one, but looking to all the circumstances, and to the fact that the weight attaching to the maxim *pater est quem nuptiae demonstrant* may under recent decisions be held to be somewhat less strong than it once was, I am of opinion that we may grant decree of divorce.

LORD SHAND.—I have given very careful and very anxious consideration to the evidence in this case, with the result that I concur with Lord Mure in the view which he has taken. There is undoubtedly a very heavy *onus* upon a pursuer who raises an action of divorce in circumstances like the present—as heavy an *onus* as I can conceive in a question where the law of evidence is involved. Where a husband and wife are living in the same village and near one another, and the wife becomes the mother of a child, the law will presume that the husband is the father, and in order to rebut the presumption he must bring evidence such as will satisfy the Court that no connection did take place between them such as might have led to the birth. But taking the case in that light, I am satisfied that no such connection took place.

It appears that shortly after their marriage the pursuer and defender separated, and it is a curious feature that notwithstanding the separation, the pursuer did continue to visit his wife for about three years afterwards, and that a second child—a daughter—was born in 1869. But he states that from a certain date in 1869 he has never again visited his wife, and the reason he gives is, that shortly before the birth of their daughter on two different occasions when he was in his wife's house he heard knocks at the door which created a suspicion in his mind. In addition, a ladder was found against her window on a third occasion in very suspicious circumstances, and there is corroborative testimony to that effect, and that the man who is presumed to have used it was caught

near the spot. The pursuer never returned after these events took place. The village is one with comparatively few inhabitants, but it is not said that there is anyone who can contradict the pursuer's statement that he did not visit his wife for fifteen years. If he had visited her there would surely be someone who would be able to speak to it. Further, the defender admits that no one ever saw the pursuer in her house during these years, and that she never told anyone he had been there. There is also another fact which provides most material corroboration of the pursuer's story, and satisfies me that it is true. A grown-up daughter, who was living with the mother in her house, says she never saw her father there. The evidence in support of the pursuer's case is therefore overwhelming unless there is something on the other side to displace it.

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But when we turn to the evidence for the defender, I think we find very strong corroboration of the pursuer's case. She says that the pursuer's visits were frequent in winter, and that he was in the constant practice of coming clandestinely. If that had been the case I do not think it possible that he would not have been seen. To be added to that there is the extraordinary circumstance that she gives no explanation of her husband's absence from her, and of his coming at night when he did come. She indeed accounts for it by saying that she supposes he was afraid of his sisters and brother, but there is nothing to support that statement, and no such explanation was ever vouchsafed to anyone—she never even mentioned to the daughter that her father was there. She further tells a different story in the witness-box to what she stated on record. There is also the fact that he has a growth on his forehead which she had failed to remark, and which truly might have escaped notice once or twice, but could not do so oftener.

On the whole matter I am satisfied that the *onus* of proof has been discharged, and that we must give decree in the pursuer's favour.

LORD ADAM.—I think the *onus* which a pursuer undertakes in a case of this kind is very well stated in the case of *Mackay*, 17 D. 494. It is this, that there must be "such clear evidence as completely satisfies the tribunal which has to decide the question that *de facto* the husband is not the father of his wife's child." That being the question of law, I am not disposed to differ from the result at which your Lordships have arrived.

LORD PRESIDENT.—This like every other case affecting status or legitimacy is of importance, and I think it right to state my opinion regarding the effect of the presumption *pater est quem nuptie demonstrant*, and how far the pursuer of such an action as the present is under the *onus* of completely establishing a negative.

The pursuer's wife was delivered of a child in October 1885, and the presumption is that the pursuer was the father. If no evidence can be adduced to shew that the child was begotten in adultery, and that the husband was certainly not the father, then the law holds that the pursuer must be presumed to be so. This is an action of divorce on the ground of adultery, and as the pursuer founds on the birth of the child he must undertake to prove that he is not the father. There have been some recent cases, the result of which it may be said has been somewhat to weaken the strength of the presumption, but I agree with Lord Adam in thinking that the rule as laid down in *Mackay's* case (17 D. 494) ought to be taken as truly representing the state of the law regarding the matter.

No. 186. That being so, I think the evidence in this case requires severe scrutiny. Accordingly I have taken great pains to see whether the allegation that the husband is not the father of this child has been established.

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Reference has been made to the case of *Montgomery*, 8 R. 403. The report of that case is rather misleading, because we are not told what the circumstances were. I have examined them, and I find there was very strong proof there of the defender's adultery with three different men. This is a very different case, and I have had great difficulty in reaching the conclusion to which Lord Mure and your Lordships have arrived. But I do not dissent, and I only wish to say that we are doing nothing to shake the strength of the presumption as settled in recent decisions, and particularly as laid down in the case of *Mackay*.

THE COURT adhered.

N. B. CONSTABLE, W.S.—JAMES SKINNER, S.S.C.—Agents.

No. 187. WALKER, HUNTER, & COMPANY, Complainers (Respondents).—*D.-F. Mackintosh—Ure.*

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FALKIRK IRON COMPANY, Respondents (Reclaimers).—*Balfour—Wilson.*
Copyright in design—Registration—Novelty—Utility—Patents, Designs, and Trade-Marks Act, 1883 (46 and 47 Vict. cap. 57), part iii.—Design for the door of a kitchen range which was held on the evidence to be a "new or original design not previously published in the United Kingdom," and therefore a proper subject for registration under part iii., sec. 47, of the Patents, Designs, and Trade-Marks Act, 1883.*

Sec. 60 of the Patents, Designs, and Trade-Marks Act, 1883, provides that "Design means any design applicable to any article of manufacture. . . . whether the design is applicable for the pattern or for the shape or configuration or for the ornament thereof, or for any two or more of such purposes." Held that where a design is registered for "shape or configuration," and a mechanical improvement is directly or incidentally secured by the adoption of such shape or configuration the mechanical improvement is secured by the registration of the design, though it might have been made the subject of protection by letters-patent.

Held that a design may be made the subject of registration, though it depict an article incomplete in itself, but which is intended to be used in combination with and as part of another article of manufacture.

Under sec. 52 of the Patents, Designs, and Trade-Marks Act, 1883,† the

* Sec. 47 provides,—“(1) The comptroller may on application by or on behalf of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom register the design under this part of this Act. . . . (3) The application must contain a statement of the nature of the design, and the class or classes of goods in which the applicant desires that the design be registered.”

† Sec. 52 provides,—“(1) During the existence of copyright in a design, the design shall not be open to inspection except by the proprietor or a person authorised in writing by the proprietor, or a person authorised by the comptroller or by the Court, and furnishing such information as may enable the comptroller to identify the design, nor except in the presence of the comptroller, or of an officer acting under him, nor except on payment of the prescribed fee; and the person making the inspection shall not be entitled to take any copy of the design, or of any part thereof. (2) When a copyright in a design has ceased, the design shall be open to inspection, and copies thereof may be taken by any person on payment of the prescribed fee.”

public are barred from demanding inspection of the design from the comptroller until the copyright has ceased. *Held* that where an infringement of copyright is complained of, the alleged infringer is entitled to call on the holder of the copyright to prove for what purpose—whether pattern, shape, or ornament—the design was registered.

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In July 1886 Messrs Walker, Hunter, & Company, of the Port Downie Iron Works, Falkirk, brought a suspension and interdict against the Falkirk Iron Company, and the individual partners thereof, in which they prayed the Court to interdict the respondents "from infringing the copyright of a registered design for kitchen range fire-doors, No. 16,596, the property of the complainers, conform to certificate of registration, dated 10th November 1884, granted in pursuance of the Patents, Designs, and Grades-Marks Act, 46 and 47 Vict. cap. 57, and in particular, from making, vending, or using any fire-doors for kitchen ranges having a moulding cast or fixed thereon in manner shewn in the design, a copy of which is annexed to the said certificate of registration, or in manner substantially the same, and from infringing the copyright of said registered design in any other manner of way."

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Lord M'Laren.
M.

The design of the fire-door registered by the complainers shewed the door of a kitchen range, but unattached to the other part of the range. The door as shewn in the drawing was rectangular, with two lance-shaped hinges fastened by bolts to the door, and with projecting bolt-holes at the side, by which it was presumably to be attached to the rest of the range. Along the upper edge of the door was a moulding projecting backwards, intended to fit into the hot-plate which, when the range was used as a close range, closed in the top of the fire.

The registered design was not accompanied by any descriptive letter-press.

It appeared from the proof that the class of range for which the door was designed was what is known as a convertible kitchen range, *i.e.* a range which may be used as a close range or as an open fire. When the range is shut it is closed in on the top by a fire-plate, and in front by means of the door. When the range is used as an open fire, a bar known as the fall-bar falls down and projects from the fire; when turned up, it is flush with the fire, and allows the door to shut. To complete the shutting in of the fire when the range is closed, it is necessary to close the open space between the hot-plate and the door. It used to be the practice to effect this by putting an iron-plate or fire-cover on the top of the fall-bar. The design registered by the complainers was intended to do away with that iron-plate or cover, and this was effected by attaching a moulding to the door which fitted on to the edge of the hot-plate. When the range is shut this moulding, besides closing the aperture, serves to continue the moulding along the top of the oven and boiler front at each side of the fire, and thus makes the whole range more symmetrical in appearance.

The complainers averred that the respondents had made and sold doors having a moulding similar to that registered by them.

The respondents admitted, under reference to their statement of facts, that they were making and selling fire-doors of similar construction to those registered by the complainers, but averred that they were entitled to do so. They stated in their statement of facts:—(Stat. 2) "Sometime ago it occurred to the respondents that it would be better so to mould the upper portion of the door that when the fall-bar is up, and the door closed, the moulding upon the upper portion of the door should fit into the edge of the hot-plate, filling the space occupied in the other system by the mould-

No. 187. ing on the plate or fire-cover. The respondents accordingly constructed ranges on this principle. Several other parties in the trade have adopted the same expedient, and it is now in common use. The complainers were not the authors of said arrangement, nor did they acquire the same for a good or valuable consideration, or by any valid and exclusive legal title." (Stat. 3) "It is believed and averred that what the complainers have procured to be registered as a design is a door constructed in a manner adapted to the last-mentioned method of closing a range. Said alleged design is not a design within the meaning of the Patents, Designs, and Trade-Marks Act, 1883. It has no applicability to the purpose for which it is used 'for the pattern, or for the shape or configuration, or for the ornament thereof.' Its shape and configuration are accidental and unimportant, and unconnected with the purpose to be attained. If there is any merit in the method above described, it is not dependent on shape or configuration, but upon a combination of means producing a useful result, and such a combination cannot be protected by registration. In any event, said alleged design is not new and original. It consists only in an increase of the size of the door relatively to the size of the range, so as to fill space, which must be filled in all close ranges, and which may be filled either by bringing the top of the door to meet the hot-plate, by bringing forward the edge of the hot-plate till it meet the top of the door, or by filling the space between the top of the door and the edge of the plate by a moulding on the fall-bar. The form of the moulding is a common form of moulding, and possesses no novelty or originality." (Stat. 4) "The complainers have failed before delivery on sale of articles to cause each such article to be marked in terms of the Patents, Designs, and Trade-Marks Act, 1883, and relative rules for the registration of designs made and issued by the Board of Trade, and dated 21st December 1883, and in terms of the said Act their copyright in the design, if they any had, has ceased."

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The complainers pleaded, *inter alia*;—(1) The respondents having infringed the complainers' copyright as above condescended on, and having refused to discontinue said infringement, the complainers are entitled to have the interdict craved.

The respondents pleaded, *inter alia*;—(3) The complainers' alleged design not being a design or a proper subject of registration and certificate within the meaning of the Patents, Designs, and Trade-Marks Act, 1883, the note ought to be refused. (4) The complainers' alleged design not being new and original, the note should be refused. (5) The complainers not being the authors of said alleged design, nor having acquired the same, or the right to use the same, by a valid or exclusive legal title, are not the proprietors thereof within the meaning of the Patents, Designs, and Trade-Marks Act, 1883. (6) The complainers having failed before delivery on sale of articles, to which their alleged registered design has been applied, to cause each such article to be marked in terms of the statute and relative rules, their copyright, if they any had, has ceased. (7) The respondents not having infringed any rights of the complainers, the note should be refused. (8) The complainers having no copyright in said alleged design, the note should be refused, and the respondents found entitled to expenses.

Proof was led in the action, from which it appeared that the application made by the complainers for registration was for "a range door, with moulding on top, moulding forming front of range, shape to be registered." The certificate which they obtained bore that "a copyright of five years" was granted in respect of the application of the design to

articles specified in Class I. of the Board of Trade rules applicable to No. 187. registration of designs.*

On the question of the novelty of the design it was proved that the respondents' workmen were led to adopt a moulding on the door similar to that registered by the complainers from seeing one of the complainers' designs. Two witnesses for the respondents—the Messrs Crosthwaite—stated that they had used a similar design, but the doors manufactured by them opened downwards, and not to the side. It was also proved that doors of a similar construction had been used in articles of furniture made of wood. The originality claimed for the shape of the moulding here, and the only novelty, consisted in its being so cut off at the ends that when the door was shut the moulding along the whole range was continuous. Mr Fairweather, patent-agent, Glasgow, one of the complainers' witnesses, deponed,—“(Q.) In your opinion, are the shape and configuration of the registered door essential to the objects to be attained as you have explained them? (A.) They are. (Q.) In your opinion, as a patent-agent, would it be a good subject-matter for a patent? (A.) Certainly not. (Q.) Why? (A.) Because there is no combination of operative parts to produce the objects to be attained. These objects are produced by the shape and configuration of the door, and by that alone. Cross.—There is nothing new in the door being rectangular. A moulding on it is not new by itself. The moulding in question is one variety of the ogee form of moulding, which is very common, and is used for ornamentation in every kind of work. (Q.) May I then take it that the really novel feature, according to your view, is the having a moulding on the top of the door which corresponds to the moulding in front of the hob? (A.) Yes, I think you may take that as my view. (Q.) Therefore the real novelty consists in the application of the contrivance as depicted to the total article, viz., the range? (A.) Yes, I think so. (Q.) Looking at the registered design No. 6, is there anything in that design which shews that the door there depicted is any part of a continuous line of moulding upon the range? (A.) No, it shews no more than the door, and is not intended to shew more. (Q.) Then there is nothing in the design as registered to shew the method of application? (A.) I think so; the whole thing is shewn on the design as registered; there is a door with an ogee moulding on the top. (Q.) But nothing to shew that that is to correspond to another ogee moulding along the top of the hot-plate? (A.) Certainly not. It shews all that is wanted—a completed door. It does not shew the rest of the range. (Q.) It comes to this—a rectangular door is not new? (A.) Not new. (Q.) A moulding is not new? (A.) It is not new. (Q.) And the combination of a moulding with a door, without anything else, is not new? (A.) The combination of a moulding with a door in this particular manner is new. (Q.) But without anything else? (A.) Not without anything else. (Q.) Then may I take it that there is nothing new in this design, in the parts, apart from the purposes to which the whole design is applied? (A.) There is only one part, the door consists of one piece. (Q.) Does it not come to this, that the whole of the parts of this registered article are old, but that what is new is the application of the combined parts to the purposes of the whole? (A.) No, it is the combining of parts that is new—the parts as combined. (Q.) And applied? (A.) And applied. Re-examined.—(Q.) A fire-door of this particular kind applied to a convertible range? (A.) Of course. (Q.) And the certificate of registration bears that it is a door for a range?

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* Class I. consisted of “Articles composed wholly or partly of metal not included in Class II.” Class II. consisted of “Jewellery.” See Brice on Patents, Designs, and Trade-Marks, p. 244.

No. 187. (A.) Yes. (Q.) Could you judge from the drawing appended to the certificate that it was intended to complete the range, and to serve the objects which you have explained? (A.) Certainly. By the Court.—
 July 20, 1887. Hunter, Walker, & Co. v. Falkirk Iron Co. (Q.) What are the goods in Class I. referred to in the certificate of registration? (A.) Class I. covers articles composed either wholly or partly of metal; it also covers goods of other make, but mainly metal. (Q.) How does it appear from the design or the certificate of registration that this is to be applied to the fire-doors of kitchen ranges? (A.) The drawing, I think, is sufficient in itself, but the application would bear that it was intended to be applied to that purpose. I am not certain if I saw the application, but I believe Mr Hunter, the complainer, consulted me about the registration. (Q.) Is there anything in the drawing or the certificate which conveys to your mind that this is a design for the fire-door of a kitchen range? (A.) I don't think it could be applied to anything else; it conveys that impression, because it is a door of a rectangular form, with hinges. (Q.) Then it is the drawing which conveys that? (A.) Yes, it conveys quite sufficient to my mind."

Mr Hunter, a partner in the complainers' firm, deponed,—“(Q.) What do you consider the point of the design which you gain by registering? (A.) The casting the moulding on the top of the fire-door. (Q.) The particular form of the moulding, in so far as composed of the ogee moulding, is of course not new? (A.) No. (Q.) And the application of the moulding to a door simply is not new? (A.) To a range fire-door I think it is. (Q.) Supposing it to be used on something else, not a range, it is not new I suppose? (A.) I suppose not. (Q.) Does it not come to this, that what is really new in your expedient is the application of the moulding to the completed fire-range, so as to afford a continuity of moulding when the whole thing is shut up? (A.) Yes, I think so. (Q.) Was this your own idea, or was it suggested to you by somebody else? (A.) It was my own idea. (Q.) Suggested by no one? (A.) No one. (Q.) A practical idea suggested by the proved inconvenience of having the moulding on the edge of the fire-cover or the fall-bar? (A.) That is so.”*

* The following evidence was also given:—Mr Foulis, ironmonger, Edinburgh, also one of the complainers' witnesses,—“Cross.—(Q.) Does the real merit of the invention consist in shutting up a place where formerly the cold air was apt to get in? (A.) Yes, that is so—principally. (Q.) The precise form of the article by which that hole is shut up would be immaterial? (A.) Yes, quite. (Q.) In your view, it would not matter whether this particular ogee moulding was replaced by another moulding of a different curve and character? (A.) No, I don't see that it would make any difference. (Q.) The whole merit of the invention is in the application of the door to the total range? (A.) To the Simplex range, or other ranges like it, with a folding bar; with the old close ranges that was not necessary, for they could be made tight without it. (Q.) That is the merit of the invention, and the precise character of the design does not matter? (A.) Yes.”

Mr Ross, hot-water engineer, Glasgow,—“Cross.—(Q.) What is new about complainers' door? (A.) The moulding on the top of the door. (Q.) The moulding is the ordinary ogee shape? (A.) Yes. (Q.) Have you ever seen a door with a moulding on it? (A.) Yes, but not applicable to a range. (Q.) But there was nothing new in a door having a moulding upon it? (A.) No, nothing. (Q.) In its application to a range it was new to you? (A.) Yes. (Q.) Was not the reason of that this, that its application to the range filled up a hole where hitherto the draught was likely to come in? (A.) That was certainly an improvement. Formerly the moulding was put on the fire-cover or on the fall-bar—generally on the fire-cover. (Q.) And the novelty of this consisted in putting it on the fire-door? (A.) Yes. (Q.) And thereby making it more convenient? (A.) Certainly. (Q.) Then the object would be equally

It was proved on the matter of utility that this moulding completely shut in the top of the fire when the door was shut, and that where the aperture was shut in by means of a moulding attached to the hot-plate the plate was so heavy as to be difficult to handle; and when it was attached to the fall-bar, and the bar was let down, it intercepted an appreciable part of the heat of the fire.

On 5th February 1887 the Lord Ordinary (M'Laren) repelled the respondents' pleas, and granted interdict as craved.*

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well served by any door that had a moulding which filled up that space, irrespective of the particular design of the moulding and of the back of the door? (A.) The moulding must correspond with the moulding on the range, or it would not meet. (Q.) If you alter the moulding on the range to suit the moulding on the door, the object will be equally well attained by any mode of filling up that space, irrespective of the particular design of the moulding? (A.) Yes; of course it must be applicable to the range. (Q.) The merit of the invention consists in the application of it to the range? (A.) Yes."

* "OPINION.—In this case the complainers are applying for interdict against the infringement of their registered design, No. 16,596, by the respondents. For reasons of convenience in the Acts of Parliament, under which exclusive privileges are granted to the originators of ornamental designs, no description of the design is permitted to enter the register; but the certificate of registration is accompanied by a perspective or diagrammatic drawing of the design, as the case may require, and the certificate is granted for the application of the design shewn in the drawing to goods of a certain class. In the present case, the certificate bears that a copyright of five years is granted in respect of the application of the design to articles in Class I. The drawing attached to the certificate is a perspective representation of an iron door, with a moulding cast on the top edge. The moulding is shewn cut off at each extremity in such a manner that it would fall in line with any continuation of the moulding which might be cast on the object to which the iron door is to be fitted. It appears from the evidence that the door shewn in the drawing is the fire-door of a kitchen range. I should infer from the drawing itself that the moulding was intended to be continuous with the moulding of the object to which the door was to be fitted; because if the moulding were intended to apply only to the door, I should have expected that it would be shewn 'returned,' or finished off in some way at the angles; and, according to the evidence, the drawing would be so interpreted by persons accustomed to deal in such things. The drawing does not bear to be a door of a kitchen range, but it is recognisable as such by persons who sell or use such articles, just as a drawing of the fire-bars of a sitting-room grate would be recognised by everyone who uses an open fireplace of the construction familiar in this country. As I have already said, the statute does not authorise the insertion of descriptive matter in the certificate, and the drawing must be self-interpreting.

"The novelty claimed by the designer consists in this: that his design is the first application of the idea of a continuous moulding along the front of a kitchen range, inclusive of the fireplace door. The respondents deny the merit and originality of the design, and also maintain that it is not a proper subject of copyright of design. The objections may be conveniently treated together. It appears to me that the design has such merit and originality as entitle it to copyright protection, provided it can be shewn to fall within the scope of the Designs Act.

"The standard of originality to which an inventor must attain in order to have legal protection is in no case a high one. I do not enter here upon the illustrations which the law of patents affords. But confining my view to the subject of design copyright, I take it to be clear that it is not necessary that the design should have any artistic merit. In the present case, no originality is claimed for the pattern of the moulding; the novelty consists in it being cut off at the extremities so as to be continuous with the moulding on the range. This is an example of what may be called constructive design; and without

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The respondents reclaimed, and argued;—The design was not novel, which it must be to be registered,¹ but had been anticipated by the device of the Messrs Crosthwaite. The door included what was claimed here as a novelty, viz., the moulding being continuous from end to end of the range, and the fact that the door fell downwards did not constitute an essential difference. Such mouldings were common on wooden articles,—*e.g.*, sideboards,—and any wooden article with metal hinges might be registered under Class I. of the Board of Trade rules. The public were not entitled to know for what purpose the design was registered; they could only know that a design was registered under the statute; they could not see the application, and if a moulding such as this was common on other articles it was not novel within the whole of Class I., which it ought to be. If that was not the limit, what was? Certainly not the terms of the application, because the public could not ask to see that. The design here registered, assuming its novelty and its utility, should have been made the subject of a patent, and was not suitable for registration as a design. The contrivance was a mechanical device for excluding air from the top of the fire, and for doing away with the diminution of radiation from the front of the fire when the fall-bar, with a moulding attached to it, was down. The word “design” was not intended to cover such mechanical contrivances. There was no statutory definition of the word design, except that in section 60 of the Act, which merely said that

professing to have any special knowledge of such matters, I may safely affirm that, in the taste or fashion at the present time, constructive design is very much in favour with the makers of furniture and articles of domestic use. Instead of overlaying their goods with ornament which has no particular relation to the structure, or part of the structure to which it is to be applied, our designers aim rather at neatness or elegance in the lines that enter into the form of the object, or are appropriate to it. In a kitchen range a plain moulding carried out broadly may be better taste than more elaborate ornament. In any view, it is an application of an idea or mode of treatment (a very elementary one it may be) to an object and in a way which is new as regards the particular application. There is evidence that the complainers’ design was immediately recognised as an improvement by the trade, and the fact that the respondents are selling the same thing (which I hold to be proved) is good evidence against them on the question of the worth of the design. In such circumstances, I am not much impressed with the argument that this is not a design entitled to copyright protection. It is said that such a thing does not fall within any of the ordinary categories of invention; that it was ‘in the air,’ and that if the suspenders had not brought it out, other makers would. The fact that several makers were thinking about something, which one of them was the first to register, is, to my mind, evidence that the thing registered is a design. It is apparently not a subject for which a patent could be obtained; and on the other hand, it is not a mere unmeaning combination of known devices. Between these limits I think the designer may get protection for any variety of intelligent form or pattern capable of being applied to the kind of goods for which he seeks a certificate. In the present case, we have such an intelligent combination adapted to objects falling under Class I. The merit of the invention, such as it is, consists in pleasing the purchaser’s eye, and has nothing to do with the uses of the grate or the processes of cooking. I am therefore of opinion that this is not a subject for protection by patent, and that it is entitled to the copyright protection which the certificate purports to grant.

“I have not referred particularly to the authorities cited, but I have considered them; and I conceive that the judgment to be pronounced is supported by the decisions.”

¹ *Lazarus v. Charles*, 1873, L. R., 16 Eq. 117; *Adams v. Clementson*, 1879, L. R. 12 Chan. Div. 714; *Mulloney v. Stevens*, 1864, 10 L. T. 190; *Le May v. Welch*, 1884, L. R., 28 Chan. Div. 24.

"design" meant "any design applicable to any article," substance, or thing therein referred to, but there were cases in which the word had been interpreted, and this did not fall within the interpretation.¹ Further, a design to be registered must be complete within itself, and not merely a part of a whole, only useful or ornamental in connection with some other part which was not registered. Further, there was nothing on the face of the design to shew which part of the door was registered, and as the public could get no access to the application they were entitled to believe that it was for the shape of the lance hinges or any other part of the door depicted on the design that the certificate was granted.

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Argued for the complainers;—The designer of any design was entitled to the benefit of his invention provided he went through the forms prescribed by the statute. If the statute had not provided the public with the means of ascertaining what was registered, and for what purpose it was registered, that was the fault of the statute, and the designer when his design was infringed ought to be allowed to prove by evidence for what purpose the registration was made. This door was novel as applied to any article in Class I., and the reclaimers had failed to prove that it was not. The design might have been a perfectly good subject for a patent, but that did not bar it from being a good subject for registration as a design. The registration was for shape and configuration, but applied for purposes partly of utility and partly of ornament. It had been settled that such a design was a suitable subject for registration.²

At advising Lord Shand delivered the opinion of the Court,—

LORD SHAND.—The pursuers, Messrs Walker, Hunter, and Company, of the Port Downie Iron Works, Falkirk, have raised this action to vindicate their alleged right of copyright in a registered design for kitchen-range fire-doors, and the Lord Ordinary by the judgment complained of has affirmed the existence of the right they claim. The defenders, the Falkirk Iron Company, have maintained under the reclaiming note presented by them that no such right exists, and the main contention presented on their behalf is that the alleged design is not a proper subject of registration and certificate—that the provisions of Part III. of the Patents, Designs, and Trade-Marks Act of 1883 (46 and 47 Vict. cap. 57), which relates to the registration of designs, do not confer an exclusive privilege or copyright in such a matter as that forming the subject of the pursuers' claim, and that the exclusive privilege claimed, if novelty and utility can be established, can only be obtained by means of letters-patent taken out in terms of the first part of the statute.

The question raised is one of importance, and is not free from difficulty. By sec. 47 of the statute the design to be protected must be a "new or original design not previously published in the United Kingdom." The alleged novelty of the pursuers' kitchen-range fire-door, which is not admitted, consists in its shape—in having a moulding on the top of the door corresponding to and fitting into the moulding in front of the hob of the range when the door is closed; and assuming that such a design applicable to a kitchen range is a good subject of copyright, it seems to me that sufficient novelty has been made out to sustain the right. It is true that doors having mouldings along the top corresponding with and fitting into the article of which they form part have been in

¹ Harrison v. Taylor, 1859, 4 H. & N. 815; Reg. v. Bessell, 1851, L. R., 16 Q. B. 810; Windover v. Smith, 1863, 32 Beav. 200.

² Rogers v. Driver, 1850, 16 Q. B. 102.

No. 187. use in wooden articles of furniture, such as sideboards, cupboard, and the like, but the evidence appears to shew that until it occurred to the pursuers, with a view to secure special advantages, to have fire-range doors so made, this had not been done by any others in the trade. The moulding on fire-ranges was in use to be fixed to the top or fire-cover of the grate or to the fall-bar, and the door which closed immediately below had no moulding, but was closed against the end of the grate immediately below the moulding on the cover or fall-bar.

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I do not think it necessary to go into the evidence on the point of novelty. It seems to be quite clear that the defenders' workmen first got the idea of adopting the shape which the pursuers introduced from having seen one of the pursuers' designs, and though there is some evidence by two witnesses of the name of Crosthwaite that they used a somewhat similar design, I think the shape of the door described by them, which opened downwards, was essentially different; while as regards the stoves spoken to by some other witnesses, the moulding extended round the whole door, and did not correspond or fit into the rest of the article as the fire-door of the pursuers does into the fire-cover or hob of the grate, so as to make one continuous moulding. It may be quite true that it did not require a great degree of originality to suggest or mature the design which the pursuers claim as new, because doors of a similar shape or moulding had been used in articles of wooden manufacture. But unquestionably on the evidence the pursuers were the first to think of and apply the design in the making of a fire-door for a kitchen range, and I think there is sufficient novelty to sustain the design as a subject of copyright.

Now, undoubtedly the adoption of this shape, which I call new on the grounds just explained, has been found to be attended with some important advantages. When the door had no such moulding (1) an open space or slit was left for the length of the fire-grate, through which cold air was admitted to the upper side of the fire; and (2) the fire-cover having the moulding on it was heavy, and inconvenience was found in lifting it off, while if the moulding was put on the fall-bar and became part of it, as was frequently the case in the later manufacture, it intercepted the heat and prevented the benefit of the full radiation being got in front of the fire. The use of the new shape results in the removal of these disadvantages, and yet preserves a symmetrical if not ornamental form.

Assuming the novelty of the design to be made out, the points of the defenders' argument, as stated, appear to be (1) that as the design serves the useful objects now explained, it should properly speaking be made the subject of a patent; and farther (2) that under the branch of the statute relating to designs you cannot have a registered design of an article not complete and independent in itself, but which is to be used in combination with an article to which it is to be attached. I shall deal with these points separately.

In regard to the first of these it is to be observed that the statute does not profess to give any definition of a design which may be the subject of copyright. Section 60 declares that design "means any design," without defining the meaning of the term, and then goes on, "applicable to any article of manufacture," &c., "whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes." Now, it is quite true that the subject of registration must not be an article of manufacture itself, but a design to be applied to an article of manu-

facture or substance for the pattern, shape, or ornament; and also that the statute in that branch of it which relates to the registration of designs does not afford or profess to afford protection to any mechanical principle or contrivance directly. The Act in this branch gives protection only to the shape or configuration, or to the design for the shape or configuration, in such a case as the present.

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The result of such protection may be, however, to secure important advantages such as attend a mechanical contrivance, if these advantages should be the result directly or indirectly of the shape or configuration adopted. Thus in the present case the new shape of fire-range door, with the moulding as part of it, has the particular advantages over the old shape of door which I have already noticed. These are not directly the subject of protection, but inasmuch as they are dependent on and inseparable from the shape or configuration, they are indirectly secured by the registration of the design. It may be quite true that in place of registering the design for its shape, and so gaining protection for a period of five years, the pursuers might rather have applied for letters-patent, with protection for the longer period of fourteen years for improvements in the manufacture of doors for convertible fire-ranges, and have made not the mere shape, but the mechanical action and contrivance, the subject of protection by letters-patent. But assuming that such letters-patent might have been obtained, and that there was novelty not only sufficient to validate the registration of a design but to create an effectual patent, this would not in my opinion lead to the result that the design was not a proper subject for registration. I observe that in Mr Coppinger's excellent work on the Law of Copyright (p. 447), when treating of the provisions of the Statute 6 and 7 Vict. c. 65, sec. 3, he observes,—"It appears to be the received opinion that under this clause may be registered designs, the subjects of which could in many cases have obtained a patent." And in the case of *Rogers* (1850), 16 Q. B. 108, an opinion to that effect was given by the learned Judges, and specially by Justices Coleridge and Yule. The words of the statute then under consideration were these—"Any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration." These are very much the words in the present Act, having this difference only, that it is not necessary now to shew that the shape of the registered design will serve a useful purpose. So I am of opinion that the registration of the design in this case, for its shape or configuration is effectual, securing as it does advantages directly resulting from the shape, and that even though the pursuers could have obtained letters-patent for improvements in the manufacture of fire-range doors which would have secured these advantages as an exclusive privilege.

I am further of opinion that the defenders' contention that a design cannot be made the subject of registration if it relate to or depict not an article complete in itself, but one which is to be used in combination with and as part of another article of manufacture, as, *e.g.*, a design of a door as specially applicable to and in connection with a fire-range, is unsound. The language of sections 60 and 57 and 58 appears to me to make this clear, for in these sections the design is described as applicable to any article of manufacture, and the exhibiting of "a design, or of any article to which a design is applied," in certain circumstances is declared to be no bar to subsequent registration of the design, and the infringement of copyright is prohibited by exposing for sale any article of manufacture, or any substance to which a registered design, or any fraudulent imitation thereof, shall have been applied. All of these provisions recognise the

- No. 187. existence of a protected design to be applied to an article of manufacture to which it may be attached, and of which it becomes a part.
- July 20, 1887. *Hunter, Walker, & Co. v. Falkirk Iron Co.* It was further maintained for the defenders that the registration of the design in question was ineffectual, because it did not carry on its face in some way the announcement that it was registered for the shape only; that third parties were entitled to assume that the registration was for the ornament in connection with the hinge, and gave no protection to the shape. The pursuers themselves, in the door which they now make, have adopted a different ornament in connection with a change they have made in the form of the hinge. I am clearly of opinion that this objection is not well founded. When an infringement of copyright is complained of, all that the alleged infringer is entitled to see is the registered design, either as it may be found in the form of the article itself, as, *e.g.*, an actual door of the fire-range in this case, or it may be the design and relative certificate which is in the hands of the owner of the copyright. The statute does not authorise him to demand inspection of the register itself from the comptroller until the copyright has ceased, as is clear from section 52 of the statute. No specification by the author of the design is required (or indeed allowed) as in the case of patents for inventions, and there is no register to which the alleged infringer can go, as in the case of infringement of a patent, in order to ascertain whether the act complained of can properly be characterised as an infringement, with reference to the purpose or object for which the design has been registered, whether for the pattern, the shape, or the ornament. In this state of matters it seems to me of necessity to follow, and it must have been intended, that the purpose for which the design was registered may be proved by evidence when any question arises on the subject,—primarily the evidence of the owner who made the registration, but tested by that of others acquainted with the trade and manufacture or business in the articles to which the design related. It will be found that many, probably the large majority, of designs are self-interpreting without such evidence, but there must be others in which a question may be raised, which, however, in most instances, will be easily settled as soon as evidence is adduced. Thus, *e.g.*, in the present case, evidence having been fully led, no one has seriously suggested on the proof, in which persons acquainted with the trade have been examined, that the pursuers' design was or could be registered for any of the purposes authorised by the statute except its shape or configuration, attended as that shape is with useful results. A person alleged to be an infringer is quite entitled to demand of the person complaining that he shall state for what purpose or purposes under the statute the design was registered, and if he be dissatisfied with the answer he may under legal proceedings have such an inquiry as has taken place on that question in this case with reference to the pursuers' design. He may in that inquiry be able to shew that the complainer is seeking to use the certificate of registration of the design for a purpose and to an effect which is not warranted by the design either as self-interpreting or as interpreted by the evidence where there is a question, and in that case he may succeed in his defence. I do not think it is possible to read the enactment of the statute, which leaves matters, and obviously designedly leaves matters, without special provisions on this subject, in any other way. For the only other reading would result in this, that where any design had a special or peculiar shape with some ornament, however slight, and was consequently registered on account of the shape, an infringer would be enabled to defeat the copy-

right by merely alleging that the design registered for shape was protected only No. 187.
as regards the ornament, or that the object of registration was doubtful, and so
the registration was ineffectual, and that evidence could not be admitted on the July 20, 1887.
subject. Such an interpretation of the statute would lead to the result that in Hunter,
the great majority of designs for which the statute obviously is intended to give Walker, & Co.
protection no such protection could be given. This view of the statute does not v. Falkirk
recommend itself, and is not in my opinion to be adopted. It seems to me Iron Co.
that in order to give reasonable effect to the statute the claim or representation
of the pursuer in such cases not only may be the subject of evidence such as we
have in this case, but may further be solved by an easy and certain test. The
statute (section 47, subsection 3) provides that the application for registration
"must contain a statement of the nature of the design" as well as of the class
or classes of goods in which the applicant desires that the design be registered.
This infers that the applicant shall state the purpose or object for which the
design is to be registered,—pattern, shape, or ornament,—and accordingly in the
Board of Trade rules issued in virtue of the statute it is provided by rule 9 that
the application "shall, in describing the nature of the design, state whether it is
applicable for the pattern, or for the shape or configuration of the design." I
see no reason to doubt that when a controversy on this subject arises in judicial
proceedings for alleged infringements of the design, and it becomes necessary to
determine whether protection was given to the design for its pattern, shape, or
ornament, "or for any two or more of such purposes," either party may refer to
the application for registration for a definition or description of the purpose of
the registration, and the Court will where necessary order the evidence on this
subject to be produced, and such evidence should go far to decide the contro-
versy. In the present case it is proved that the application was for a design for
a "range fire-door with moulding on top, moulding forming front of range.
Shape to be registered." This piece of evidence by itself, and even more
strongly if regard be had to the other evidence in the case, makes it clear that
the pursuers' design was registered not for any mere matter of ornament in con-
nection with the form of hinges of the door or otherwise, but without reference
to ornament, solely for its shape in connection especially with the moulding on
the top, which has material advantages.

I am of opinion that the pursuers' design was novel, that the design was
registered for its shape or configuration, that it was a proper subject for registra-
tion and certificate under the statute, and as the design was clearly copied by
the defenders the alleged infringement has been made out. On these grounds,
though differing in some respects from the views of the Lord Ordinary, I am of
opinion that his Lordship's judgment should be affirmed.

THE COURT adhered.

AULD & MACDONALD, W.S.—J. & J. ROSS, W.S.—Agents.

JOHN T. MACLAGAN (Collector of Ministers' Widows' Fund), First Party. No. 188.
—Murray—C. S. Dickson.

REVEREND WILLIAM M. BROWN, Second Party.—Pearson—Wallace.

July 20, 1887.
MacLagan v.
Brown.

Church—Ministers' Widows' Fund—Chapel of Ease—Contributor—Statute.
—Held that a minister of a chapel of ease, which had been built by private sub-
scription, on being inducted to the same church after its erection into a quoad

No. 188. *sacra* church, was entitled and bound to become a contributor to the Ministers' Widows' Fund.

July 20, 1887. *MacLagan v. Brown.* *Observations on Grant v. Macintyre*, July 14, 1849, 11 D. 1370.

1ST DIVISION.
M.

THE CHURCH OF ST MARGARET'S, Dumbiedykes, Edinburgh, was built in 1881 by private subscription as a chapel of ease in connection with the Church of Scotland, and on 17th October of that year the trustees of the church wrote to the Reverend William M. Brown, "At a meeting of the trustees, held this forenoon, it was agreed to offer you the charge as minister of Dumbiedykes Church. We guarantee you a yearly stipend of £150 for the first three years, the grant from the Home Mission in addition." Mr Brown was at that date an ordained minister of the Church of Scotland, but not a parish minister. The cost of salaries to the church officials, and of maintaining the ordinances of the church were defrayed by the trustees, the income derived from seat-rents and collections being appropriated to meet the stipend and other expenses.

The Presbytery having approved of these arrangements and of Mr Brown's appointment, he entered upon his duties as minister of the church.

In March 1885 the trustees of the church presented a petition to the Presbytery of Edinburgh, setting forth that they were about to apply to the Court of Teinds for the erection of the church, with a suitable district attached, into a church and parish *quoad sacra*, in terms of the Act 7 and 8 Vict. cap. 44, and they therewith submitted a draft of a constitution for the Presbytery's sanction and approval. Article 15 of the constitution proposed,—“That the Rev. William Morris Brown, M.A., shall be recognised and received by the Presbytery of the bounds as the first minister of the new church and parish as soon as possible after decree of disjunction has been pronounced by the Court of Teinds, whom failing, the appointment of the first minister shall be made by the said trustees or their successors.”

Decree of disjunction and erection was pronounced by the Teind Court on 12th July 1886, and Mr Brown was inducted to the new parish on 25th August 1886.

A question having thereafter arisen as to the right and duty of Mr Brown to become a contributor to the Ministers' Widows' Fund, a special case was presented to the Court by the collector of the fund as first party, and by Mr Brown as second party, which embodied the above facts, and put this question,—“Is the party of the second part bound and entitled to become a contributor to the Ministers' Widows' Fund?”

It was stated at the bar that in practice the case of *Grant* had always been held to apply to cases similar to the present, and that there were 122 ministers in the same position as Mr Brown.

There was this further statement in the case,—“In the case of *Grant v. Macintyre*, 14th July 1849 (reported 11 D. 1370), it was found, in conformity with the opinion of the majority of the whole Court, ‘that ministers ordained or admitted to the charge of any church and district, after the same shall have been erected into a church and parish *quoad sacra* under authority of the Statute 7 and 8 Vict. cap. 44, are bound and entitled to become contributors to the Ministers' Widows' Fund,* but find that parties holding the charge of any church and district so erected, but who have been appointed to the same before the date of such erection, are not bound or entitled to become contributors to the said Fund.’ In

* The Ministers' Widows' Fund Act (54 Geo. III. cap. 169) provided that “every minister who was possessed of a benefice in the Church of Scotland” should be entitled to participate in the fund.

view of said decision, the party of the first part contends that the party of the second part had been appointed as minister of the Church of St Margaret's, Dumbiedykes, before said church was erected into a church and parish *quoad sacra*, and that he is consequently neither bound nor entitled to become a contributor to the fund. The party of the second part contends that he was not appointed to the same until after the date of the said erection, and that he is bound and entitled to be a contributor to the said fund." No. 188. July 20, 1887. *MacLagan v. Brown.*

The first party argued;—The decision in the case of *Grant*¹ ruled this case. On the face of the proceedings, it was clear that Mr Brown was admitted minister in 1881. Further, by the constitution drawn up in 1885, he was in terms "recognised" "as the first minister of the new church and parish." Admission was equivalent to ordination. If, therefore, the Presbytery had declined to approve of the subsequent proceedings in 1886, they could not have done so otherwise than by libelling Mr Brown's life or doctrine. The question was a very serious one,—involving large pecuniary interests, looking to the number of ministers who were affected by it,—and that being so, the practice which had always been followed by the church in regard to it was most important. It was suggested that the 1881 appointment was merely temporary, but that was not so. It was no doubt true that the stipend was guaranteed for three years only in the first instance, but that was immaterial. Further, a parish was not an essential of the status of a minister, so as to entitle him to claim the benefit of the Widows' Fund.² Ministers of parliamentary churches were in the same position as Mr Brown, and the two cases were parallel.³

The second party argued;—When Mr Brown was first appointed in 1881, it was to a chapel of ease only, which was in no sense a benefice. He was not even appointed *ad vitam aut culpam*, but only under a contract of employment, which guaranteed him payment of a certain stipend for three years. The position of a minister of a chapel of ease fell, in this respect, below that of a minister of a parliamentary church. In the latter case it was the Crown which appointed, a district was set aside and attached to the church, and a stipend was provided out of public funds. In the present case the stipend was provided by private subscription, and there was no district to which Mr Brown could be admitted until after the erection. It was, therefore, only in a subsidiary sense that Mr Brown could be said to be appointed prior to the decree of the Teind Court, and for the purposes of the present question his appointment was simultaneous with the erection of the parish. Prior to that he was a mere missionary. The decision in the case of *Grant* must be read with reference to the case which was then being dealt with. There was nothing to be found in the opinions of the Judges in that case to the effect that a minister of a chapel of ease was disqualified from contributing to the Widows' Fund when he subsequently became minister of a *quoad sacra* parish. Nor was there anything in the terms of the Ministers' Widows' Fund Act (54 Geo. III. cap. 169) to lead to such a result.

LORD PRESIDENT.—The second party to this case is the minister of the church and parish *quoad sacra* of St Margaret's, Dumbiedykes, and *prima facie* he is

¹ *Grant v. Macintyre*, July 14, 1849, 11 D. 1370, 21 Scot. Jur. 567.

² *Gordon v. Trustees of the Widows' Fund*, Feb. 18, 1836, 14 S. 509, Nov. 15, 1836, 15 S. 15; Act 7 and 8 Vict. cap. 44, sec. 13.

³ *Irvine v. Trustees of Ministers' Widows' Fund*, May 24, 1838, 16 S. 1024; *Cheynes v. Magistrates of Dundee*, June 27, 1866, 1 Macph. 963.

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entitled and bound to be a contributor to the Ministers' Widows' Fund, because all persons admitted to a benefice of that description are held by judgments of this Court to be so entitled. But it is maintained by the first party that Mr Brown is not entitled and not bound to contribute, because he was formerly minister of a church which has now, along with a certain district, been erected into a parish *quoad sacra*. That contention is rested upon the decision of the Court in the case of *Grant v. Macintyre* (11 D. 1370). I am of opinion that the question put to the Court must be answered in the affirmative, and that Mr Brown having been admitted to a *quoad sacra* church and parish is entitled and bound to contribute to the fund.

The circumstances of the case are very simple. The church in question was erected by private subscription, and although it was recognised by the Presbytery as in communion with the Church of Scotland, it had no other status than that of a chapel of ease erected by the benevolence of some gentlemen in the district. The trustees or subscribers applied to Mr Brown in 1881, and offered him the appointment of minister. The terms of the appointment were set forth in a letter which they wrote to Mr Brown, offering him the charge and a yearly stipend of £150 for the first three years, apart from the grant from the Home Mission Scheme of the Church. They further informed him that a meeting of the committee appointed by the Presbytery was to be held on the Friday following, before which date they desired to have his answer. The answer was favourable, the meeting of the Presbytery committee was held, and it was agreed that Mr Brown should be appointed minister on the terms expressed in the offer.

I pause here for the purpose of considering the nature of the relation which subsisted between the trustees for the subscribers and Mr Brown. The church of which Mr Brown was appointed the minister belonged to the subscribers; the property never was transferred to anyone else; Mr Brown was selected to officiate as minister, and as he happened to be an ordained minister it was not necessary that he should be ordained again. The relation subsisting between them was therefore that of parties to a mutual contract of employment. In consideration of services to be rendered by Mr Brown, the trustees guaranteed him remuneration at the rate of £150 for three years. That was the whole arrangement between them,—no doubt it was carried through with the sanction of the Presbytery, and quite rightly so, because the church was intended to be in communion with the Church of Scotland.

When it was subsequently agreed to apply to the Court of Teinds for the purpose of having the church along with a suitable district erected into a *quoad sacra* parish, the trustees availed themselves of the provisions of the 8th section of the Act 7 and 8 Vict. cap. 44, and offered their church as the church of the new parish. Mr Brown's new position was essentially different from that held by him as minister of the chapel of ease, because now he had a permanent endowment secured to him under the 8th section of the Act to which I have referred. He was no longer dependent upon a contract of employment. On the contrary a stipend of a certain amount fell to be secured to him to the satisfaction of the Court, and it is further provided by the Act that in the event of the stipend being of a certain amount a manse should be inalienably attached to the benefice, and provision made for its upkeep. The church and its appurtenances also fell to be transferred to the new parish, and the maintenance of the whole ecclesiastical buildings had to be provided for by a permanent endow-

ment. That put an end to the chapel of ease, because it was handed over No. 188.
to the new parish, and a deed of constitution was arranged with the General July 20, 1887.
Assembly, or its committee, and the original subscribers as to the way in which MacLagan v.
the church should be managed after the decree of erection was obtained. Brown.
Among other things the constitution provided that Mr Brown should be appointed the first minister of the newly erected church and parish. It appears to me that when the Presbytery, after the decree of erection had been obtained, proceeded to induct Mr Brown into the new *quoad sacra* church and parish, they were acting with perfect regularity and propriety,—for he had never previously been admitted to a benefice.

Accordingly, the case appears to be very clear, if it were not for the argument which has been founded upon the case of *Grant v. Macintyre* (11 D. 1370). It has been strongly contended by the Collector of the Widows' Fund that the position of the minister of a parliamentary charge is on all-fours with that of Mr Brown as the minister of a chapel of ease. But it appears to me to be essentially different. When Mr Macintyre was admitted to a parliamentary church and district, he was admitted once for all to a church and benefice. The decree of erection *quoad sacra*,—when subsequently obtained,—simply altered his position as minister of the benefice, but it did not lead to any new admission. The only admission was the original one to the parliamentary church and district. His status was altered, and he became possessed of all the powers of a parish minister, but his stipend, manse, and rights in connection therewith remained as before. His office was the same as it had been, except that his powers and privileges were enlarged. Accordingly, we must look to the fact, on the one hand, that Mr Macintyre had been admitted to a parliamentary church and district prior to the decree of erection in his case, and, on the other hand, that Mr Brown had never been admitted to any office or benefice in the church until he was admitted to the *quoad sacra* church and benefice of St Margaret's. In Mr Macintyre's case, no one could have prevented him from continuing to occupy the district church and manse. His position as regards his civil rights in connection with the benefice remained the same after as before the decree of erection. In Mr Brown's case it is different. Prior to the decree of erection he had no other connection with the chapel of ease than that he was employed to conduct service there, and the trustees and subscribers might have limited his contract of employment in any way they pleased. The guarantee for £150 of stipend was a mere private arrangement. There was no security or endowment, and there was no payment or anything else to which he was entitled by virtue of his office.

Such being the state of the facts, and there being the differences I have pointed out between the present case and that of *Macintyre*, it is not necessary to say much about the terms of the statute. But a short reference to these will make the case more clear. Every minister who is admitted to a benefice becomes thereby entitled and bound to become a contributor to the Widows' Fund, but that is only when he is admitted to a benefice. It surely cannot be said that he is admitted to a benefice when he is appointed to a chapel of ease with a personal guarantee of stipend limited to three years. There is no benefice there. No doubt a parliamentary minister is not considered in the proper sense to hold a benefice when he is appointed and inducted, but at anyrate he is appointed to a permanent office, and although a decree of the Teind Court alters materially the character of the district and church, and the minister's

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status and powers, it in no way affects his title to remain there, which was secured to him when he was presented and inducted.

I think there is a clear distinction between this case and that of *Macintyre*, and that Mr Brown having been now duly inducted is entitled and bound to become a contributor to the Widows' Fund.

LORD MURE.—I am of the same opinion, and I have little to add. Mr Brown is now admittedly minister of the *quoad sacra* parish and church of Dumbiedykes, erected under decree of the Court of Teinds in 1886, and that being so, he was, I think, *ex facie* of this position, entitled and bound to become a contributor to the Ministers' Widows' Fund. It has, however, been argued by the first party that this contention must fail, because of the judgment in the case of *Grant* (11 D. 1370), in which it is said to have been laid down that ministers who have held the charge of a *quoad sacra* church or district before the date of its erection under the statute were not entitled to become contributors to the fund; and that this was the position of the second party in the present case. Now, assuming that to have been so decided in the case of *Grant*, which is, I think, doubtful, it appears to me that the circumstances of this case are not such as can bring it under any such rule. Because there was not, as I conceive, anything in the arrangements under which the second party officiated in that church, prior to the erection of the *quoad sacra* parish, which can be held to have disqualified him from becoming a contributor to the Widows' Fund in respect of the decision in *Grant's* case. There was no district attached to his ministry before the date of erection in 1886 equivalent to a district or parish; but he was simply the minister of a chapel of ease, and not the minister of a *quoad sacra* district. I therefore agree with your Lordship.

LORD ADAM.—It is quite clear to my mind that Mr Brown was admitted to be minister of the *quoad sacra* parish and church of Dumbiedykes for the first time in 1885. Before that time he was only minister of a chapel of ease, which is not a benefice in any sense. I think the case is quite clear, and I should not have seen any difficulty except for the case of *Grant*. But upon consideration, I do not think the two cases are identical, or even similar.

LORD SHAND was absent.

THE COURT accordingly answered the question in the affirmative.

INGLIS & ALLAN, W.S.—MACKENZIE & BLACK, W.S.—Agents.

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Foulis v.
Fairbairn.

MRS E. W. MOFFAT OR FOULIS, Pursuer (Reclaimers).—*Salvesen*.
F. S. FAIRBAIRN, Defender (Respondent).—*Murray—Watt*.

Aliment—Mother and Son-in-law—Amount.—*Held* (following *Moir v. Reid*, 4 Macph. 1060), that a husband is bound to contribute to the aliment of his wife's mother when her circumstances are such as to entitle her to aliment from her children.

Aliment.—Circumstances in which a widow, unable to support herself, was held entitled to aliment from her children at the rate of £40 per annum.

1st DIVISION.
Lord Lee.
B.

MRS E. W. MOFFAT OR FOULIS, residing at Hastings, widow of the late Robert Foulis, raised this action against F. S. Fairbairn, solicitor, Gala-shiels, her eldest daughter's husband, concluding that the defender should be ordained to make payment to the pursuer of the sum of £40 yearly, or

such other sum as our said Lords shall determine to be fair and reasonable, No. 189.
as his proportion of a contribution to the aliment to which the pursuer is
entitled from the members of her family "during the joint lives of the July 20, 1887.
pursuer and defender." Foulis v.
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The pursuer (in a record amended in the Inner-House), averred that she was the widow of the late Robert Foulis, head master of the New Plymouth High School, New Zealand, who died on 21st July 1885, and that since her husband's death she had been in very poor circumstances, and was now dependent for her maintenance upon the contributions of such of her family as were able to assist her. She stated that her eldest son Dr Foulis, a medical practitioner in England, was the only member of her family (other than the defender) who was able to contribute to her support, and that he had done so, and was willing to contribute a sum equal to that for which the defender might be found liable in the present action.

The defender denied, *inter alia*, that Dr Foulis was the only member of the family, other than his wife, who was in a position to assist the pursuer, and stated that she was in receipt of a sum of £52 per annum for personal maintenance from Dr Foulis, and that accordingly he declined to pay.

The pursuer pleaded;—The defender being bound to aliment the pursuer, his mother-in-law, and the sum sued for being fair and reasonable as his proportion of the aliment to which the pursuer is entitled from the members of her family, she is entitled to decree in terms of the conclusions, with expenses.

The defender pleaded;—(1) The statements of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (2) The pursuer not being indigent, the present action ought to be dismissed. (3) The defender being only the son-in-law of the pursuer, is not liable to aliment the pursuer, or, at least, is not liable to contribute to the aliment furnished for her by her own children.

The Lord Ordinary (Lee), on 27th May 1887, pronounced this interlocutor:—"Finds it not disputed that the pursuer is in receipt of aliment from a son at the rate of £52 per annum; and finds that the allegations on record are not relevant and sufficient to support the conclusions of the present action: Therefore dismisses the action, and decerns," &c.

The pursuer reclaimed.

The Court then allowed a proof, which was taken before Lord Shand. It appeared from the evidence that only two of Mrs Foulis' children, viz., Dr Foulis and Mrs Fairbairn, were in a position to contribute to her support; that since the end of 1886 she had been endeavouring to get employment, such as she could undertake, but without success. Dr Littlejohn who was examined for the defender, deponed that Mrs Foulis, although weakly, was suffering from no disease. He added,—“I think she is not fit for manual work, or for going upstairs; but I think she might act as a companion, or keep lodgers with the aid of servants.”

The pursuer deponed that she was the daughter of the late T. M. Moffat, S.S.C. and S.L., and that prior to her marriage she had done nothing to support herself, that her husband had been seven years head master of James Gillespie's School in Edinburgh, that in consequence of his health breaking down he went to New Zealand in 1877, and that at the time of his death he was rector of the New Plymouth High School there.

The pursuer argued;—Upon the evidence it was in vain for the defender to say Mrs Foulis could earn anything. It was further proved that Dr Foulis and Mrs Fairbairn alone of her children were able to support her. It was settled that a son-in-law was bound to contribute to the aliment

No. 189. of his mother-in-law, and the defender was therefore liable.¹ As to the amount of aliment, the £40 given in *Thom v. Mackenzie*² was less than the Court should award, now that the expense of living was greater.

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The defender argued ;—There was nothing in the physical condition of the pursuer to prevent her from earning her livelihood. She was not therefore “indigent,” and had no claim for maintenance against others.³ In the case of *Mackenzie*,³ the question of Mrs Mackenzie’s indigence was not determined, owing to the judicial offer which was made. But besides proving indigence on her own part, the pursuer was bound to prove superfluity on the defender’s part.⁴ (LORD PRESIDENT.—But there is no averment or plea to that effect.)

Besides *Moir v. Reid*, which found a son-in-law liable to support his mother-in-law, was not well decided.⁵ Due weight was not given in that case to the opinions of the Judges in the case of *Macdonald*⁶ to the effect that a son-in-law was not liable to support his father-in-law.

As to the amount, *Mackenzie’s* case² ought to be followed.

LORD PRESIDENT.—It is not in our power to review the judgment which was pronounced in the case of *Moir v. Reid*, 4 Macph. 1060. It was a unanimous judgment, and I still remain of opinion that it was a sound one. Accordingly, on the assumption that the son of the pursuer and her daughter, as represented by her husband the defender, are equally liable to support the pursuer, the only question which we have to decide is the amount which they are to contribute. I am not disposed to go beyond the sum which the Court judged to be sufficient in the case of *Thom*, 3 Macph. 177. That case was a very fair precedent for Mr Murray to found upon, and therefore I think we shall do justice to the pursuer if we decern against the defender for the one-half of £40, the other half being provided by Dr Foulis.

LORD MURE concurred.

LORD SHAND.—The case of *Moir v. Reid* was decided in 1866 and we are now in 1887, and your Lordship has pointed out that the judgment was a unanimous one. But, if the matter which was there decided could have been opened up, I should not have regretted it, for I have always entertained considerable doubts as to the soundness of the judgment. Although in the general case a husband when he marries incurs liability for his wife’s debts, I think that in a case like the present there is room for saying that that general principle does not apply.

Otherwise, I agree that £40 is a sufficient sum to award to the pursuer.

LORD ADAM concurred.

THE COURT pronounced this interlocutor :—“The Lords decern against the defender for payment of aliment to the pursuer at the rate of £20 per annum as his contribution towards the support of the pursuer, and that half-yearly, beginning the first

¹ *Moir v. Reid*, July 13, 1866, 4 Macph. 1060, 38 Scot. Jur. 551 ; *Laidlaw v. Laidlaw*, July 3, 1832, 10 S. 745.

² *Thom v. Mackenzie*, Dec. 2, 1864, 3 Macph. 177, 37 Scot. Jur. 86.

³ *Erskine’s Inst.* i. 6, 56.

⁴ *Hamilton v. Hamilton*, March 20, 1877, 4 R. 688.

⁵ *Fraser on Parent and Child*, 115.

⁶ *Macdonald v. Macdonald*, June 20, 1846, 8 D. 830.

term's payment at Martinmas 1886: Find the pursuer entitled No. 189. to expenses," &c.

STURROCK & GRAHAM, W.S.—THOMAS DALGLEISH, S.S.C.—Agents.

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THE MARQUIS OF HUNTLY AND OTHERS, Pursuers.—*Pearson.*
THE EARL OF FIFE, Defender.—*Balfour—Lorimer.*

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Marquis of
Huntly v.
Earl of Fife.

Superior and Vassal—Conveyancing Act, 1874 (37 and 38 Vict. c. 94), sec. 4, subsecs. 1 and 3—Implied entry—Trustees for payment of debts.—Held by Lord Kinnear, Ordinary, that the infestment of trustees under a trust-disposition for payment of certain debts, containing a power of sale, and an obligation on the trustees to reconvey when the trust purposes were satisfied, did not divest the granter of the disposition of the feudal fee, and that the implied entry obtained by the trustees by recording the disposition did not entitle the superior to a casualty.

THE present Marquis of Huntly was served heir of tailzie and provision to his father, the late Marquis, by decree of special service, dated 1st November 1866, and he was infest by recording the decree in the General Register of Sasines on 5th December 1866. OUTER-HOUSE
Lord Kinnear.

On 9th June 1882 the Marquis conveyed to certain persons as trustees the lands of Davoch and Inverenzie, for payment of certain debts. The deed gave the trustees the same powers of sale as were possessed by the granter, and contained an obligation on the trustees to reconvey when the trust purposes were satisfied.

The trustees were infest by recording the disposition on 21st June 1882. The superior, the Earl of Fife, demanded a composition from the trustees in respect of the implied entry.

The Marquis of Huntly and the trustees raised an action against the Earl of Fife, concluding to have it found and declared (1) that the Marquis as proprietor of the lands of Davoch and Inverenzie was duly entered with the said defender as superior in these lands; (2) that the pursuers were liable only in payment of relief-duty of one penny Scots, and that no further composition or relief-duty was payable by the pursuers or either of them to the Earl of Fife in respect to the lands during the life of the Marquis of Huntly; and (3) that the said trustees were not liable in any composition in respect of the said trust-disposition in their favour and infestment thereon.

The pursuer pleaded;—(1) The pursuer the said Marquis being the heir of the vassal last entered who paid a casualty, and being himself duly entered by operation of the Conveyancing Act, 1874, is only liable in a relief-duty. (2) The pursuers as trustees not being proprietors of the said lands, are not liable in a composition.

The defender pleaded;—(1) By virtue of the Conveyancing Act, 1874, the trustees under the trust-disposition of 1882, and not the Marquis of Huntly, are now duly entered with the defender as superior.† (2) The

* Decided Dec. 5, 1885.

† Conveyancing Act, 1874, sec. 4, subsec. 2,—“Every proprietor who is at the commencement of this Act, or thereafter shall be, duly infest in the lands, shall be deemed and held to be, as at the date of the registration of such infestment in the appropriate Register of Sasines, duly entered with the nearest superior.” . . . Subsec. 3—“Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the land at or prior to the date of such entry . . . but provided always that such implied entry shall

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disponees under the trust-disposition of 1882 are liable to a composition of a year's rent, although the same may not be exigible during the lifetime of the Marquis of Huntly.

The Lord Ordinary (Kinnear) repelled the defences, and pronounced decree of declarator in terms of the conclusions of the summons.*

not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering."

* "OPINION.—The Marquis of Huntly's title to the lands in question was completed in 1866 by recording a decree of special service in his favour as heir of tailzie and provision to his father, the late Marquis, in the General Register of Sasines. He was therefore in the position of being infeft base under the deceased Earl of Fife by virtue of Service of Heirs Act when the Conveyancing Act of 1874 came into operation and effected his entry with the defender as the nearest superior. He thus became liable in payment of a relief-duty, which amounted to one penny Scots, the lands being held for payment of one penny in name of blench-farm if asked allenarly. But payment was not asked nor offered, and no consideration has yet been given for a renewal of the investiture.

"A variety of deeds for disentailing and re-entailing the lands were executed between 1876 and 1884, none of which in any way affected the investiture. But in 1882 the Marquis conveyed the lands to the other pursuers in trust for the payment of certain specified debts, with a power to sell to the extent to which the Marquis himself had power to sell and realise under his titles, but under an obligation to reconvey when the trust purposes have been satisfied. The trustees were infeft by recording the disposition in their favour, and thereupon were entered with the defender as superior by the operation of the Act of 1874.

"The question in these circumstances is, whether the casualty now payable to the defender is the relief-duty of one penny Scots for the entry of the heir, or a year's rent of the lands as composition for the entry of a singular successor!

"The question depends upon whether the Marquis is still proprietor infeft in the subjects in question, or whether he has been divested in favour of his trust-disponees. If he is undivested he is clearly entitled to the declarator he seeks, because in that view he is the vassal infeft in the lands and duly entered with the superior.

"On the other hand, if there is no subsisting fee in him he can have no title to interpose between the superior and his disponees, who on that supposition will have been entered as vassals in his room.

"If the disposition therefore had been *ex facie* absolute, I think it clear that the superior would have been entitled to exact payment of composition as for the entry of a singular successor. The investiture of a disponee upon an absolute title would have left no room for the supposition of a continuing fee in the disponent, and the previous entry of the divested disponent would afford no answer to the superior's demand, because as no consideration was paid for his entry, he (the superior) would not have been demanding a casualty sooner than he might have done under the prior law. There can be no question that a casualty is presently exigible, because no casualty has been paid on entry by any living vassal. It is settled by the case of *Mounsey v. Palmer*, 12 R. 236, that the superior's demand is available against the actual vassals alone, and whether they are to pay composition or relief must depend upon the character in which they have entered.

"But it has been settled law since the case of *Campbell v. Ederlin's Creditors*, that an infeftment under a conveyance which bears on its face to be a conveyance in trust for the payment of creditors, even although it gives a power of sale to the trustees, does not divest the grantor of his feudal title to the subject conveyed, but merely operates as an incumbrance upon his right. The feudal fee in the Marquis of Huntly therefore has not been transferred to his trust-disponees, but remains in him precisely as it was before the trust-disposition was executed, but subject to a burden, which may be extinguished by a dis-

charge, or by payment of the debts in security of which it was created. If the trustees were to sell in the execution of these powers, the Marquis would be divested by the infestment of the purchaser, but until a sale is effected he is still the proprietor infest. This is fixed beyond all question as a principle of feudal conveyancing.

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"It follows that the Marquis of Huntly is still the vassal infest in the lands, and as such he is entitled to protect his estate by tendering payment of the relief-duty, which is undoubtedly exigible and which has not been paid. It is said to have been decided by the cases of *Lamont v. Rankine* and *Ferrier v. Baillie* that there is no room for the entry of an heir to the granter of a trust-disposition after the trustees have been entered by the implication of the statute, and that by the same reasoning the granter himself cannot continue to hold the position of an entered vassal after his disponees have been infest. But all that was decided in these cases was that it is no more possible under the existing law than under the law as it stood before the Conveyancing Act for two co-ordinate infestments to co-exist in the same fee. And the principle upon which the decision in the case of *Ederline* and the numerous cases which followed it proceeded is, that the infestment of a trustee for the payment of debts is not co-ordinate with the infestment of the granter, but may co-exist with it as a mere encumbrance. There is nothing inconsistent, therefore, with *Lamont v. Rankine* and *Ferrier v. Baillie* in holding that the Marquis of Huntly is still undivested of the feudal fee which was vested in him by his recorded service and by the operation of the Conveyancing Act. Nor would these decisions create any obstacle to the service of his heir-at-law if the fee became vacant by his death while the lands remain unsold in the hands of the trustees. The implied entry of the trustees under a mere security title will no more divest the truster of the estate held of his superior than their infestment upon his own precept will divest him of the *dominium utile*.

"The defender, however, maintains that the implied entry of the trustees by the operation of the Conveyancing Act entitles him to payment of a composition, because trustees for creditors, under the old law, could not have obtained an entry upon other terms. The cases must have been exceedingly rare in which such trustees thought it necessary to enter where the lands were held of a subject, since it was not desirable to begin the administration for creditors by the sacrifice of a year's rent. It is true, however, that if they did desire to enter they could not compel the superior to receive them except on payment of composition; but it does not follow that under the present law the superior can demand payment for an implied entry. He must shew that he could have required the trustees to enter under the prior law, and he could not have done so if the fee was already full.

"It is said that the conveyance may turn out to be an absolute alienation because the trustees may sell, and that the pursuers are not entitled to the decree they ask so long as the effect of the conveyance is in suspense. But if the effect of the conveyance is in suspense, it has not divested the granter. If the trustees should sell and convey the estate or a part of it to a purchaser, their disponee will be entered as a regular successor, and he will have to pay composition in that character if the fee would at that time have been vacant but for his entry. But in the meantime it is filled by Lord Huntly, and he and his trustees had a legitimate interest to secure his position by payment of the relief-duty in order to protect their disponees against any demand for composition being brought against them sooner than they could have been required to enter under the old law."

APPENDIX.

The following Report, appended to the Defender's Minute of Debate in the case of the Glasgow Provident Investment Society v. Westminster Fire Office, supra, p. 947, is referred to in Lord Trayner's opinion in that case :—

EXTRACT from *The Review* of 13th January 1886.

HIGH COURT OF JUSTICE—QUEEN'S BENCH DIVISION, December 18, 1885.

(Before Mr Justice CAVE and Mr Justice WILLS.)

Nichols & Co. v. Scottish Union and National Insurance Company.

Dec. 18, 1885.
Nichols & Co.
v. Scottish
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surance Co.

HIGH COURT
OF JUSTICE
(ENGLAND).
Justice Cave.
Justice Wills.

THIS case, which came before the Court on a special case stated by an arbitrator for the opinion of the Court, was an action brought by the plaintiffs, who are paper manufacturers at Grimshaw bridge, near Darwen, to recover from the defendants, a fire insurance company incorporated by special Act, with head offices at Edinburgh and London, the sum of £416, claimed under an agreement of fire insurance. Before the proposal to insure them, certain mills, or property connected therewith, known as Grimshaw Bridge Paper Mills, in the township of Yates and Peckup-Bank, in the county of Lancaster, and a steam-engine, boiler, and other machinery and chattels connected therewith, and certain other property in Eccleshill, in the said county, had been mortgaged to the Blackburn and District Permanent Benefit Building Society, and this society, under the powers of their mortgage, had agreed by memorandum in writing, dated January 28, 1878, to sell the said mills and property to the plaintiffs for £5250; £250 of this sum was to be paid in cash, and the remainder of the purchase-money, £5000, was to be secured by mortgage of the premises in the form ordinarily used by the society. The plaintiffs by the agreement agreed to take, and took, 500 shares in the said society, pursuant to the rules thereof, being let into possession of the premises from the date of the agreement. They were then called upon under the rules of the society to insure the property in the names of the trustees. On July 11, 1878, Mr S. A. Nichols, being an agent of the Lancashire Insurance Company, effected an insurance with it for £4000. The buildings in the policy were numbered 1, 2, 3, 4, and 5. Building 1 was insured for £300, buildings 2 and 3 for £650, and buildings 4 and 5 for £200. On 3d December 1878 the plaintiffs, for their own benefit, proposed to the defendants to effect an insurance against fire with them on the said mills and property to the extent of £2500; this sum was distributed over the various portions of the said mills and property, £1500 of it being attributed to the buildings 1, 2, 3, 4, and 5. Thus, at the time of the loss or damage by fire which took place on the premises on 22d December 1878, there was an insurance in the names of the trustees subsisting effected with the Lancashire Company, and another subsisting effected in the name of the plaintiffs with the defendant company for £1500 covering the same buildings. The damage by the fire to the buildings was fixed and ascertained at £1554. Before action the defendants had paid to the plaintiffs £1083, and the Lancashire Company had effected repairs to No. 1 building to the extent of £24, and had paid to the trustees £30, which sum was subsequently paid or allowed by the trustees to the plaintiffs, leaving £416, the amount of the claim in this action, still unpaid in respect of the loss. It was admitted that, assuming the defendants were liable to a rateable proportion only, this amounted to £1083, which they had already paid. The question for the Court

was, whether, under the circumstances, the plaintiffs were entitled to recover from the defendants the £416. Rule 43 of the society was in these terms:—"All property mortgaged to this society shall be insured, and the secretaries shall effect the insurance immediately upon any advance being made in the names of the trustees of the society, and shall continue the insurance for such an amount as the board may consider necessary. The member on whose account such premiums for insurance shall be paid shall, on demand, refund the amount so paid, or the secretaries shall be authorised to deduct it from the first money tendered to them by such member." Rule 45,—“When any property mortgaged shall have sustained damage by fire, the secretaries, on behalf of the trustees, shall receive the amount of the damage so sustained from the insurance office, and shall give a receipt for the same, which shall be a sufficient discharge to the office liable by virtue of any policy of insurance. The money received for such damage shall be applied to the payment of the amount secured in the mortgage deed of the premises, or, at the option of the board, shall be expended in repairing the damages.” The ninth and tenth conditions of the policy issued by the Lancashire Insurance Company were in these words:—

“9. If at the time of any loss or damage by fire happening to any property hereby insured there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage.

“10. In all cases where any other subsisting insurance or insurances, whether effected by the insured either exclusively or together with any other property in and subject to the same risk only shall be subject to average, the insurance on such property under this policy shall be subject to average in like manner.”

Mr Henn Collins, Q.C. (with whom was Mr Bigham, Q.C.), for the plaintiffs, cited *Lees v. Whiteley* (L. R., 2 Eq. 143) and *The North British and Mercantile Insurance Company v. The London, Liverpool, and Globe Insurance Company* (5 Ch. Div. 569).

Mr Cohen, Q.C. (with whom was Mr J. Gorell Barnes), for the defendants, cited *Darrell v. Tibbets* (5 Q. B. Div. 560), and *Castellain v. Preston* (11 Q. B. Div. 380). With reference to the case of *The North British and Mercantile Insurance Company v. The London and Liverpool and Globe Insurance Company* (*sup.*), the learned counsel said that the decision in it had astonished insurance companies, and induced them to insert the word “buildings” instead of that of “property” in their policies.

Mr Justice CAVE said the question for the Court was whether the insurance with the Lancashire Insurance Company covered that effected by the plaintiffs with the defendant company. If the interest is the same, the plaintiffs were only entitled to the moneys already paid to them. Rule 43 of the society would appear to leave the matter open. It is necessarily of the greatest importance to the mortgagee that the property should be insured. Whether the name of the mortgagor and mortgagee be given in a policy is immaterial to the mortgagee, but this is otherwise with the mortgagor. The present issue was really decided by rule 45, the terms of which were fatal to the contention of the plaintiff.

Mr Justice WILLS concurred.

JUDGMENT.

Mr JUSTICE CAVE.—The question in this case is whether, as is stated in the seventh paragraph of the case, the insurance with the Lancashire Company does

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cover the same interest as that effected with the Scottish Union and National Insurance Company. If the interests are the same in the two policies, why, then, the clause set out in paragraph 7 applies, and the plaintiff is only entitled to recover a proportion of the loss or damage from the defendants. If, on the other hand, the interests are different, why, then, there is nothing in common between the two, and that paragraph does not apply. In other words, if it is the interest of the mortgagor which is insured in the policy with the Lancashire Company, then, as it is undoubtedly the interest of the mortgagor which is insured in the policy with the Scottish Union Company, the interests insured are the same; but, if in the policy with the Lancashire Company it is the interest of the mortgagee only that is insured, why, then, the interests are not the same. In order to see which of those is the right construction, one must look through, firstly, the agreement between the parties. Now, the agreement between the parties was contained, amongst other things, in the rules of the society, and the material parts of those rules are to be found in rules 43 and 45. Rule 43 says,—“All property mortgaged to this society shall be insured, and the secretaries shall effect the insurance, immediately upon any advance being made, in the names of the trustees of the society, and shall continue the insurance for such an amount as the board may consider necessary. The member on whose account such premiums for insurance shall be paid shall, on demand, refund the amount so paid, or the secretaries shall be authorised to deduct it from the first money tendered to them by such member.” Now, it appears to me that clause so far leaves the matter still open. All that it provides for is, that there shall be an insurance. Now, it is to the interest, of course, of the mortgagee that there shall be an insurance, because he relies for the recovery of his money, first, on the personal liability of the mortgagor, and secondly, upon the property which he takes in mortgage. If by any accident the property taken in mortgage is destroyed by fire, it is obvious that, unless in some way he is protected by insurance, he is thrown back on the personal liability of the mortgagor, and, therefore, where the property mortgaged is capable of being destroyed by fire, it is important for the security of the mortgagee that he should in some way or other be insured. Now, whether the interest of the mortgagor is insured, or whether the interest of the mortgagee alone is insured, is, for the purpose of the mortgagee, immaterial, because in either case he will be safeguarded. For the purposes of the mortgagor, of course, it is far from being immaterial, because, if it is only the interest of the mortgagee that is insured, he derives no benefit from it whatever, whilst, if it is his own interest that is insured, he does derive a corresponding benefit. Now, therefore, where it is the subject of agreement between the parties, one *prima facie* would expect the mortgagor to stipulate that his interest should be insured, especially where he himself has to pay the premium, because, in that case, he would derive an advantage which he would entirely fail to get from the payment if it is confined solely to the interest of the mortgagee, and provided provision is made for the mortgagee getting hold of the insurance money, it is, as I have said, quite indifferent to the mortgagee whether the interest is that of the mortgagor,—that is to say, the whole interest in the property,—or the interest of the mortgagee in getting his debt paid. Now, that being so, we come to Rule 43, which provides that “when any property mortgaged shall have sustained damage by fire, the secretaries on behalf of the trustees shall receive the amount of the damage so sustained from the insurance office, and shall

give a receipt for the same, which shall be a sufficient discharge to the office liable by virtue of any policy of insurance." So far, again, there is nothing to shew very conclusively which interest it is which is intended to be insured. Then we come to the latter part of the clause :—"The money received for such damage shall be applied to the payment of the amount secured in the mortgage deed of the premises, or, at the option of the board, shall be expended in repairing the damages." Now, it seems to me that that clause is decisive of the question at issue. If the money is to be applied in payment of the amount secured in the mortgage deed, either it is to be applied for the benefit of the mortgagor, because his debt is to that extent wiped out, or, if it is not applied for the benefit of the mortgagor, what follows?—that that clause is merely ridiculous. It says :—"The money received for such damage shall be applied to the payment of the amount secured in the mortgage," leaving the mortgagees, nevertheless, at liberty the very next moment to bring an action for that very same money, only for the benefit of the insurance company, instead of for their own benefit. Now, it is absolutely impossible to conceive that any stipulation of that kind should have been made between the parties. There is no earthly object in it, unless that means that the money is to be applied in payment of the amount secured by the mortgage deed, and to that extent is to discharge the mortgagor from his liability. I cannot conceive what earthly possible use there could have been, as between mortgagor and mortgagee, in inserting that clause in an agreement which was intended to affect their rights as between themselves. It seems to me that the only possible construction which one can, in common sense, put on that is, that the moneys, when received from the insurance company, are to be applied to the benefit of the mortgagor, as well as the benefit, incidentally, of course, of the mortgagee, and that, consequently, the interest which is insured is really the interest of the mortgagor, including, as of course in such a case it does, also the interest of the mortgagee, that is to say, the mortgagee derives incidentally a benefit from it. But the person who is intended to be benefited in the first place, and through him incidentally the mortgagee (because you cannot benefit the mortgagor without benefitting the mortgagee), is the mortgagor; and when you consider that the premiums are to be paid by the mortgagor, and that this is a subject-matter in which payments of principal are continually being made from time to time, so that the interest—that is to say, of the mortgagee—is continually diminishing, becoming less and less as time goes on, why, every consideration points to the desirability of insuring, not an interest which is continually growing less and less, and which will not do the mortgagor one pennyworth of good, but of insuring an interest which will remain the same throughout, and which will benefit the mortgagor equally with the mortgagee. Then, that being the state of things, the mortgagees have undertaken that the property shall be insured, the mortgagor of course paying the premiums, and they have undertaken that they will receive the money and will apply it to the benefit of the mortgagor. Now, then, how are they to do that? The only way in which they can do that is not by insuring their own interest only, because that would not effect the purpose at all. They can only do it by insuring the interest of the mortgagor, and, when you come to the document itself, the document itself does not contain a single word which in any way limits the interest to be insured to the bare interest of the mortgagee—that is to say, to secure that he shall be paid, leaving the insurers to be subrogated in his place, and to sue the mortgagor. On the contrary, it is a

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form of policy of insurance which is applicable where the whole interest is intended to be insured, and nothing is said in it at all as to how much of the interest in those buildings is to be insured. But the buildings themselves are spoken of as being the property which is to be insured, and, as I have said all through, the language of the policy is just that which it would be if the whole were endeavoured to be secured. Now, suppose an action were brought in the name of the trustees of the building society upon this policy of insurance, it is wide enough to cover the total interest in the property as far as the language goes. Now, what answer could they set up? They would set up,—“Well, but you have got no interest. You, Henry Ward and George Pickup Hartley, you represent the Building Society. You have described yourselves as trustees of the Building Society, and you have no interest in having these moneys under the circumstances of the case; or, at all events, if you have an interest in getting them out of us, it is only for your own protection, and we must be put in your position so that we can sue Nichols.” The answer to that, I think, would be,—“Oh, dear no; that is not so at all. We have entered into an agreement with Nichols, by virtue of which we have engaged to apply these policy moneys in such a way that they wipe out his debt, and if you contend that they are only to be paid to us upon the terms that we shall immediately put in our claim and sue him for this debt, then they do not wipe out the debt at all, and then we have broken our agreement with him, and then we shall be liable to be sued by him; and we shall be liable to be sued by him for the very sum which he would have to pay you, and consequently we shall get nothing at all out of our insurance.” The real way out of that difficulty is to hold what seems to me to be the intention of the parties, that the total interest in the property was intended to be insured for the benefit of the mortgagor, and so incidentally for the benefit of the mortgagee, consequently, that the contention of the defendants is right, and that our answer to this case must be in their favour.

MR JUSTICE WILLS.—I am of the same opinion. Under a clause like the one with which we have to deal, a clause as to payment in rateable proportion only by the insurance company, who are defendants in this case, the question always is, whether the subject-matter of that insurance and of the insurance with another company, which is said to give rise to the right of the first insurance company to pay a rateable proportion only, is identical. If it is, the clause applies. If the subject-matter of the insurance in the two policies is different, then it does not apply. Now, in a case like the present, in which the question arises with respect to the mortgagor and mortgagee, the question, therefore, must be always whether the policy effected in the name of the mortgagee is really an insurance of his interest, or whether it is an insurance of a part of the interest covered by the policy effected by the mortgagor for the whole value of his goods. Now, if it is intended to be for the benefit of the mortgagee only, this consequence would follow, that the payment of the money secured by it by the insurance company with which the mortgagee insures in no way alters the relations between the mortgagor and the mortgagee, and when it is paid, and although it is paid, the mortgagor is still liable upon his covenant in the mortgage deed to pay the whole amount of the mortgage money which may still be owing to the mortgagee, and really the consequence of that is, that we must always look at the substance rather than the form in these matters. The consequence of that is, that really the second policy, although in form an insur-

ance of the property described in the same words as in the original policy, is really an insurance of the solvency of the mortgagor and of nothing else, because the relations between the mortgagor and mortgagee being unaffected by the payment of the subject of insurance to the mortgagee, it follows that the insurance company which has effected that insurance would have a right to sue the mortgagor in the name of the mortgagee and to recover to the extent to which they had paid any debt that might be due upon a mortgage contract between the mortgagor and the mortgagee. So that, when you come to deprive the matter of all the mere circumstances and mere forms, and come to the substance of it, it is an insurance of the solvency of the mortgagor, and it does not go beyond that. That being so, it certainly is not an insurance of the same subject-matter as that which has been effected by the mortgagor who has made his insurance in the ordinary manner on the physical property which he describes in his policy. Now, anything, therefore, which goes to shew that that is not what the parties intended, goes of necessity to prove that the real substance of the insurance effected by the mortgagee is not one merely for his own benefit, but is one on behalf of the mortgagor, although nominally on behalf of the mortgagee. Now, when we come to look at clause 45, and to take clauses 43 and 45 together, it is hardly possible to doubt that there are elements in this case which go to shew that the benefit of the insurance must enure to the mortgagor and not to the mortgagee, because, when the insurance company pay the money, it is as between the mortgagor and the mortgagee to be deemed an extinction *pro tanto* of the debt, or else is to be applied (which comes to the same thing as far as his pecuniary interest is concerned) in repairing or rebuilding the premises, that is to say, in reinstatement. That shews to my mind conclusively that it is in substance, although not in form, an insurance for the benefit of the mortgagor. If so, it is an insurance in substance (although not in form) *pro tanto*, and, to the extent to which it goes, an insurance which covers exactly the same subject-matter as the original insurance on the part of, and in the name of the mortgagor; and the moment it is established that there is an identity of subject-matter, then it seems to me to be past all possibility of argument that the rateable clause does apply. I am of opinion, therefore, in this case that it does apply, and that our judgment must be for the defendant.

MR COHEN.—That will be judgment for the defendants with costs, my Lord?
MR JUSTICE CAVE.—Yes.

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ADMINISTRATION OF JUSTICE. *Removal of law-agent's name from roll—Law-Agents (Scotland) Act, 1873 (36 and 37 Vict. cap. 63), secs. 13 and 14.*

1. In a petition by the Incorporated Society of Law-Agents praying the Court to direct the removal, from the rolls of law-agents in the Court of Session and in the Sheriff Court of the Lothians and Peebles, of the name of a law-agent who had been convicted of an offence under the 11th section of the Criminal Law Amendment Act, 1885, and had been expelled from the Society of Solicitors before the Supreme Courts, the Court in the circumstances, and having regard to a representation signed by a large number of enrolled law-agents to the effect that he should not be removed, *refused* the petition. Incorporated Society of Law-Agents in Scotland v. Clark, Dec. 3, 1886, p. 161.

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2. Action of damages against public official. *M'Murphy v. Campbell*, May 21, 1887, p. 725; *Beaton v. Ivory*, July 19, 1887, p. 1057.

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3. *Observations* upon the powers of Magistrates to make apprehensions without written warrant. *Beaton v. Ivory*, July 19, 1887, p. 1057.

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4. Alleged competition of civil right. *Scott v. Thomson*, June 4, 1887, Just. Cases, p. 45.

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1. In an action brought by a client against a firm of law-agents for recovery of money invested through them on a bad security, it was proved that the agents acted for both parties, the borrowers being the brothers of the leading partner of the agents' firm. The client, a widow lady of middle age, handed the money, a sum of £400, to this partner, and he lent it at five per cent on the security of house property bought by the borrowers immediately before for £1350, and already burdened with a bond for £1000 and a feu-duty of £15. The pursuer averred and deponed at the proof that she had told her agent to lend her money on a first bond, and had given no further instructions; the agent, on the other hand, averred and deponed that he had arranged with a relative and adviser of the pursuer, since dead, before he met her, that this particular security should be taken, and that it was taken with her full approval and in knowledge of its being a postponed security. There was no other material evidence. *Held* on the proof that the defender had been employed as agent for the pursuer, and that that agency was not limited, as the defender averred, and that, therefore, the security being such as no prudent agent should have taken for a client, the defender was liable for the loss. *Oastler v. Dill, Smillie, & Wilson, &c.*, Oct. 29, 1886, p. 12.
2. Circumstances in which the Court *held* that a firm of law-agents were not

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Agent's responsibilities to third parties.

3. *Observations, per curiam*, upon the responsibilities of agents in protecting rights conferred by their clients upon third parties. *Williamson v. Bagg*, May 18, 1887, p. 720.

AGENT AND PRINCIPAL. Stockbroker—Contract for differences.

A stockbroker, in carrying over at the settlement £10,000 "Trunk Thirds" stock bought for a client, sent his client a continuation-note in these terms:—"I have continued for you as under. Sold 10,000 Trunk 3rds at £50, bought at £50, 3s. 3d. com. in a/c." In reality the broker had not bought that amount of stock at the price stated, but had bought a much larger quantity in different parcels and at different prices. These he lumped together and divided among those of his clients who had given him orders for Trunk Thirds, charging as the price the average of the different prices. This average price was that stated in the above continuation-note, and it corresponded to none of the individual prices. In an action by the stockbroker against the client for payment of the differences on a series of such transactions, *held* by a majority of seven Judges (*viz.*, Lord Justice-Clerk, Lords Craighill, Shand, and Adam, *diss.* Lords Mura, Young, and Rutherford Clark), that in so purchasing the stock the pursuer was to be regarded as having bought it on his own account, and not as agent for the defender, and that the defender having employed the pursuer merely as a broker was not responsible, no special custom of trade in regard to brokers on the Stock Exchange having been averred or proved. *Maffet v. Stewart*, March 4, 1887, p. 506.

ALIMENT. Amount—Reasonable provision.

1. The beneficiary under a testamentary trust enjoyed the income of £26,000, which amounted to about £875 per annum, as an alimentary provision from which the diligence of creditors was excluded. He was twenty-six years of age, unmarried, and was subject to no incapacity, mental or physical. He was the second son of a landed proprietor, and, in the event of his surviving his mother, would succeed to an estate. He had no other source of income than the alimentary provision above mentioned. *Held* that, in the circumstances, £500 per annum would be a suitable provision for the beneficiary, and that the balance of the income was open to the diligence of his creditors. *Livingstone v. Livingstone*, Nov. 5, 1886, p. 43.

Of mother-in-law—Amount.

2. *Held* (following *Moir v. Reid*, 4 Macph. 1060), that a husband is bound to contribute to the aliment of his wife's mother when her circumstances are such as to entitle her to aliment from her children.

Circumstances in which a widow, unable to support herself, was held entitled to aliment from her children at the rate of £40 per annum. *Foulis v. Fairbairn*, July 20, 1887, p. 1088.

See Parent and Child, 2, 3.

ALIMENTARY PROVISION. Excess over suitable aliment—Diligence.

A testator directed his trustees to pay certain proportions of the residue of his estate to his grandchildren on their attaining twenty-five years of age, but, in the event of any beneficiary so conducting himself as not to merit the approbation of the trustees, they were empowered to restrict the provision in his favour to a liferent alienary, and it was provided "that it shall not be in the power of the party or parties whose shares have been so restricted to a liferent to sell, assign, dispoise, or convey away his or their

ALIMENTARY PROVISION—Continued.

said liferent, but the same shall be applied for his or their alimentary use alienably, nor shall it be in the power of his or their creditors to attach the said liferent by arrestment, poinding, or other legal diligence, all of which are hereby excluded." *Held* that the alimentary provision was only protected from the diligence of creditors to the extent of a reasonable provision, regard being had to the station and circumstances of the beneficiary, and that *quoad excessum* it was open to diligence. *Livingstone v. Livingstone*, Nov. 5, 1886, p. 43.

APPEAL. House of Lords—Leave to appeal.

Leave to appeal to the House of Lords against an interlocutor appointing a case to be tried before a Lord Ordinary without a jury *refused*. *Scottish Rights of Way and Recreation Society, Limited, v. Macpherson*, Nov. 16, 1886, p. 74.

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ARBITRATION. Oversman, appointment of—Casting lots.

1. Two arbiters, who had power to appoint an oversman, differed as to which of two persons should be nominated. Both were agreed that the two were equally eligible, and eventually they selected one by lot. *Held* that the appointment was valid. *Smith v. Liverpool and London and Globe Insurance Co.*, July 15, 1887, p. 931.

Oversman—Disqualification.

2. *Held* that two arbiters, who had power to appoint an oversman, were not entitled to appoint a person who was a shareholder in an unincorporated company—one of the parties to the reference. *Smith v. Liverpool and London and Globe Insurance Co.*, July 15, 1887, p. 931.

ARRESTMENT. Ship.

1. *Observations* (*per* Lord Fraser) on warrants for arresting and dismantling ships. *English's Coasting and Shipping Co., Limited, v. British Finance Co., Limited*, Dec. 10, 1886, p. 220.

See *Expenses*, 8.

Prescription—Furthcoming—Act 1669, cap. 9—Personal Diligence Act, 1838 (1 and 2 Vict. c. 114), sec. 22.

2. A creditor arrested upon a decree a fund vested in his debtor, but not payable till the death of an annuitant. Within three years of the date of the arrestments the debtor applied for and obtained decree of *cessio*. The arrester appeared to oppose the application, but did not found on his arrestments. *Held* that on the lapse of the three years, the arrestments prescribed, as they had not been "pursued or insisted on" in the sense of the Act 1669, cap. 9.

Observed, that though the arrested fund was not payable till the death of the annuitant, it would have been competent for the arrester to interrupt the course of prescription by raising an action of furthcoming, concluding for payment upon that event. *Jameson v. Sharp*, March 18, 1887, p. 643.

ASSIGNATION. See Trust, 3.**BANKRUPTCY. Effect of Bankruptcy—Illegal preference—Act 1696, c. 5.**

1. Where money is advanced on the faith of a specific security to be immediately granted, it will not vitiate the security that it is not formally completed till within sixty days of the granter's bankruptcy; but when the stipulation is that the debtor shall give security, whether general or over a specific subject, whenever the creditor shall desire it, the granting of the security within sixty days of the granter's bankruptcy is reducible under the Act 1696, c. 5. *Gourlay v. Mackie*, Jan. 27, 1887, p. 403.

Trust for creditors—Stipulation for discharge—Right of non-acceding creditor to sue trustee for share.

2. Where a debtor executed a trust-deed for behoof of acceding creditors, with the condition that all creditors acceding or receiving a dividend should be held to have discharged their claims in full, *held* (1) that a creditor who

BANKRUPTCY—Continued.

did not accede to the trust was entitled to a share of the estate in proportion to his debt unconditionally, and (2) that he was entitled to recover his share by direct action against the trustee. *Ogilvie & Son v. Taylor*, Jan. 27, 1887, p. 399.

Sequestration—Process—Application to sequestrations of Sheriff Court Act, 1876 (39 and 40 Vict. cap. 70), sec. 6.

3. *Question*, whether petitions in the Sheriff Court for sequestration under the Bankruptcy Act, 1856, must be in the form prescribed by the 6th section of the Sheriff Court Act, 1876. *Opinion (per Lord Young)* that they need not. *Cuthbertson v. Gibson*, May 31, 1887, p. 736.

Sequestration—Process—Reclaiming Note—Application to sequestrations of Court of Session Act, 1868 (31 and 32 Vict. cap. 100).

4. *Held* that the Court of Session Act, 1868, did not apply to proceedings under the Bankruptcy Acts, and that a reclaiming note against an interlocutor of the Lord Ordinary on the Bills in an appeal against a resolution of creditors in a sequestration under the 169th section of the Bankruptcy Act, 1856, was competently brought within fourteen days, and without leave of the Lord Ordinary. *M'George v. M'George's Creditors*, June 25, 1887, p. 841.

Sequestration—Process—Election of Trustee—Review of interlocutory judgment before appointment.

5. A note of objections was lodged with a Sheriff against his confirming the election of a trustee on a sequestrated estate, in which the objector alleged that the person elected was unsuitable on various grounds, and that the cautioner proposed was insufficient. The Sheriff allowed a proof, and the trustee appealed to the Court of Session. The Court *sustained* the competency of the appeal, but, without deciding as to the relevancy of the averments, refused to interfere with the Sheriff's exercise of his discretion in ordering inquiry. *Moncur v. Macdonald, &c.*, Jan. 8, 1887, p. 305.
6. In a sequestration a Sheriff pronounced an interlocutor disposing of certain objections to votes in the election of a trustee, and allowing a proof with reference to another objection. The candidate to whom the Sheriff's judgment was adverse appealed. *Held* that the Sheriff's judgment, in so far as it disposed of the objections, was final, and in so far as it allowed a proof, was incompetent. *Reid v. Strathie*, June 29, 1887, p. 847.

Sequestration—Process—Appeal—Resolution accepting composition offer—Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), secs. 138, 139, 169.

7. *Held* that an appeal by certain creditors on a sequestrated estate against the resolution of an alleged statutory majority of their number accepting a composition offer by the bankrupt was competent under the 169th section of the Bankruptcy Act, 1856, and was not excluded by the fact that the appellants had another remedy under the 138th and 139th sections of the Act. *M'George v. M'George's Creditors*, June 25, 1887, p. 841.

Sequestration—Process—Appeal against trustee's deliverance sustaining preferential claim—Duty of trustee.

8. Where an appeal is taken against the deliverance of a trustee in a sequestration, it ought to be served upon the creditor whose interest it is to oppose it, and it is not the trustee's duty to defend his deliverance by appealing against the interlocutor of a Sheriff recalling it, when the result of that appeal, if successful, would be injurious to the interests of the general body of creditors. *Skinner's Trustee v. Keith*, March 4, 1887, p. 563.

Sequestration—Balancing of accounts—Improvements on a pupil's estate by his father without authority—Sequestration of father.

9. A pupil having succeeded to heritage, his father, as his administrator-in-law, proceeded to execute improvements on it, and borrowed money for the purpose, granting, as "tutor-at-law," a bond and disposition in security primarily over the pupil's lands, and secondarily and collaterally over lands belonging to himself, declaring that in the event of his making payment he should be entitled to relief from the pupil's lands and the proprior

BANKRUPTCY—Continued.

thereof. The bond narrated the purpose to which the loan was to be applied. The father having become bankrupt some years afterwards, the trustee upon his sequestrated estate paid up the loan, taking an assignation to the security, including the right of relief, and then sued the son for £500, the amount to which it was admitted he was *lucratus* by his father's expenditure. The son pleaded that he was entitled to set off the rents of his estate (amounting to £310), which were in his father's hands at the date of the sequestration unaccounted for, against the £500. *Held* that the bond was invalid *quoad* the pupil, and that the only obligation upon him was to recompense his father for the sum beneficially expended by him upon the estate, and that this was a debt due to the father at the date of his sequestration against which the pupil was entitled to set the rents then due to him by his father (*diss.* Lord Shand, who held that the history of the transaction shewed that the true creditor in the improvement expenditure was the grantor of the loan, and that the pursuer having obtained an assignation thereto after the sequestration was entitled to full payment of the £500, leaving the son to rank as a creditor on his father's estate for the rents). *Scott's Trustee v. Scott*, July 19, 1887, p. 1043.

See *Judicial Factor*, 1, 6.

BILL OF EXCHANGE. Promissory-note—Sexennial limitation—Terminus a quo—12 Geo. III. c. 72, sec. 37.

1. In the case of a promissory-note payable three months after notice, the sexennial limitation does not begin to run till the lapse of three months after a demand for payment has been made. *Broddelius v. Grischotti*, March 4, 1887, p. 536.

Promissory-note—Stamp—Stamp Act, 1870 (33 and 34 Vict. c. 96), secs. 17, 54.

2. In an action to recover the amount contained in a foreign promissory-note, which, at the date of the action, was properly stamped, *held* that an averment that, when originally presented for payment in the United Kingdom, it was unstamped, was irrelevant, since presentation without a stamp did not involve nullity. *Broddelius v. Grischotti*, March 4, 1887, p. 536.

See *Husband and Wife*, 2.

BUILDING SOCIETY. Borrowing member—Effect of stopping business prior to liquidation—Liability for loss in questions between members.

1. *The rules of a building society, constituted under the Building Societies Act, 6 and 7 Will. IV. c. 32, provided that a borrowing member who had given heritable security might have his property redeemed (1) on giving three months' notice before Whitsunday or Martinmas, by renouncing the shares representing the advance, and paying the amount of the advance under deduction of instalments already paid and interest thereon, his connection with the society, so far as these shares were concerned, then ceasing, or (2) by repaying the advance and retaining his shares, or (3) by the amount of his subscriptions with the profits allocated to him amounting to the sum advanced, his connection with the society then ceasing.*

The society carried on business for some years prior to 13th May 1882, when it ceased to do so, and issued a circular to members intimating that the society had sustained loss through the depreciation of its securities, and suggesting that all members should give notice of withdrawal from the society, so as to prevent individual members obtaining preferences. On 9th July 1884 the society presented a petition for a winding-up order, which was granted on 19th July.

On 6th December 1882 Tosh, a borrowing member, paid by anticipation the final instalments on his shares, which would have fallen due and matured his shares on 3d June 1883, his subscriptions and profits allocated then amounting to the sum advanced.

On 17th April 1882 Guthrie, and on 16th May 1882 Finlay, both borrowing members, gave notice of withdrawal at Martinmas 1882.

BUILDING SOCIETY—Continued.

In an appeal held (rev. judgment of the Court of Session) that nothing had occurred prior to the winding-up order of July 1884 to suspend the operation of the rules of the society under which the shares of borrowing members matured, and under which borrowing members were entitled to withdraw.

Held further (rev. judgment of the Court of Session) that the case was ruled by Brownlie v. Russell, L. R., 8 App. Ca. 235, 10 R. (H. L.) 19, which decided that in building societies the rights of individual members in questions between them and the society fell to be determined solely by the terms of the contract embodied in the rules, and that, although the contract might give borrowing members a right to have shares of profits allocated to them, it did not thereby make them responsible for loss when that was not expressly provided for by the rules. Tosh v. North British Building Society, July 30, 1886, H. L., p. 6.

Unadvanced member—Withdrawal—Power of society to reduce sum at the credit of unadvanced members.

2. *The rules of a building society provided that each member should be furnished with a pass-book in which all payments made by him should be entered; that any unadvanced or investing member might withdraw "the whole or any portion of the sum at his credit," twenty-eight days after having given notice of his intention to do so and after having left his pass-book at the office, such withdrawing member to be paid in rotation according to the priority of his notice; and that a general meeting of the members should be held annually in March or April, at which a report and statement of accounts, with a balance-sheet for the year ending 18th February preceding, should be submitted.*

At the annual general meeting of the society, held on 29th March 1882, the society approved of a report by the directors recommending that in consequence of the depreciation of the heritable property on the security of which the funds of the society were invested, a sum of 1s. 6d. per £1 should be deducted from the accounts of all shareholders and placed to a suspense account.

In a question between the society and an investing member, who, after the meeting, gave notice of withdrawal, held (rev. judgment of Second Division) that the rules of the society constituted a contract between the society and each member which the society had no power to alter, and that the resolution of the society was in breach of the contract and ultra vires, and that the member who had given notice of withdrawal was entitled to receive payment of the sum standing at his credit at the date of the resolution, without deduction of any sum on account of the society's losses. Auld v. Glasgow Working-Men's Provident Investment Building Society, Feb. 15, 1887, H. L., p. 27.

Winding-up—List of Contributories.

3. *In the winding-up of a building society the liquidator presented a note to the Court setting forth a scheme of settlement of the list of contributories. The following questions, arising on the construction of the rules of the society, were settled by the Court:—*

Bank Interest.—Rule 13 of the society provided that "Any member holding any share, in respect of which no advance has been made, which, by the subscriptions paid and the profits thereon, shall have accumulated to £25 (the amount of said share), shall be entitled to receive the amount thereof, with bank interest from the date of completion, and his connection with the society in respect of the same shall cease." *Held* that there being no stipulation to the contrary, and as the funds of the society were operated on from day to day, interest was due at bank current account rates.

Advanced and unadvanced shares.—A shareholder who held forty shares of the society of the nominal value of £1000 obtained an advance of £500 from the society. *Held* that in the winding-up he was to be treated as having received payment by anticipation of twenty completed shares and

BUILDING SOCIETY—Continued.

as a holder of twenty unadvanced shares, and not as having obtained a loan on the security of his forty shares.

Fines.—Rule 3 of the society provided that members in arrear two fortnightly instalments should pay a fine. The liquidator admitted that at the date of the last balance-sheet of the society no fines had been levied on certain members, and that it was not the practice of the society to exact fines in terms of the rule. *Held* that the liquidator was not entitled to enforce the rule in the winding-up.

Non-timeous withdrawal of shares.—By rule 12 it was provided that members on whose shares no advances had been made might "on one month's notice in writing to the manager withdraw his or her subscriptions paid thereon," with interest at a certain rate, "and the same shall be paid as soon after the expiry of the month's notice as the funds will permit." *Held* that members who only gave notice of withdrawal within one month of the date of the winding-up could not benefit by the rule.

Interest on advances.—Rule 15 provided,—"Any member who has been granted an advance shall, from the date of granting the same, become liable for such a rate of interest as along with the interest allowed by the bank will amount to 5 per cent until said member has received said advance, when he shall pay to the society interest thereon at the rate of 5 per cent on the full amount of said advance; and all interest shall be payable at the terms of Martinmas and Whitsunday; and members failing to pay the same within fourteen days thereafter shall be charged interest thereon at 5 per cent from the term of payment." *Held* that the rule ceased to be operative when the society ceased to be a going concern. *North British Building Society v. M'Lellan*, June 23, 1887, p. 827.

BURGH. Magistrates—Election—Appointment of returning officer.

1. The Provost and one of the two junior Magistrates of a police burgh fell to go out of office at the same date, both being candidates for re-election. The other junior magistrate had died. In ordinary circumstances the Provost would under the statute have been returning officer at the election, and in the event of his being one of the retiring commissioners the duty would have devolved upon one or other of the junior magistrates. The Court named one of the Sheriff-substitutes of the county, whom failing, the senior Sheriff-Clerk-Depute of the county, to act as returning officer, and superseded extract, the election falling to be held two days later. *Muirhead*, Oct. 29, 1886, p. 18.

Dean of Guild—Jurisdiction—Nuisance.

2. The Dean of Guild having refused to sanction the erection within burgh of a byre for the accommodation of twelve cows, on the ground that it was likely to create a nuisance, on appeal the Court, doubting the Dean of Guild's jurisdiction to entertain the question of nuisance, *sisted* the process to enable the objectors to bring an interdict against the erection of the building in question. This having been done, after proof the interdict was *refused*, and in respect thereof the Dean of Guild's interlocutor in the other process was recalled, and a remit made to him to proceed with the lining. *Manson v. Forrest*, June 14, 1887, p. 802.
3. The surveyor of a burgh objected to warrant being granted by the Dean of Guild Court for the increase of certain stabling accommodation belonging to a carriage-hirer, on the ground that the buildings proposed to be enlarged were in the middle of a square of buildings densely populated, and that the smell and noise from them would constitute a nuisance, and that the danger of fire in the district would be increased by them. The Dean of Guild having allowed a proof as to these objections, the petitioner appealed, and maintained that they related only to the use of the proposed building and to alleged nuisance, which were beyond the jurisdiction of the Dean of Guild. The Court (*diss.* Lord Rutherford Clark) *refused* the appeal on the ground that it was expedient that the facts should be ascertained before

BURGH—Continued.

determining whether the questions raised by the objections fall within the jurisdiction of the Dean of Guild. *Robertson v. Thomas*, June 17, 1887, p. 822.

Dean of Guild—Free space for air—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 370.

4. Plans of buildings proposed to be erected in Glasgow which were held not to comply with the provisions of the 370th section of the Glasgow Police Act, 1866, requiring a certain amount of free space in front of the windows of sleeping apartments. *Glass v. Glasgow Master of Works*, March 5, 1887, p. 567.

Dean of Guild—Alterations "affecting the exterior dimensions" of a building—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), secs. 364 and 365.

5. The Glasgow Police Act, 1866, secs. 364 and 365, enacts that the proprietors of buildings within the city who, without the authority of the Dean of Guild, alter their buildings "in a manner which will affect the exterior dimensions thereof," shall be guilty of a Guild offence, and liable in a penalty. *Held* that the insertion of a window 5 feet by 3, which did not project beyond the plane of the wall, in each of two gables of a building was not an alteration affecting the exterior dimensions of the building in the sense of the foregoing enactment. *Gourlay v. Lang*, June 4, 1887, *Just. Cases*, p. 31.

Burgh property—Foreshore—Jus spatiiandi.

6. *Held* that the Act to extend the royalty of Dundee, 1831 (1 and 2 Will. IV. cap. xlv.) did not transfer the property of the foreshore *ex adverso* of the extended royalty of the burgh of Dundee from the Crown to the Magistrates, as representing the burgh. *Keiller v. Magistrates of Dundee*, Dec. 7, 1886, p. 191.
7. *Held* that the Magistrates of a burgh, the inhabitants of which had been in use to resort for recreation to a particular piece of foreshore, had a good title to challenge a disposition which purported to convey that foreshore in property to a private person, and that although a right of property might be shewn to exist in a private person, he had no right to exclude the public from resorting there as they had done from time immemorial. *Keiller v. Magistrates of Dundee*, Dec. 7, 1886, p. 191.

Police Commissioners—Sale of lands for which Commissioners had no use—Nobile officium—General Police and Improvement Act, 1862 (25 and 26 Vict. c. 101).

8. The Police Commissioners of a royal burgh resolved to sell for £200 to the town-council of the burgh a portion of the property of the Police Commissioners, acquired under sec. 125 of the General Police and Improvement Act, 1862, for which they had no use, and petitioned for leave to carry out the proposed sale, stating that though under the General Police and Improvement Act, 1862, secs. 161 and 373, they had power to discontinue the use of public washing-houses, drying-grounds, &c., and to sell the same, the Act did not contain any provisions authorising the sale of other property which was of no use to them. The Court having indicated an opinion that a sale by private bargain would be *ultra vires* of the Commissioners, the Commissioners obtained leave to amend the prayer of the petition, to the effect of asking for authority to put up the subjects to public auction. The Court *granted* the prayer of the petition, as amended. *Linthgow Police Commissioners*, Feb. 2, 1887, p. 444.

Erection of byre in burgh—Nuisance.

9. *Held* that the business of cowkeeping may be so conducted and regulated within burgh as not to be a nuisance. *Manson v. Forrest*, June 14, 1887, p. 802.

COMMERCIAL. *Goods—Condition—Construction of contract.*

Question, whether a printed circular post-card sent by shipowners to post-shippers of goods in Galway, which stated that the s.s. "Clara"

CARRIER—Continued.

would sail from Glasgow to Galway on a date named, and contained this intimation :—" All goods carried on condition as per sailing bills," which conditions relieved the shipowners from all liability for the consequences of their own or their servants' fault, could be held to apply to the return voyage of the "Clara" from Galway to Glasgow, so as to import the conditions on the sailing bills into a contract for that voyage. *Lightbody's Trustee v. J. & P. Hutchison*, Oct. 16, 1886, p. 4.

Goods—Reparation—Consequential damages.

2. A manufacturer forwarded a bale of cloth by rail, consigned to a shipping agent at Grimsby, who was to ship it for Germany. On arrival at Grimsby the package was found to be frayed, and some slight damage done to the cloth. The shipping agent refused to take delivery, being of opinion that the goods could not be safely forwarded in their damaged package. The railway company thereupon returned them to the manufacturer, who re-packed them, and forwarded them to Germany. On arrival there they were rejected as being too late. The manufacturer having sued the railway company for damages for loss of market, *held* that the shipping agent was entitled to refuse to take delivery, and that the loss of market was the direct result of the damage done to the package by the railway company, who were therefore liable for it. *Keddie, Gordon, & Co. v. North British Railway Co.*, Dec. 15, 1886, p. 233.

CHURCH. Heritors—Liability for repairs—Cess-roll of valued rent—Ecclesiastical Buildings (Scotland) Act, 1868 (31 and 32 Vict. c. 96), sec. 23.

1. In 1826 the seats in a parish church were allocated among the heritors according to their valued rents. In 1857 one of the heritors had become divested of the *dominium utile* of his whole lands in the parish (with the exception of the minerals), but his name remained as before on the Cess-roll of valued rent. The heritors having on various occasions after that date imposed assessments upon him for repairs of the church, in 1886 he raised an action against the heritors for declarator that he was not liable for any assessments imposed after 1857, on the ground that after that date he was no longer a heritor in the parish. *Held* that the heritors were bound to assess according to the Cess-roll, and had no power to alter it.

Observed that the pursuer's remedy was to apply to the Commissioners of Supply to have the roll altered, and the names of the feuars, with the proportionate part of the rent allocated upon each, entered. *Trades' House of Glasgow v. Heritors of Govan*, July 8, 1887, p. 910.

Heritors—Objections to validity of assessments.

2. When a heritor has objections to the legality of an assessment imposed on him by the heritors of his parish they must be stated *tempestive*, and not after the lapse of years. *Trades' House of Glasgow v. Heritors of Govan*, July 8, 1887, p. 910.

Minister—Stipend—Assistant and Successor—Annat.

3. It was provided in an agreement between a parish minister and his assistant and successor that the former should "surrender" to the latter £165 "of the annual income derivable from the benefice of said parish, payable half-yearly at Martinmas and Whitsunday." The minister having died on 29th April, *held* that under the agreement his executor was not bound to pay the assistant for his services between the previous Martinmas and that day, the stipend for that period being payable to the minister's next of kin as annat, and there having been no personal obligation upon him and his representatives to make any payment. *Dow v. Imrie*, July 15, 1887, p. 928.

Minister—Quoad sacra—Trust.

4. An estate was left to the Provost and Magistrates of Kilmarnock, "the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of the parish of Riccarton, all for the time being, and their successors in office," to hold the same, and to apply the income to certain pur-

CHURCH—*Continued.*

poses, paying the balance of the income "equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith." *Held* (1) that the ministers of three *quoad sacra* parishes, the churches of which were situated within the burgh, were trustees both to hold the general fund and to receive and expend the balance of income; but (2) that the minister of a *quoad sacra* parish erected out of portions of Kilmarnock, of Riccarton, and of Galston parishes was neither a trustee of the general fund nor of the balance, his church being situated outside the burgh of Kilmarnock. *Buchanan's Trustees v. Buchanan Bequest Trustees*, Dec. 18, 1886, p. 284.

Minister—Chapel of ease—Ministers' Widows' Fund.

5. *Held* that the minister of a chapel of ease, which had been built by private subscription, on his being inducted to the same church after its erection into a *quoad sacra* church, was entitled and bound to become a contributor to the Ministers' Widows' Fund. *MacLagan v. Brown*, July 20, 1887, p. 1083.

Glebe and churchyard—Consent of heritors to excambion of.

6. The consent of heritors is not necessary to a contract of excambion of glebe lands.

The minister of a parish, with consent of the Presbytery, excambied the site of the church, the churchyard, and part of the glebe, for other lands belonging to a heritor in the parish. In an action of reduction subsequently brought by the minister and the kirk-session for reduction of the deed as being null without consent of the heritors, *held* (1) that in so far as regarded the site of the church and the churchyard, the deed was invalid as granted without the consent of the heritors; (2) that *quoad ultra* the deed was valid—the pursuer and his successors in the benefice not being prejudiced by its partial reduction, or by the failure of the transaction with regard to the site of the church and the churchyard. *Bain v. Lady Seafeld*, July 15, 1887, p. 939.

Dissenting Church—Trust—Cy près.

7. Part of a congregation connected with the United Original Secession Church separated from that church with their minister, and formed a new congregation. In 1871 the congregation bought a place of worship, and a minister's house, taking the title in favour of certain members of the congregation, and such other persons as might thereafter be appointed by male members of the congregation, on condition that any trustee or member leaving the congregation and "worshipping elsewhere not in harmony with the principles contained in the Testimony (United Original Secession)," should be disqualified from acting or voting. In consequence of the minister falling into bad health the church was closed in 1878, and the trustees were authorised to sell the church. The church was not sold, but the premises were let and the rents applied in reduction of debt. In 1886 a petition was presented by the Synod of the United Original Seceders, with the concurrence and consent of four persons describing themselves as members of the congregation "at the time of its dissolution," against the two surviving trustees, praying the Court to ordain the trustees to pay over the trust-funds, and to convey the trust property to the petitioners for behoof of certain funds of the Synod, or to pay and convey the same for such purposes as the Court should deem most in accordance with the purposes of the trust, on the ground that the purposes of the trust had failed. The trustees, in answer, stated that the rents of the buildings were being applied in reduction of the debt, and that when the debt was extinguished they hoped to get a new minister. *Held* that it had not been proved that the purposes of the trust had failed, and petition *dismissed*. *Thomson v. Anderson*, July 19, 1887, p. 1026.

COMPANY. *Offence by Company—Complaint—Fine or imprisonment.*

1. A statute making regulations for alkali works enacted that contraveners

COMPANY—Continued.

should be liable to certain fines, and failing payment of fines and costs, to imprisonment. A complaint against a limited company set forth that the company had contravened the statute in a certain way "whereby the company" had become liable to a fine and to imprisonment in the event of the fine and costs not being paid, and prayed the Court to convict the company of the contravention, and to adjudge it "to suffer the penalties provided" by the Act. *Objection* to the relevancy of the complaint, on the ground that the company was not liable to imprisonment, *repelled*. *Fletcher v. Eglinton Chemical Co., Limited*, Nov. 13, 1886, Just. Cases, p. 9.

Offence by company—Liability of shareholders—Pharmacy Act, 1868 (31 and 32 Vict. c. 121), *secs. 1 and 15*.

2. A limited company carried on business as "Wholesale Chemists, Druggists, and Tea-merchants," doing both a wholesale and retail business. None of the shareholders was a duly qualified chemist and druggist under the Pharmacy Act, 1868, but the dispensing of drugs was done by duly qualified chemists and druggists. *Held* that the individual shareholders were not liable under sec. 1 and sec. 15 of the Act to be prosecuted for the offence of unlawfully taking and using the name chemists and druggists, and advertising the company as chemists and druggists. *Bremridge v. Gray*, July 20, 1887, Just. Cases, p. 60.

Slander by Company—Reparation.

3. Where the officials of a company had prepared and published, but without the authority, knowledge, or assent of the directors, a libellous circular concerning another company, and the latter company asked for interdict against the former circulating the document in question, the Court found that the publication and circulation by the officials of the defenders' company having been allowed to continue after the action was raised and the facts were brought to the knowledge of the directors, the pursuers were entitled to interdict. *British Legal Life Assurance and Loan Co., Limited, v. Pearl Life Assurance Co., Limited*, June 15, 1887, p. 818.
4. A company, or a private partnership may be sued for damages for slander, notwithstanding that malice must be proved against the defenders. *Gordon v. British and Foreign Metaline Co.*, Nov. 16, 1886, p. 75.

Transfer of shares—"Unnecessary delay" in registering transfer—Rectification of register—Companies Act, 1862 (25 and 26 Vict. c. 89), *sec. 35*.

5. A shareholder transferred fifty shares in a company, the stock in which was then unsaleable, to his wife, whose sole separate estate consisted of an alimentary annuity of £150 a-year. The transfer was intimated to the company in December 1883. The transfer was not considered at the first meeting of directors, which took place in January, but at the next meeting, which took place in April, the directors, in the exercise of a power given to them by the articles of association, declined, without cause assigned, to register the transfer, and the rejection was communicated to the holder. In an action for payment of subsequent calls against the original shareholder, the defender maintained that in consequence of the unnecessary delay of the directors in dealing with the transfer he was no longer liable for calls. The defender also presented a petition for rectification of the register. *Held* (1) that there had been "unnecessary delay," in the sense of the 35th section of the Companies Act, 1862, in the directors not disposing of the transfer at their first meeting, but that this did not of itself entitle the defender to have the transfer registered; and (2) that although the defender might have been entitled to have the register rectified if he could have shewn that he had been prejudiced through the delay of the directors in dealing with the transfer, he had failed to instruct such prejudice, the shares having been unsaleable during the whole time. The Court therefore gave decree for the calls, and refused the petition. *Property Investment Co. of Scotland, Limited, v. Duncan*, Jan. 6, 1887, p. 299.

Transfer of shares—Company's lien over shares for debts due by shareholder.

6. A limited company, incorporated under the Companies Acts, has, at common

COMPANY—*Continued.*

law, a right of retention over the shares of a partner in security of debts due by him to the company. *Bell's Trustee v. Coatbridge Tinplate Co., Limited*, Dec. 17, 1886, p. 246.

Winding-up by the Court—Creditors' petition—Disputed debt—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 80.

7. In a petition for the compulsory winding-up of a limited company the petitioners alleged that the company was unable to pay its debts within the meaning of the 1st subsection of the 80th section of the Companies Act, 1862, two bills drawn by the petitioners and accepted by the company not having been paid when due. It appeared that the company had no other debts, and had large assets, and that there was a *bona fide* dispute between the parties relating to the sum contained in the bills in question, the respondents alleging that there was a large balance due to them. The Court *dismissed* the petition on consignment being made by the respondents, and found the petitioners liable in expenses. *Cuninghame, &c., v. Walkinshaw Oil Co.*, Nov. 17, 1886, p. 87.

Winding-up by the Court—Creditor's petition—Security for debt—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 80, subsec. 1.

8. Where a limited company, in answer to a creditor's petition for a winding-up order, on the ground of inability to pay a liquid debt under the 1st subsection of the 80th section of the Companies Act, 1862, pleads that the debt is sufficiently secured, the security must be such as will command in the market the amount of the debt founded on. *Commercial Bank of Scotland, Limited, v. Lanark Oil Co., Limited*, Dec. 2, 1886, p. 147.

Winding-up by the Court—Creditor's petition—Assets in America.

9. A petition having been presented by a creditor for the judicial winding-up of a company, which was admittedly insolvent, and for the appointment of a liquidator, answers were lodged by the company and certain secured creditors stating that all its assets were in America, and that, it being the intention to have a receiver appointed there, the appointment of a liquidator in this country was unnecessary. The creditors, other than the petitioner, were all either directors or concerned in the management of the company. The Court *granted* the prayer of the petition. *Smyth & Co. v. Salem Flour Mills Co., Limited*, Jan. 29, 1887, p. 441.

Winding-up by the Court—Where name of company struck off register by Registrar of Joint Stock Companies.

10. On 16th October 1886, a creditor of a limited company presented a petition for its winding-up, stating that it had suspended business for more than a year, and that it was unable to pay its debts. Three days after the petition had been presented, the Registrar of Joint Stock Companies struck the name of the company off the register, and notice of this was published in the *Gazette* of the same day; the effect being to dissolve the company as at that date, unless a winding-up order were granted on the petition, which would draw back to 16th October. The company could not be restored to the register except on an application to the Court by the company or by one of its members. The Court *granted* the petition. *Alliance Heritable Security Co., Limited*, Nov. 2, 1886, p. 34.

Winding-up subject to supervision—Objection by creditors to petition for.

11. A petition for a supervision order by the liquidator in a voluntary winding-up was objected to by a creditor of the company, on the ground that the winding-up would injuriously affect his rights. He also presented a petition on the same ground for recall of the resolution to wind up the company. *Held* that the objection was not relevant, and that the petition was incompetent.

The A company, limited, which carried on business as seedmen and nurserymen, agreed to transfer its seed business at a valuation to the B company, and to allow the latter to manage and realise the nurseries for a commission of 5 per cent on sales, reserving right to the A company to sell

COMPANY—*Continued.*

the nursery stock as a whole, and also agreed that the B company should, subject to the control of the A company, collect the whole debts due to the A company for a remuneration of 5 per cent. Two years afterwards the A company resolved to wind up voluntarily. In a petition by the A company and its liquidators for a supervision order the B company opposed the application, and presented a petition for recall of the resolutions to wind up, alleging that the liquidation was a device of the A company to get rid of the agreement; that it was perfectly solvent, and had no creditors pressing for payment, and that the respondents would, under the agreement, be able to recover more than sufficient to pay any sums due to them. Further, that if the object of the liquidation was the realisation of the A company's estates, they had agreed that the realisation should be effected by the B company, and that the latter had a right to conduct it. *Held* that the petition for recall was incompetent, and that the answers to the A company's petition for a supervision order were irrelevant. *Lawson Seed and Nursery Co., Limited, v. Lawson & Son, Limited, Dec. 2, 1886, p. 154.*

Winding-up subject to supervision—Objections by shareholders to petition for.

12. At an extraordinary meeting of a limited company resolutions were carried by the statutory majority to the effect (1) that it had been proved to the satisfaction of the company that it could not, by reason of its liabilities, continue its business, and that it was advisable to wind it up; and (2) that the company should be wound up voluntarily. A petition to have the winding-up brought under the supervision of the Court having been presented, certain shareholders lodged answers objecting to the winding-up, on the ground (1) that the adoption of the resolution in question had been arranged as part of a scheme by certain shareholders to acquire the company estate for their own purposes; and (2) that the company was not unable to carry on its business. *Held* that these were not relevant answers to the petition, and supervision order *granted*. *Monkland Iron Co., Limited, v. Dun, &c., Dec. 16, 1886, p. 242.*

Winding-up subject to supervision—Confirmation of liquidator's appointment.

13. It is not proper in a petition for placing a winding-up under supervision of the Court to pray for confirmation of an appointment of a liquidator. *Monkland Iron Co., Limited, v. Dun, &c., Dec. 16, 1886, p. 242.*

Winding-up—Liquidator—Objection to appointment.

14. *Question*, whether averments that a liquidator appointed by a majority of shareholders at a statutory meeting at which a resolution to wind up had been carried was "conjunct and confident" with certain persons who had promoted the winding-up with a view to securing the property on their own terms, were relevant averments to justify the Court in removing him "on due cause shewn" in terms of the 141st section of the Companies Act, 1862. *Monkland Iron Co., Limited, v. Dun, &c., Dec. 16, 1886, p. 242.*

Winding-up—Sale of Assets.

15. Circumstances in which the liquidator of a company in liquidation under supervision was *authorised* to sell growing timber belonging to the company by private bargain. *British Canadian Lumbering and Timber Co., Limited, Dec. 3, 1886, p. 160.*

Winding-up—Process—Intimation—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 100.

16. The liquidator of a company applied for an order under the 100th section of the Companies Act, 1862, on a former agent of the company, who was resident in Canada, to deliver up books and papers in his possession belonging to the company, and moved the Court to pronounce the order without intimation. The Court *refused* the motion, and ordered intimation. *British Canadian Lumbering and Timber Co., Limited, Dec. 3, 1886, p. 160.*

Winding-up—Expenses—Meetings of creditors with view to reconstruction of company—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 156.

17. In a petition presented by certain creditors of a company in liquidation for

COMPANY—*Continued.*

an order under sec. 156 of the Companies Act, 1862, for access to the company's books, the petitioners obtained an order, and subsequently held meetings with a view to reconstruct the company. The scheme of reconstruction having proved abortive, *held* that the creditors were not entitled to their expenses out of the funds in the liquidation. *Halden v. Liquidator of the Scottish Heritable Security Co., Limited*, March 16, 1887, p. 633.

COMPENSATION. *Lease—Partial destruction of subject—Abatement of rent.*

Held that a tenant is not bound to pay the full rent if, during possession, through no fault of his own, he loses the beneficial enjoyment of part of the subject let, and that his claim to abatement may be stated by way of defence to an action for payment of the full rent. *Muir v. McIntyre*, Feb. 4, 1887, p. 470.

See *Bankruptcy*, 9.

CONJUNCT FEE AND LIFERENT. See *Succession*, 2.CONTRACT. *Pactum illicitum—Marriage with deceased wife's sister—Bona fides.*

1. A Scotsman went through a ceremony of marriage with the sister of his deceased wife in Norway, where such marriages are legal. They returned to Scotland, and cohabited together there for about twelve years. They then entered into an agreement to separate, the man to pay the woman an annuity of £52 a-year. *Held* that this agreement was not struck at as being *ob turpem causam*. *Webster v. Webster's Trustee*, Nov. 17, 1886, p. 90.

Failure of consideration from supervening circumstances.

2. By written assignation Smith, an old man of eighty-two, the yearly tenant of a farm, on the narrative that from age he was unable to attend properly to business, agreed with Riddell, the husband of one of his nieces, "that during the remainder of my life the said James Riddell shall maintain and support me at bed, board, and lodging suitable to my station, and along with the said James Riddell and his family, to which I shall be considered to belong, and that whether I or the said James Riddell or both of us remain as tenant" of the farm or remove to another. In consideration Smith assigned and made over to Riddell "the lease and right of occupancy of the said farm, together with the whole stocking, crop, and other effects thereon, surrogating and substituting the said James Riddell in my full right and place of the premises, with full power to him to take and receive full possession of the said whole stocking, crop, and other effects as his own absolute property." Riddell signed the deed as consenting to and adopting it, and shortly thereafter, with his wife and family, went to reside in the farmhouse with Smith, and began to manage the farm; but before he had done so for six months, and before he had been accepted as tenant by the landlord, he died. His widow, as his executrix, claimed the stocking and crop. *Held* that as in consequence of Riddell's death his part of the agreement was incapable of fulfilment, his widow was not entitled to the stocking and crop, which remained the property of Smith. *Smith v. Riddell*, Nov. 18, 1886, p. 95.

Interpretation—Creditors making performance impossible.

3. The North British Railway Company, by an agreement entered into with the Duke of Abercorn to facilitate the passage of a bill promoted by them, agreed to buy 35 acres lying along the north side of their line at Portobello, including the site of a road running north and south across the land so acquired called Hope's Road. The company also agreed "whenever they take possession of any part of Hope's Road," to make a road "coloured yellow on a plan and according to section and specification hereto annexed," and to pay for the ground required at the rate of £400 per acre. This road was to run from east to west along the southern boundary of the Duke's ground and to lead at its eastern end into a road running parallel to Hope's Road. The agreement further provided,—“The Duke to have it in

CONTRACT—Continued.

his option either to require of the railway company that this road be made, or that the cost of constructing said road, including the cost of the land at £400 per acre, and the cost of erecting larch fencing along north side of same, be paid to him in lieu thereof. Time of payment to be whenever the company take possession of any part of Hope's Road." A person coming in right of the Duke feued off his ground to different feuars up to the boundary of the company's property, and encroached inadvertently on that property, thus making it impossible to form the road stipulated for. *Held* that as the road, the formation of which was the basis of the whole article of the agreement, was not to be formed, those in right of the Duke could not demand from the company a sum equal to the cost of constructing or of fencing it. *North British Railway Co. v. Benhar Coal Co.*, Dec. 1, 1886, p. 141.

Interpretation—Lease.

4. *Lease to two persons and the survivor binding the tenants and their respective heirs and executors conjunctly and severally—Heirs of predeceaser held liable with survivor.* *Burns v. Martin*, Feb. 14, 1887, H. L., p. 20.

Constitution—Joint adventure.

5. Correspondence which was *held* (rev. judgment of Lord Lee) not to constitute a contract of joint adventure, in respect it contained no *termini habiles* for determining the duration of the contract or its essential conditions. *Young v. Dougans*, Feb. 23, 1887, p. 490.

Error—Records—Plan—Partial reduction of a feu contract.

6. By a feu-contract the granter became bound to form certain roads on the ground disposed, in so far as delineated and tinged brown on a plan appended to the contract. On the plan appended a number of other roads were by mistake also tinged brown. The feu-contract, with the erroneously coloured plan, was duly recorded. None of the parties to the contract observed the blunder at the time of signing and it was not discovered until some years afterwards, when the ground had been sold by the original vassals to a building company. The company then raised an action against the superior for payment of the cost of forming the roads erroneously tinged brown on the plan, and the superior brought an action against the company for reduction of the feu-contract, in so far as it imported an obligation on him to form these roads. *Held* (rev. judgment of Lord Fraser) that as the original feu-contract was not intended to impose an obligation to make the roads in question on the superior, and as the company in contracting with the vassals did not stipulate for and did not understand that they were getting such an obligation, the mere fact that such an obligation erroneously appeared in the feu-contract and in the record did not entitle the company, though *bona fide* purchasers for value, to object to the Court rectifying the feu-contract and the records.

Observed (per Lord Young) that one purchasing on the faith of the records is not entitled to rely on the validity or subsistence of such incidental obligations as an obligation to make roads although appearing on the records undischarged. *Glasgow Feuing and Building Co., Limited, v. Watson's Trustees*, March 11, 1887, p. 610.

Innominate contract—Proof—Parole.

7. *Question*, whether, in an action of accounting between a principal and a commission agent, it was competent to prove by parole that the agent, in order to retain his principal's custom, had agreed in a particular transaction to pay a minimum sum as the price of the goods to be sold, whether that sum should be realised on sale or not. *Reid v. Reid Brothers*, June 8, 1887, p. 789.

Implied contract—Property—Nuisance—Acquiescence.

8. In 1868 the Commissioners of Police of a town, under the General Police Act of 1862, executed drainage works, in doing which they took advantage of a neighbouring proprietor's system of drainage, with his knowledge. Thereafter the quantity of sewage drained towards the proprietor's lands was greatly augmented. The sewage irrigation became unsatis-

CONTRACT—Continued.

factory and was abandoned. In 1886 the proprietor, in consequence of the nuisance caused by the quantity of sewage sent upon his lands, raised an action against the Commissioners, concluding for declarator that the town was not entitled to send sewage upon the pursuer's lands, and for interdict. *Held* (1) that no contract by which the proprietor was bound to receive the town sewage upon his lands could be implied from the actings of parties; and (2) that he could not, by having allowed the drainage system of the town to be made so as to join his own, without objection, be held to have acquiesced in their sending sewage upon his lands in time coming, and therefore that he was entitled to decree of declarator and interdict as craved. *Houldsworth v. Burgh of Wishaw*, July 14, 1887, p. 920.

COPYRIGHT. Lectures in University.

1. Held that a professor in a university is entitled to prevent by interdict the publication of lectures delivered by him in his ordinary university course, such delivery not being equivalent to publication of the lectures. *Caird v. Sime*, June 13, 1887, H. L., p. 37.

Patents, Designs, and Trade-Marks Act, 1883 (46 and 47 Vict. cap. 57).

2. Design for the door of a kitchen range which was held on the evidence to be "a new or original design not previously published in the United Kingdom," and therefore a proper subject for registration under part 3, sec. 47, of the Patents, Designs, and Trade-Marks Act, 1883.

Held that where a design is registered for "shape or configuration," under sec. 60 of the Patents, Designs, and Trade-Marks Act, 1883, and a mechanical improvement is directly or incidentally secured by the adoption of such shape or configuration, the mechanical improvement is secured by the registration of the design, though it might have been made the subject of protection by letters-patent.

Held that a design may be made the subject of registration though it depict an article incomplete in itself, but which is intended to be used in combination with and as part of another article of manufacture.

Under sec. 52 of the Patents, Designs, and Trade-Marks Act, 1883, the public are barred from demanding inspection of the design from the comptroller until the copyright has ceased. *Held* that where an infringement of copyright is complained of, the alleged infringer is entitled to call on the holder of the copyright to prove for what purpose—whether pattern, shape, or ornament—the design was registered. *Hunter, Walker, & Co. v. Falkirk Iron Co.*, July 20, 1887, p. 1072.

CROWN. See *River, &c.*, 2, 3, 4, 5, 6.

DEPOSIT. Retention.

Held that a depositary was bound to restore to the depositor the balance that remained of a fund deposited to meet a contingent claim, when that claim had been ascertained and satisfied, and was not entitled to retain any part of the balance on the plea that he himself had a claim against the depositor for expenses incurred in ascertaining by arbitration the amount of the contingent claim to meet which the fund was deposited. *M'Gregor v. Alley & M'Lellan*, March 4, 1887, p. 535.

DESIGN. See *Copyright*, 2.

DILIGENCE. See *Arrestment—Foreign*, 3.

DISCHARGE. *Where minor and pupil children recover damages—Guardianship of Infants Act, 1886* (49 and 50 Vict. cap. 26), sec. 2.

In an action of damages at the instance of children, some of whom were minors and others pupils, against a railway company for loss sustained by them through the death of their father, who was killed by an accident on the defenders' line, the defenders made a tender of £50 to each child, which was accepted. On a motion for decree, the defenders raised a question as to the capacity of the pursuers to grant a valid discharge. *Held* (1) that

DISCHARGE—Continued.

the mother of the children (sisted as a party in the cause, as tutor to the pupil children) could, under sec. 2 of the Guardianship of Infants Act, 1886, grant a valid discharge of the sums paid to the pupil children; and (2) that the minor children could themselves grant a valid discharge, and that the sums paid to them being of the nature of alimentary payments, and not capital sums for investment, it was not necessary, to secure against the risk of future challenge, to have a curator appointed to concur with them in the discharge. *Jack, &c., v. North British Railway Co.*, Dec. 17, 1886, p. 263.

DONATION. Husband and Wife.

1. A husband purchased certain heritable property, taking the title in favour of himself and his wife in conjunct liferent for her liferent use alienarily, and their children in fee, but under reservation of power to the husband at any time during his life, and without consent of his wife or children, "to sell, burden, wadset, and affect with debt, or even gratuitously dispose the subjects as if he were absolute proprietor of the same." There was no provision made for the wife by antenuptial contract or otherwise, and there was no allegation that the husband was not solvent at the date of the purchase. In an adjudication at the instance of a creditor of the husband, raised after his death, *held* that as the provisions for the wife and children were revocable by the husband at any time the subjects were not protected from his creditors. *Honeyman & Wilson v. Robertson, &c.*, Dec. 7, 1886, p. 163.

Delivery—Trust—Policy of insurance in favour of wife and children.

2. *Held* (rev. judgment of Lord McLaren) that a policy of insurance taken by a husband in favour of trustees for behoof of his wife and the children of the marriage did not confer a vested right in the beneficiaries without delivery, actual or constructive, of the policy.

Circumstances which were *held* not to amount to delivery of a policy of insurance taken by a husband in favour of trustees for behoof of his wife and children. *Jarvie's Trustee v. Jarvie's Trustees*, Jan. 28, 1887, p. 411.

ELECTION. See Succession, 5, 6.**ELECTION LAW. County Franchise—Long leaseholder—Joint tenant—Representation of the People Act, 1884 (48 and 49 Vict. cap. 3), sec. 4, subsec. 2.**

1. The Reform Act of 1884 provides, sec. 4, subsec. 2, that "where two or more men are owners, either as joint tenants or as tenants in common, of an estate in any land or tenement, one of such men, but not more than one, shall, if his interest is sufficient," be entitled to be registered as a voter. *Held* (dub. Lord Mure) that this limitation applies to the case of joint tenants under a lease for a period exceeding fifty-seven years. *Cuninghame v. Grossart*, Nov. 26, 1886, p. 121.

County Franchise—Inhabitant-occupier—Change of Qualification.

2. *Held* that a person who had been for twelve months preceding 31st July in occupation of a dwelling-house in a county, but had removed from it in September, and was consequently not in occupation when the Sheriff came to consider his right at a Registration Court in October, fell to be struck off the roll, and that although he had removed to and then occupied another house in the same division of the county, and would have been entitled to be enrolled had he lodged a new claim. *Smith v. McDonald*, Nov. 26, 1886, p. 125.

County Franchise—Inhabitant-occupier—Service Franchise—"Dwelling-house"—Representation of the People Act, 1884 (48 and 49 Vict. c. 3), sec. 3.

3. A clerk in the employment of a hydropathic company occupied as sole occupant a room in the building belonging to the company. No particular room was expressly stipulated for by him, but when he entered on his

ELECTION LAW—Continued.

employment a room was given to him which he had occupied for ten years; part of its furniture belonged to him. He took no meals in this room, but either in the servants' hall or the reception-room. During about four months in winter he left the room thus occupied by him and lived in a smaller and more comfortable room. No one occupied the other room in his absence; he was entitled to use it, and he moved from the one to the other of his own choice. The house-steward had a room in the building set apart for him, but usually resided in a separate house in the neighbouring village. *Held* that the clerk inhabited a "dwelling-house" in the sense of the 3d section of the Reform Act of 1884, and that the "dwelling-house" was not inhabited by any person under whom he served, and that therefore he was entitled to be registered. *Ballingal v. Menzies*, Nov. 26, 1886, p. 127.

ENTAIL. Limited and unlimited title—Consolidation.

1. An entail, dated in 1715, comprised, *inter alia*, certain lands the *dominium utile* of which had been disposed by the entailer or his predecessors prior to the date of the entail, so that the entail only carried the superiority thereof. The *dominium utile* was acquired in 1721 by the next succeeding heir of entail, who took a disposition in favour of himself and his heirs and assignees whomsoever, being a different destination from that contained in the entail. He was not infeft either under the entail or under the disposition. In 1765 the next heir was infeft upon the unexecuted precept in the conveyance of 1721, having previously served heir in general to the last heir. The next heir in 1780 made up a title under the entail, but no separate title to the said lands, which he possessed along with the entailed estate down to 1843, when he died. *Held* that consolidation had not operated so as to bring the *dominium utile* of the said lands within the entail, and that a subsequent heir was therefore proprietor thereof in fee-simple. *Earl of Glasgow v. Boyle*, Jan. 28, 1887, p. 419.

Disentail—Valuing of debts and provisions—Deductions from rental before ascertaining provisions—Rutherfurd Act, 1848 (11 and 12 Vict. cap. 36), sec. 6.

2. In a petition for disentail under the Rutherfurd Act, 1848, *held* in estimating the amount of security to be made prior to disentail, in respect of certain Aberdeen Act provisions, by the petitioner in favour of his wife and children, that (1) the rental of the year of disentail must be taken in place of the rental of the year of the granter's death, but that (2) deductions ought not to be made therefrom in respect of terminable rent charges, or in respect of a subsisting annuity in favour of the widow of a former proprietor; and (3) that in computing the amount of security to be granted for the annuity to the petitioner's wife no account should be taken of the children's provisions, nor any account of the widow's annuity in computing the security to be made for the children's provisions, and that security must be granted for the children's provisions to the maximum amount chargeable, although at the date of the disentail there were only two in existence. *Earl of Glasgow*, Nov. 12, 1886, p. 59.

Disentail—Value of next heir's expectancy—"Proper security"—Entail Amendment (Scotland) Act, 1875 (38 and 39 Vict. c. 61), sec. 5, subsec. 2 (b).

3. *Held* that the "proper security" to be given under the above Act must be such as a prudent lender would accept, and that, failing such security, the sum representing the value in question must be paid into bank.

Circumstances in which the Court *held* that "proper security" was not offered by the disentailling heir, and *ordained* the sum representing the value of the next heir's expectancy to be paid into bank. *Farquharson v. Farquharson's Curator ad litem*, Dec. 15, 1886, p. 231.

ERROR. Contract—Records—Plan—Partial reduction of a feu-contract.

1. By a feu-contract the granter became bound to form certain roads on the

ERROR—Continued.

ground disposed, in so far as delineated and tinged brown on a plan appended to the contract. On the plan appended a number of other roads were by mistake also tinged brown. The feu-contract, with the erroneously coloured plan, was duly recorded. None of the parties to the contract observed the blunder at the time of signing, and it was not discovered until some years afterwards, when the ground had been sold by the original vassals to a building company. The company then raised an action against the superior for payment of the cost of forming the roads erroneously tinged brown on the plan, and the superior brought an action against the company for reduction of the feu-contract, in so far as it imported an obligation on him to form these roads. *Held* (rev. judgment of Lord Fraser) that as the original feu-contract was not intended to impose an obligation to make the roads in question on the superior, and as the company in contracting with the vassals did not stipulate for and did not understand that they were getting such an obligation, the mere fact that such obligation erroneously appeared in the feu-contract and in the record did not entitle the company, though *bona fide* purchasers for value, to object to the Court rectifying the feu-contract and the records.

Observed (per Lord Young) that one purchasing on the faith of the records is not entitled to rely on the validity or subsistence of such incidental obligations as an obligation to make roads although appearing on the records undischarged. *Glasgow Feuing and Building Co., Limited, v. Watson's Trustees*, March 11, 1887, p. 610.

Succession—Election.

2. A daughter, who had intimated to her father's trustees her election to take legitim in place of her testamentary provisions in the belief that her right to the whole legitim fund was admitted by the trustees, of whom her brother was one, subsequently, when her brother declared his intention to dispute her right to more than half of the legitim fund, withdrew her election and claimed her testamentary provisions. *Held* that she was not barred from doing so.

Opinion (per Lord Shand) that even if the error had been one of law, and whether induced by another or not, the daughter would have been entitled to withdraw her election. *Inglis' Trustees v. Inglis*, May 31, 1887, p. 740.

EXECUTOR. Heir and executor—By whom obligation of warrandice prestatable.

1. An obligation to free lands of debt arising under the warrandice clause of a disposition falls to be satisfied by the executor of the granter of the disposition in a question between him and the heir. *Stirling Crawford's Trustees*, Nov. 26, 1886, p. 131.

Whether trustee or executor—Trusts Act, 1861 (24 and 25 Vict. c. 84), sec. 1.

2. A testator in his will nominated certain persons as "executors," and directed them "to make and continue" certain annual payments to certain persons "till death or marriage," and to pay the liferent of his estate to his widow and a niece, and, on the death of the survivor of these two, to close their accounts at as early a date as practicable, and to divide the proceeds among specified persons. A "house, stable, and their fixtures," were to be sold soon after the testator's death. The executors were further directed to retain, or to realise for reinvestment, in their discretion, various securities, &c., held by him. There was no clause conveying any part of the estate to the executors. *Held* in a question between the co-executors, that though called "executors" in the deed, the executors were truly "gratuitous trustees nominated in a deed," and therefore were entitled to exercise the powers of assumption conferred on such trustees by sec. 1 of the Trusts Act, 1861. *Ainslie, &c. v. Ainslie*, Dec. 8, 1886, p. 209.

Sheriff—Jurisdiction.

3. *Held* that the fact that the confirmation of an executor to an estate has been taken out in the Sheriff Court of the deceased's domicile does not of itself

EXECUTOR—Continued.

subject the executors to the jurisdiction of that Court, and that an action will not lie against them if none of them is resident within that jurisdiction. *Halliday's Executor v. Halliday's Executors*, Dec. 17, 1886, p. 251.

EXPENSES. Reparation—Vindication of character—Nominal damages.

1. In an action of damages for vindication of character, the jury found pursuer entitled to one farthing of damages. Circumstances in which pursuer held entitled to expenses. *Bonnar v. Roden*, June 1, 1887, p. 761.

Several defenders—Common defence.

2. Certain subfeuars from A were called and appeared as defenders, along with A, in an action by the over-superior for reduction of the feu-contract, *quoad* certain obligations imposed on him. With this action had been conjoined a petitory action by A alone against the over-superior for payment of a sum of money in respect of the non-implement of the obligations sought to be reduced. The defences of the subfeuars caused no additional expense. The over-superior having been successful in the conjoined actions, *held (dis. Lord Young)* that, having appeared as defenders in the action of reduction, the subfeuars were liable in expenses along with A. *Glasgow Feuing and Building Co., Limited, v. Watson's Trustees*, May 18, 1887, p. 718.

Company—Winding-up—Independent proceedings of creditors.

3. A scheme for the reconstruction of a public company in liquidation having proved abortive, *held* that the creditors by whom the scheme was promoted were not entitled to their expenses. *Halden v. Liquidator of the Scottish Heritable Security Co., Limited*, March 16, 1887, p. 633.

Husband and Wife—Administration of Justice and Appeals Act, 1808 (48 Geo. III. cap. 151), sec. 16.

4. *Held* that the condition imposed by sec. 16 of the above Act upon a person presenting a petition to be reponed against an interlocutor of a Lord Ordinary allowed to become final by mistake, that the petitioner shall be subjected in the payment of the expenses previously incurred in the process by the other party, was inapplicable where the petitioner was a wife seeking to be reponed in an action between her and her husband. *Steedman v. Steedman*, March 19, 1887, p. 682.

Skilled witnesses—Judge's certificate—Notice—A. S., 15th July 1876.

5. *Held* (1) that the Act of Sederunt, 15th July 1876, does not apply to causes in which the evidence is led before one of the Judges of a Division on a remit by the Division, and (2) that in such causes it is in the discretion of the Court to allow additional charges in respect of skilled witnesses on the motion for the approval of the Auditor's report.

Opinion (per Lord Craighill) that notice that an application is to be made for a certificate for skilled witnesses need not be given to the opposite party. *Lord Elphinstone v. Monkland Iron and Coal Co.*, Feb. 2, 1887, p. 449.

Scientific witnesses—Certificate—A. S., 10th July 1844, sec. 4.

6. The Division before whom a proof has been brought upon a reclaiming note cannot certify the expenses of scientific witnesses under the Act of Sederunt of 10th July 1844, even in cases where the judgment of the Lord Ordinary has been reversed and the party found liable in expenses by him has been found entitled to expenses by the judgment of the Inner-House. *Gibson v. West Lothian Oil Co.*, March 9, 1887, p. 578.

Service—Citation Amendment Act, 1882 (45 and 46 Vict. cap. 77).

7. In taxing an account of expenses the cost of service by an officer of Court will be allowed where the party cited does not reside in a postal delivery district, and it is improbable that a letter of citation will reach him. *Macleod v. Davidson*, Jan. 6, 1887, p. 298.

Arrestments on the dependence—Maritime cause.

8. *Held* that the expenses of arresting a ship on the dependence of an action and dismantling her are not recoverable by the pursuer as expenses of process. *Black v. Jehangeer Framjee & Co.*, March 19, 1887, p. 678.

Expenses in Sheriff Court. See *Sheriff*, 5.

FISHINGS. *Trawler—Reparation—Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22), sched. art. xix.*

1. The Sea Fisheries Act, 1883, sched. art. xix., provides that, "where trawl fishermen are in sight of drift-net or long-line fishermen, they shall take all necessary steps in order to avoid doing injury to the latter. Where damage is caused, the responsibility shall be on the trawlers, unless they can prove that they were under the stress of compulsory circumstances, or that the loss sustained did not result from their fault." In an action of damages by fishermen against a trawler, *held*, after a proof, that the defenders had proved that the loss sustained did not result from their fault. Defenders therefore *assolized*. *Leslies v. Walker, &c.*, Dec. 18, 1886, p. 288.

White fishings—Tidal and navigable river—Acts Anne, 1705, cap. 2, and 29 Geo. II. cap. 23.

2. A member of the public brought an action against the riparian proprietor concluding for declarator that he had a right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish which were not of the salmon kind, in that part of the river Doon where the tide ebbed and flowed, and as far as the highest point reached by the ordinary spring tides; and averred that the portion of the Doon so described extended from the sea to a distance of about 500 yards inland. The action was founded both on common law and the Acts of Anne, 1705, cap. 2, and 29 Geo. II. cap. 23. *Held* after a proof (1) that the Doon between the points in question was neither a tidal nor a navigable river, and that the pursuer was not entitled to declarator either at common law or under the statutes; and (2) that the defender under his titles had right to the whole fishings therein, and had had from time immemorial exclusive possession thereof. Defender therefore *assolized*. *Bowie v. Marquis of Ailsa*, March 18, 1887, p. 649.

Salmon fishing.

3. Size of mesh required by the Salmon Fisheries Act, 1868 (31 and 32 Vict. cap. 123), sec. 15, subsec. 4, schedule E. *Mackenzie v. Pitcaithley*, Feb. 18, 1887, Just. Cases, p. 19.

FOREIGN. *Foreign decree—Prorogation of foreign jurisdiction.*

1. A wife sued her husband in the English Courts under the Married Women's Property Act, 1882, and the action was compromised by an agreement between the parties, by which their respective rights in their properties were defined, and the husband undertook to make over certain property to his wife. The agreement bore that an order of Court should be taken to that effect. Thereafter the husband returned to France, where both spouses had been domiciled at the date of the marriage, and where he alleged he was still domiciled, and refused to implement the agreement. The wife raised an action in England to enforce implement, in which she obtained decree in absence. In an action in the Court of Session to enforce implement of this decree, *held* that the husband could not be heard to plead that the English Courts had no jurisdiction, in respect that he had prorogated their jurisdiction. *Bank of Scotland v. Gudin*, Dec. 8, 1886, p. 213.

Decree conform—Forum non conveniens—Husband and Wife.

2. A wife raised an action in the Court of Chancery against her husband to have certain property deposited in a bank in Scotland declared to belong to her in virtue of an antenuptial marriage-contract in French form, executed in France, where the parties were domiciled at the time. For some time before the raising of the action the spouses had been resident in England. The action was compromised by an agreement, providing, *inter alia*, that the parties should execute a deed of separation, and that the property in question should belong to the wife. The husband thereafter raised an action in France to have the agreement declared null as being *ultra vires* of the spouses. The wife obtained from the Court of Chancery a decree in absence ordaining implement of the agreement, and in Scotland raised a multiplepinding in name of the bank in which she claimed the

FOREIGN—Continued.

property deposited. The husband, a competing claimant, pleaded that the action should be sisted to await the result of the action depending in France, as a more convenient *forum* for determining the question between the parties. *Held* that the wife was entitled to be preferred *de plano*. *Bank of Scotland v. Gudin*, Dec. 8, 1886, p. 213.

Judgments Extension Act, 1868 (31 and 32 Vict. c. 54), sec. 2.

3. *Held* that a certificate of a judgment of the "High Court of Justice, Queen's Bench Division, Liverpool District Registry," could be registered in the Books of Council and Session in terms of section 2 of the *Judgments Extension Act*, 1868.

Held that to entitle a creditor who holds a judgment of the High Court of Justice in England to register the same in Scotland, under section 2 of the *Judgments Extension Act*, 1868, to do diligence thereon, it is not necessary that the debtor should be subject to the jurisdiction of the Scottish Courts. *English's Coasting and Shipping Co., Limited, v. British Finance Co., Limited*, Dec. 10, 1886, p. 220.

See *Bill of Exchange*, 2—*Meditatio Fugæ*.

FORESHORE. See *River*, &c., 3, 4, 5, 6.

GUILD, DEAN OF. See *Burgh*, 2, 3, 4, 5.

HARBOUR. See *Insurance*, 3.

HEIR. See *Executor*, 1.

HUSBAND AND WIFE. *Marriage with deceased wife's sister.*

1. A Scotsman went through a ceremony of marriage with the sister of his deceased wife in Norway, where such marriages are legal. They returned to Scotland, and cohabited together there for about twelve years. They then entered into an agreement to separate, the man to pay the woman an annuity of £52 a-year. *Held* that this agreement was not struck at as being *ob turpem causam*. *Webster v. Webster's Trustees*, Nov. 17, 1886, p. 90.

Wife's capacity to contract—Promissory-note.

2. *Held* that the *Married Women's Property Act*, 1881, and the *Bills of Exchange Act*, 1882, do not give married women capacity to grant promissory-notes. *M'Lean v. Angus Brothers*, Feb. 2, 1887, p. 448.

Competency of evidence of wife of accused in public-house prosecution.

3. A public-house keeper, convicted of a breach of his certificate, appealed on the ground, *inter alia*, that he had tendered his wife as a witness, and her evidence had been rejected by the magistrates as incompetent. The Court, without deciding that the evidence of the wife of the accused in a public-house prosecution was in all circumstances incompetent, *refused* the appeal. *Morrison v. Morrison*, June 3, 1887, Just. Cases, p. 28.

Separation—Insanity.

4. *Held* that an action of separation at the instance of an insane wife is incompetent. *Thomson v. Thomson*, March 16, 1887, p. 634.

Divorce—Desertion.

5. *Held* that a wife who had left her husband's house on account of his drunken violence, and gone to live with her father, was not thereby barred from instituting an action of divorce on the ground of desertion. *Gow v. Gow*, Jan. 29, 1887, p. 443.

Divorce—Evidence.

6. *Presumption pater est quem nuptiæ demonstrant.* *Steedman v. Steedman*, July 20, 1887, p. 1066.

Process—Expenses—48 Geo. III. cap. 151.

7. *Held* that the condition imposed by sec. 16 of the above Act upon a person presenting a petition to be reponed against an interlocutor of a Lord Ordinary allowed to become final by mistake, that the petitioner shall be subjected in the payment of the expenses previously incurred in the process by the other party, was inapplicable where the petitioner was a wife seek-

HUSBAND AND WIFE—Continued.

ing to be reponed in an action between her and her husband. *Steedman v. Steedman*, March 19, 1887, p. 682.

See *Donation—Foreign*, 1, 2—*Marriage-contract—Succession*, 2, 9, 10.

INSURANCE. Fire insurance—Right of postponed bondholder to recover when prior bondholder has received a sum sufficient to reinstate.

1. The proprietor of mills (which with the site were at least of the value of £10,000) granted bonds over them for £9000, and subsequently a postponed bond to another creditor for £900. Policies of fire insurance for £7000 were taken in name of the prior bondholders for behoof of themselves and of the owner in reversion. The postponed bondholder, an investment society, took a policy of fire insurance from another company for £900 in name of the society and of the owner "in reversion." The policy insured against damage by fire "the property described on the margin hereof." On the margin were set forth various items forming parts of the mills and machinery, with the specific sum insured on each. The owner paid the premiums of insurance.

A fire occurred, which damaged the mills and stopped the works. The holders of the prior bonds obtained under their policies of insurance the sum of £5668, which was sufficient to reinstate the works, but they applied it in reduction of their debt.

Subsequently the investment society raised an action, with consent and concurrence of the owner, against their insurers for declarator that the pursuers were entitled to be indemnified by the defenders against the loss they had sustained by the fire, and for payment. The defenders denied liability, on the ground that the loss caused by the fire had already been made good to the prior bondholders and the owner. It was admitted that at the date of the fire the subjects were of sufficient value to cover all the bonds, and that after the fire the subjects were not of sufficient value to meet the prior bonds.

Held (by a majority of the whole Court) that the defenders were bound under their contract to indemnify the investment society for the loss it had sustained by the fire.

Observed that the investment society, after receiving payment of the indemnity, would not be entitled either to recover the whole sum in the bond for their own benefit, or to give their debtor the benefit of their insurance by discharging any part of his debt, but were bound to give the insurers the benefit for their relief of such portion of their claim as had been satisfied by payment of the indemnity. *Glasgow Provident Investment Society v. Westminster Fire Office*, July 16, 1887, p. 947.

Life insurance—Policy of insurance in favour of wife and children.

2. *Held* (rev. judgment of Lord McLaren) that a policy of insurance taken by a husband in favour of trustees for behoof of his wife and the children of the marriage did not confer a vested right in the beneficiaries without delivery, actual or constructive, of the policy.

Circumstances which were *held* not to amount to delivery of a policy of insurance taken by a husband in favour of trustees for behoof of his wife and children. *Jarvie's Trustee v. Jarvie's Trustees*, Jan. 28, 1887, p. 411.

Marine insurance—Harbour—"Port."

3. In a marine policy of insurance the term "in port" must be construed according to the meaning put on the term by persons resorting to or doing business in the port.

Held (*disa.* Lord Shand, *aff.* judgment of Lord Trayner) that in a policy of insurance on a ship for the voyage, and "while in port thirty days after arrival," the meaning of the term "port," as applicable to the port of Greenock, did not include the fairway of the navigable channel of the river Clyde *ex adverso* of the harbour works.

Held (*per* Lord Trayner, Ordinary) that where a ship left a public dock in Greenock Harbour, and was laid up in a private graving dock, situated between two of the public docks belonging to the harbour trustees, for

INSURANCE—Continued.

repairs, she had quitted the port of Greenock within the meaning of a policy of insurance for the voyage, and "while in port thirty days after arrival."

Opinions on the point reserved by the Lord President, Lord Mure, and Lord Adam.

Opinion contra (per Lord Shand). Owners of "Afton" v. Northern Marine Insurance Co., Limited, March 4, 1887, p. 544.

INTERDICT. Trespass—Right not insisted in.

1. In a petition by a proprietor of lands for interdict to prevent persons pasturing their cattle on his lands, the defenders, *inter alia*, pleaded on record that they had a right so to pasture their cattle. Subsequently, by minute, they stated that they never claimed, and did not now claim, such a right, but they made no motion to have the pleas asserting a right deleted from the record, although asked by the Court whether they proposed to do so. *Held* that the petitioner was entitled to interdict. Macleod v. Davidson, &c., Nov. 17, 1886, p. 92.

Procedure—Breach—Patent.

2. A, the holder of a patent, obtained interim interdict against B to prevent infringement. B did not object to the validity of the patent, but immediately thereafter assumed his son C as a partner with a view to manufacturing articles which A alleged were in infringement of his patent. A thereupon presented a petition and complaint against B and C for breach of interdict. B and C averred that the articles manufactured by them did not constitute an infringement, and further C challenged the validity of A's patent. *Held* (in conformity with *Dudgeon v. Thomson and Donaldson*, 3 R. 604 and 974, and 4 R. (H. L.) 88), (1) that it was competent to bring C into the process, though the interdict was not directed against him personally, and (2) that C was not entitled to a proof of his averments regarding the validity of the patent. Harvie v. W. & T. Ross, Nov. 13, 1886, p. 71.

See *Justiciary Cases*, 2.

JUDICIAL FACTOR. Appointment—Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 16.

1. The appointment of a judicial factor under the 16th section of the Bankruptcy Act, 1856, is not a matter of course, and ought to be made only where immediate measures for the preservation of the estate are necessary. Cuthbertson v. Gibson, May 31, 1887, p. 736.

Investment of funds—Loan over buildings in course of erection.

2. Buildings in course of erection are not a security on which a judicial factor is entitled to lend trust-funds.

Circumstances in which a judicial factor was held liable to make good a loss of trust-funds arising out of a loan over subjects in course of building, which afterwards proved insufficient to meet it. Guild v. Glasgow Educational Endowments Board, July 16, 1887, p. 944.

Investment of funds—Trusts Amendment Act, 1884 (47 and 48 Vict. c. 63).

3. A *curator bonis*, being a trustee in the meaning of the Trusts Amendment Act, 1884, is entitled to invest the funds in his hands as curator in the purchase of the stocks and in the loans authorised as trust investments by that Act, notwithstanding that the registration of his name as holder of these stocks cannot by the practice of the Bank of England, where a large number of these stocks are transferable, be qualified by any entry to shew the character in which he holds them, the Bank of England declining to take cognisance of trusts. Accountant of Court v. Crumpton's *Curator Bonis*, Nov. 12, 1886, p. 55.

Recall—Junior Lord Ordinary—Distribution of Business Act, 1857 (20 and 21 Vict. cap. 56), sec. 6.

4. *Held* (following *Kyle*, 24 D. 1083), that the appointment of a *curator bonis* made by the Junior Lord Ordinary, may competently be recalled by him. Tweedie, Dec. 8, 1886, p. 212.

JUDICIAL FACTOR—*Continued.*

5. *Held* by Lord Trayner (Ordinary) that a petition for recall of the appointment of a judicial factor may be competently presented to the Junior Lord Ordinary. *Masterton v. Erskine's Trustees*, May 14, 1887, p. 712.

Recall—Bankruptcy Act, 1856 (19 and 20 *Vict. cap.* 79), *sec.* 164.

6. At the instance of certain heritable creditors, a judicial factor was appointed under the 164th section of the Bankruptcy Act, 1856, upon the estate of a person deceased who had died intestate, and whose representatives, two brothers and a sister, were then in America. One of the brothers returned temporarily to Scotland, where he was decerned executor-dative, and the other sent instructions to have his title as heir made up. The brothers and sister then presented a petition for recall of the factor's appointment, but while the petition was pending the executor returned to America. The heritable creditors opposed the recall. The Court made a remit to the Accountant in Bankruptcy, who reported that it was doubtful whether the property would realise enough to pay off the bonds in full. The Court *refused* the petition for recall. *Masterton v. Erskine's Trustees*, May 14, 1887, p. 712.

See *Minor*, 1.

JURISDICTION. *Exclusion of Courts of Law—Crofters Holdings (Scotland) Act*, 1886 (49 and 50 *Vict. cap.* 29), *sec.* 6, *subsec.* 5.

1. *Held*, on a construction of the Crofters Holdings (Scotland) Act, 1886, particularly *sec.* 6, *subsec.* 5, thereof, that the jurisdiction of the ordinary Courts of law to grant decree for payment of arrears of rent is not suspended by the presentation of an application to the Commissioners under the Act to fix a fair rent and to deal with arrears. *Fraser v. Macdonald*, Dec. 7, 1886, p. 181.

Exclusion of Courts of Law—Volunteer Act, 1863 (26 and 27 *Vict. cap.* 65), *secs.* 24, 25, and 27.

2. *Held* that the rules for the management of the property, finances, and civil affairs of a corps, made and approved in terms of the Volunteer Act, 1863, may competently include rules providing for the payment of subscriptions by officers (both active and honorary) to the funds of the corps, and that such subscriptions so provided for may be recovered in a Court of law. *Morrison v. Neilson*, Feb. 2, 1887, p. 452.

Jurisdiction of Court of Session.

3. To review entries in a valuation-roll. *Magistrates of Glasgow v. Hall*, Jan. 14, 1887, p. 319.
4. To set aside a classification of lands and heritages under the Poor-Law Amendment Act, 1845 (8 and 9 *Vict. cap.* 83), *sec.* 36. *North British Railway Co. v. Cardross Parochial Board*, Feb. 17, 1887, p. 478.
5. To reduce a Debts Recovery decree. *Robertson v. Pringle*, Feb. 5, 1887, p. 474.

Meditatio fugæ—Execution abroad.

6. *Held* (1) that a *meditatio fugæ* warrant could not be put into execution furth of Scotland, and (2) that a creditor who had by means of such a warrant brought a debtor from England to Scotland was not entitled to avail himself of the fact that he had brought the debtor within the jurisdiction of the Courts of Scotland. *Adam v. Crowe*, June 14, 1887, p. 800.

See *Burgh*, 2, 3—*Foreign—Process*, 15, 16, 17—*Sheriff*, 1, 2, 3, 4.

JUSTICIARY CASES. *Crimes—Culpable, reckless, and negligent steering—Collision—Indictment—Specification.*

1. The masters of two steamers which had been in collision in the Clyde were charged in the River-Bailie Court of Glasgow on a single complaint with "culpable negligence and reckless conduct in navigating, directing, managing, or steering steam vessels, whereby a collision took place, and the lives of the lieges were endangered, actors or actor, or art and part, in so far as," at a time and place libelled, the accused "did both and each, or one or other of them, while said vessels were approaching each other, so

JUSTICIARY CASES—*Continued.*

culpably, negligently, and recklessly navigate, direct, manage, or steer' their vessels "as to bring or cause or permit them to come into violent collision with each other, whereby" the vessels were damaged and the lives of lieges endangered. The charge was found proven against one of the accused, who was fined £3, but against the other it was found not proven. Conviction *quashed* on the ground that the libel was irrelevant for want of specification of the fault said to have been committed. *Clelland v. Sinclair*, March 18, 1887, *Just. Cases*, p. 23.

Crimes—Mobbing and Rioting—Deforcement.

2. An indictment charging the panels with mobbing and rioting and deforcement, in setting forth the *modus* which was applicable to both of the crimes charged, stated that the messenger-at-arms alleged to have been deforced had been instructed to serve a copy of a note of suspension and interdict and relative interlocutor upon a large number of persons, against whom the prayer of the note was directed, and that the interlocutor was in these terms, "To see and answer within fourteen days: Reserving as to interdict in the meantime"—(with no order for intimation or service). The indictment further bore that the messenger having for the purpose of serving a copy of the note on each of the persons concerned proceeded to the farm of A and there having served copies on certain persons, and having thereafter proceeded towards B for the purpose of serving the remaining copies, a mob at or near A assembled for the purpose of preventing him from fulfilling his duty of serving these copies, and by threats and acts of violence deforced the officer. The panels were charged with forming part of the mob. Objections to the relevancy of the indictment—on the grounds (1) that the duty in which the messenger was said to be engaged when deforced was the service of a copy of the note of suspension and interdict and not of the note itself; (2) that the interlocutor founded on was not a legal warrant, as it contained no express order for intimation; and (3) that the deforcement was alleged to have taken place not when the officer was actually engaged in serving, but after he had served his writs at A and before he reached B, where the remainder were to be served—*repelled*. *Her Majesty's Advocate v. McLean*, Oct. 18, 1886, *Just. Cases*, p. 1.

Crimes—Theft—Customer carrying off goods on credit against will of seller.

3. A shopkeeper refused to sell certain goods to one of his customers, unless the customer paid for the goods before delivery. To this the customer agreed, but after the shopkeeper had weighed the goods the customer, who was under the influence of drink, took violent possession of them, and carried them off without payment of the price, 3s., notwithstanding the remonstrances of the shopkeeper. The customer was convicted of theft of the goods. Conviction *quashed*. *Clyne v. Keith*, March 18, 1887, *Just. Cases*, p. 22.

Statutory offences—Poaching—Farm-servant killing rabbits under authority from his master—Day Trespass Act (2 and 3 Will. IV. c. 68)—Ground Game Act, 1880 (43 and 44 Vict. c. 47).

4. *Held* that rabbits not being game at common law, a farm-servant snaring rabbits under verbal authority from his master on his master's farm cannot be convicted of trespass in pursuit of conies under the Day Trespass Act, and that the provisions of the Ground Game Act, 1880, sec. 1, subsec. 1, requiring written authority from the occupier to kill ground game, did not apply. *Jack v. Nairne*, Feb. 18, 1887, *Just. Cases*, p. 20.

Statutory offences—Salmon Fisheries Act, 1868 (31 and 32 Vict. c. 123), sec. 15, subsec. 4—Bye-law, schedule E.

5. Size of mesh. *Mackenzie v. Pitcaithley*, Feb. 18, 1887, *Just. Cases*, p. 19.

Statutory offences—Ship—Employment of person as master who has no certificate—Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 136.

6. The 136th section of the Merchant Shipping Act, 1854, enacts that no ship shall proceed to sea unless the master thereof has a valid certificate under

JUSTICIARY CASES—*Continued.*

the Act, and that any person who employs any person as master without ascertaining that he is possessed of such a certificate shall incur a penalty. In a complaint against the owner of a whaling ship for a contravention of the above section, it was held proved by the Sheriff that the accused had employed on board, nominally as icemaster, a person who possessed great experience as a navigator among ice, and as a whale fisher, but had no certificate under the Merchant Shipping Acts, and also another person, nominally as master, who held a master's certificate but was without experience in the two respects named; that, acting under the instructions of the accused, the icemaster assumed the command of the ship from the time she left Scotland till she was abandoned in the Arctic Seas; that he was considered by the crew as master, occupied the master's berth, and with a single exception gave all the orders, although several of the crew deposed that they would have considered themselves bound in law to obey the certificated master in preference to him; that it was requisite that the person in command should have some special knowledge of ice navigation, and that it would not have been safe to have entrusted the command to a certificated master, however good, who was not possessed of such knowledge; and that the certificated master was entered in the ship's books as master, and signed the articles as such, the icemaster being designed as "icemaster, in full charge." The Sheriff convicted the accused. On appeal the Court *quashed* the conviction. *Healop v. Cadenhead*, June 4, 1887, Just. Cases, p. 35.

Statutory Offences—Failure to educate children—Education Act, 1872 (35 and 36 Vict. cap. 62), sec. 70—Education Act, 1883 (46 and 47 Vict. cap. 56), secs. 9 and 10.

7. In order to a prosecution under the Education Acts, 1872 and 1883, for failure to educate children, it is essential that there should be produced either a certificate of failure to educate under section 70 of the Act of 1872, or an attendance order under sections 9 and 10 of that of 1883. *Macaulay v. Macdonald*, June 4, 1887, Just. Cases, p. 43.

Statutory offences—Locomotive on Highway—Locomotive Act, 1861 (24 and 25 Vict. cap. 70), sec. 6—Locomotives Amendment Act, 1878 (41 and 42 Vict. cap. 58).

8. A bridge on a highway may be stopped for locomotive traffic by a bye-law relating to it passed under the powers given by the Locomotives Amendment Act, 1878, by the road authorities of the district, and, after the advertisement specified in that Act, duly confirmed; and, therefore, a complaint alleging a contravention of such bye-law does not require to libel the Locomotives Act, 1861, or to set forth that, as required by section 6 of that Act, a notice was placed at the bridge itself that it was insufficient for the ordinary traffic of the district. *Cadenhead v. Milne*, July 14, 1887, Just. Cases, p. 58.

Statutory offences—Sunday Trading—Act 1661, cap. 18.

9. *Observations* on the question whether the Act 1661, cap. 18, was in desuetude. *Nicol v. McNeill*, July 13, 1887, Just. Cases, p. 47.

Statutory Offences—Sale of Drugs—Limited Company—Pharmacy Act, 1868 (31 and 32 Vict. c. 121), secs. 1 and 15.

10. A limited company carried on business as "Wholesale Chemists, Druggists, and Tea-merchants," doing both a wholesale and retail business. None of the shareholders was a duly qualified chemist and druggist under the Pharmacy Act, 1868, but the dispensing of drugs was done by duly qualified chemists and druggists. *Held* that the individual shareholders were not liable under sec. 1 and sec. 15 of the Act to be prosecuted for the offence of unlawfully taking and using the name chemists and druggists, and advertising the company as chemists and druggists. *Bremridge v. Gray*, July 20, 1887, Just. Cases, p. 60.

Statutory offences.

11. Public-house and police offences. See *Public-House* and *Police*, 1.

JUSTICIARY CASES—*Continued.**Procedure—Proof.*

12. A declaration taken on a charge of assault and mobbing and rioting and breach of the peace *held* to be competent evidence against the accused in a trial for breach of the peace only. *Macdougall v. MacLulich*, Feb. 18, 1887, *Just. Cases*, p. 17.
13. Competency of evidence of accused in a customs prosecution. *Dodsworth v. Rijnbergen*, Dec. 15, 1886, p. 238.
14. Competency of evidence of wife of accused in a public-house prosecution. *Morrison v. Morrison*, June 3, 1887, *Just. Cases*, p. 28.

Review—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62).

15. An appellant is not entitled to raise on the facts stated in a case under the Summary Prosecutions Appeals Act, 1875, any question of law to which he has not specially directed the attention of the inferior Judge in requiring the case to be stated. *Macdougall v. MacLulich*, Feb. 18, 1887, *Just. Cases*, p. 17.

Review—Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. c. 62), sec. 3, subsec. (1)—Lodging of bond of caution.

16. In a case under the Summary Prosecutions Appeals Act, 1875, it was stated that the bond of caution required by the Act only reached the Sheriff-clerk's office by post on the morning after the statutory period of three days had expired. The Sheriff-substitute stated the case, leaving the question of the competency open as one of the questions of law for the opinion of the Court. The appellant's counsel opened the case on the merits without any objection on the part of the respondents to the competency of the appeal. *Held* that the facts in regard to the lodging of the bond of caution and the relative question of law were not competently part of the case, and that in the circumstances the Court would not entertain the objection to the competency of the appeal.

Opinion (per Lord Young) that if a bond of caution had not been timeously lodged owing to mishap not attributable to the fault of the appellant, the Court might give relief against the mishap. *Thom v. Caledonian Railway Co.*, Nov. 12, 1886, *Just. Cases*, p. 5.

Review—Amendment of incompetent sentence—Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. cap. 62), sec. 3.

17. A Sheriff sitting in the Summary Court sentenced a person to pay a fine of £1, 1s., and ordained him to find caution to the amount of £10 for twelve months. In an appeal, *held (diss. Lord Craighill)* that it was competent for the Court to amend the sentence to the effect of restricting the period of caution to six months. *Macbeath v. Fraser*, Nov. 20, 1886, *Just. Cases*, p. 16.

Objections to inferior Court proceedings—Jurisdiction—Competency of Summary Complaint—Sheriff—Alkali, &c., Works Regulations Act, 1881 (44 and 45 Vict. cap. 37).

18. *Held* that proceedings for recovering the fines imposed by the Alkali, &c., Works Regulation Act, 1881, fall within the Sheriff's criminal jurisdiction, and are competently brought by way of complaint under the Summary Jurisdiction Acts, 1864 and 1881. *Fletcher v. Eglinton Chemical Co., Limited*, Nov. 13, 1886, *Just. Cases*, p. 9.

Objections to inferior Court proceedings—Jurisdiction—Competency of Summary complaint—Sunday Trading—Act, 1861, cap. 18.

19. A complaint in a Police Court at the instance of the procurator-fiscal charging a contravention of the Act 1861, cap. 18, "for the due observance of the Sabbath-day," set forth that the accused was "liable, on conviction, to pay a penalty of £10 in Scots money, or 16s. 8d. in sterling money, and failing payment of said penalty, is liable to be exemplarily punished in his person, namely, to be imprisoned for any period not exceeding twenty days," and prayed that the accused should be punished "according to law." The complaint did not bear to proceed under any of

JUSTICIARY CASES—Continued.

the statutes relating to summary procedure. The evidence of the witnesses was recorded, and the recorded depositions were signed by the respective witnesses and by the presiding magistrate. The accused was convicted. On a suspension, conviction *quashed*, *per* the Lord Justice-General, Lord Young, and Lord M'Laren, on the ground that the case of *Bute v. More*, Nov. 24, 1870, 1 Coup. 495, 9 Macph. 180, decided that a summary complaint for a contravention of the Act 1661, cap. 18, was incompetent, and *per* the Lord Justice-Clerk, Lord Mure, Lord Craighill, and Lord M'Laren, on the ground that, even if a summary complaint were competent, the present complaint could not be sustained, not being brought under the Summary Jurisdiction Acts, 1864 and 1881. *Nicol v. M'Neill*, July 13, 1887, Just. Cases, p. 47.

Objections to inferior Court proceedings—Jurisdiction—Alleged competition of civil right—Day poaching.

20. A person charged on a summary complaint with day poaching produced a written permission by a burgh to shoot "over the lands belonging to" the burgh, and alleged that the *locus* libelled in the complaint formed part of the lands belonging to the burgh. The burgh declined to state whether they claimed the ground in question as their property, and it was not disputed that it was in the occupation of one of the complainer's tenants. The Sheriff-substitute dismissed the complaint in respect that it involved a question of civil right. On an appeal, *held* that no question of civil right was involved, and case *remitted* to the Sheriff-substitute to be tried. *Scott v. Thomson*, June 4, 1887, Just. Cases, p. 45.

Objections to inferior Court proceedings—Complaint—Fine or imprisonment—Limited Company.

21. A complaint against a limited company set forth that the company had contravened a statute in a certain way, "whereby the company" had become liable to a fine and to imprisonment in the event of the fine and costs not being paid, and prayed the Court to convict the company of the contravention, and to adjudge it "to suffer the penalties provided" by the Act. *Objection* to the relevancy of the complaint, on the ground that a company was not liable to imprisonment, *repelled*. *Fletcher v. Eglinton Chemical Co., Limited*, Nov. 13, 1886, Just. Cases, p. 9.

Objection to inferior Court proceedings—Oppression—Railway—Travelling without proper ticket.

22. A bye-law of a railway company provided that "any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings." *Held* that the bye-law was only applicable to cases where an attempt was made to cheat the company, and that it was oppressive to prosecute for the penalty when there was no such attempt. *Thom v. Caledonian Railway Co.*, Nov. 12, 1886, Just. Cases, p. 5.

Objections to inferior Court proceedings—Penalty—Modification.

23. In a prosecution for an offence against the Public Houses Acts brought under the Edinburgh Police Act, 1879, and not under the Summary Jurisdiction Acts of 1864 and 1881, the magistrate may competently exercise the power conferred by the Summary Jurisdiction Act, 1881, sec. 6, subsec. A, to impose a modified penalty. *Linton v. Sherry*, June 4, 1887, Just. Cases, p. 46.

LEASE. *Lease to two persons and the survivor—Respective heirs bound conjunctly and severally.*

1. In a lease in favour of two persons and the survivor the tenants bound "themselves and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion, to pay" the rent to the landlord. *Held* (in rev. judgment of Second Division) that on the death of one of the tenants his representatives became jointly and severally liable with the survivor for the rent till the termination of the lease. *Burns v. Martin*, Feb. 14, 1887, H. L., p. 20.

LEASE—Continued.

Partial destruction of subject—Abatement—Retention of rent—Liquid and illiquid.

2. *Held* that a tenant is not bound to pay the full rent if, during possession, through no fault of his own, he loses the beneficial enjoyment of part of the subject let, and that his claim to abatement may be stated by way of defence to an action for payment of the full rent. *Muir v. McIntyre*, Feb. 4, 1887, p. 470.

Hypothec.

3. The landlord's hypothec does not extend to articles sent to a commission-agent for exhibition as samples. *Pulsometer Engineering Co., Limited, v. Gracie*, Jan. 14, 1887, p. 316.

Removing—Title to sue.

4. The estates of A were sequestrated in 1876, and his trustee sold to B his right and interest in an inn (which he held of the proprietor under a verbal lease). The trustee granted an assignation of the rents under declaration that "I have no title to the said subjects" beyond the act and warrant, and that "I will not be bound to give any, there being no written title or right either in me or in the said A, the subjects being possessed merely at the will of the proprietor." A continued in possession of the inn till his death in April 1886. In March 1886 B had raised an action of removing against him, which was in dependence at the date of his death. In May 1886 B presented a petition in the Sheriff Court for a warrant for the summary ejection of A's widow, in which he averred that he was proprietor of the subjects occupied by the defender, and founded on the assignation as his title. On this petition the Sheriff found that A's widow had no right or title to occupy the subjects, and granted warrant for her removal. A's widow brought a suspension thereof in the Court of Session. In his answers B averred that after the date of the assignation A occupied the subjects as his tenant under a verbal agreement to that effect. The Court (*diss.* Lord Shand, *aff.* judgment of Lord McLaren) refused B a proof of his averments of tenancy, and suspended the proceedings complained of, on the ground that B had no title to sue the removing. *Sinclair v. Leslie*, June 9, 1887, p. 792.

Agricultural Holdings Act, 1883 (46 and 47 Vict. c. 62), secs. 28, 35, and 42.

5. *Held* that the Agricultural Holdings (Scotland) Act, 1883, did not apply to the case of a hotel and 30 acres of land let together as one subject. *Macintosh v. Lord Lovat*, Dec. 18, 1886, p. 282.

Agricultural Holdings Act, 1883 (46 and 47 Vict. cap. 62), secs. 1, 36, and 42—Compensation for unexhausted improvements—Renunciation.

6. *Held* that a renunciation of a lease by a tenant, accepted by the landlord, did not bar the tenant from recovering compensation for unexhausted improvements under the Agricultural Holdings Act, 1883. *Strang v. Stuart*, March 16, 1887, p. 637.

Agricultural Holdings Act, 1883 (46 and 47 Vict. cap. 62), sec. 7—Compensation for unexhausted improvements—Notice.

7. The Agricultural Holdings Act, 1883, requires a tenant who claims compensation from his landlord for unexhausted improvements to give notice of his claim four months before the termination of his tenancy. *Held* that, in the case of leases which terminate at Martinmas for the arable land, and six months later for the houses and grass, notice given four months before the latter term is sufficient notice. *Strang v. Stuart*, March 16, 1887, p. 637.

Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), sec. 6, subsec. 5.

8. *Held*, on a construction of the Crofters Holdings (Scotland) Act, 1886, particularly sec. 6, subsec. 5, thereof, that the jurisdiction of the ordinary Courts of law to grant decree for payment of arrears of rent is not suspended by the presentation of an application to the Commissioners under the Act to fix a fair rent and to deal with arrears. *Fraser v. Macdonald*, Dec. 7, 1886, p. 181.

See Contract, 2.

LEGITIM. See *Succession*, 8.

MARRIAGE-CONTRACT. *Provision to husbands—Implied condition.*

A husband by his antenuptial marriage-contract made certain provisions for his wife "if she shall survive him," and she on the other part conveyed to him "and his heirs and assignees whomsoever, All and Sundry the whole means and effects, heritable and moveable . . . now belonging or indebted and owing to her . . . and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour." The marriage was dissolved by the death of the husband, and the wife subsequently acquired considerable funds, and then died intestate. *Held* that the conveyance by the wife in favour of her husband, and his heirs and assignees, was subject to the implied condition that he should survive her. *Russell's Trustees*, June 30, 1887, p. 849.

MASTER AND SERVANT. See *Reparation*, 10 to 15.

MEDITATIO FUGÆ. *Execution in a foreign country.*

Held (1) that a *meditatio fugæ* warrant could not be put into execution furth of Scotland, and (2) that a creditor who had by means of such a warrant brought a debtor from England to Scotland was not entitled to avail himself of the fact that he had brought the debtor within the jurisdiction of the Courts of Scotland. *Adam v. Crowe*, June 14, 1887, p. 800.

MINES AND MINERALS. *Clay—Compulsory sale—Water-Works Clauses Act, 1847 (10 and 11 Vict. c. 17)—Railways Clauses Act, 1845 (8 and 9 Vict. c. 33).*

1. *Held* (diss. Lord Mure, rev. judgment of Lord M'Laren) that the provision of the Water-Works Clauses Act, 1847, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, iron-stone, slate, or other minerals" applied to minerals of every kind which the seller might find it profitable to work, and therefore applied to ordinary clay having a commercial value. *Magistrates of Glasgow v. Farie*, Jan. 21, 1887, p. 346.

Support to adjacent surface.

2. A proprietor of lands sold the surface, reserving the minerals and right to work the same "upon payment to the proprietors of the ground of what loss and damage they shall sustain thereby upon the land." He then worked out the whole of an upper seam of coal by stoop-and-room. Subsequently he sold a lower seam to a person who worked out the coal therein, leaving, however, a solid mass of coal unworked beneath and fifty yards round a steading which belonged to the owner of the surface. That steading having been damaged by subsidence of the ground, caused by the withdrawal of the lateral support in the lower seam, the owner of the surface raised an action against the owner of the lower seam and his tenant, in which the defenders pleaded that they were not liable for the damage in respect that it was due to the previous working in the upper seam, and that the defenders had left the subjacent support entirely unworked, and were not bound to give support *a latere*. *Held* that the pursuer was entitled to damages from the defenders on the ground that the original proprietor of the minerals after working out the upper seam could not have wrought the lower without being liable for the damage resulting therefrom, and could not transmit his right without that liability. *White's Trustees v. Duke of Hamilton*, March 10, 1887, p. 597.

MINOR AND PUPIL. *Power to grant discharge—Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 26), sec. 2.*

1. In an action of damages at the instance of children, some of whom were minors and others pupils, against a railway company for loss sustained by them through the death of their father, who was killed by an accident on the defenders' line, the defenders made a tender of £50 to each child, which was accepted. On a motion for decree, the defenders raised a question as

MINOR AND PUPIL—*Continued.*

to the capacity of the pursuers to grant a valid discharge. *Held* (1) that the mother of the children (sisted as a party in the cause, as tutor to the pupil children) could, under sec. 2 of the Guardianship of Infants Act, 1886, grant a valid discharge of the sums paid to the pupil children; and (2) that the minor children could themselves grant a valid discharge, and that the sums paid to them being of the nature of alimentary payments, and not capital sums for investment, it was not necessary, to secure against the risk of future challenge, to have a curator appointed to concur with them in the discharge. *Jack, &c., v. North British Railway Co.*, Dec. 17, 1886, p. 263.

Heritable bond by tutor.

2. A bond granted by a tutor over his ward's estate is null. *Scott's Trustees v. Scott*, July 19, 1887, p. 1043.

MORA. *Poor—Assessment—Classification.*

1. In 1846 a parochial board, with the approval of the Board of Supervision, adopted a classification of lands and heritages for occupants' rates into "(1) lands let for farming, (2) houses let as dwelling-houses and shops," the former being assessed at one-sixth of their full value, the latter at their full value. At that date there were no railways in the parish, but a railway was constructed in 1850. It was assessed in Class II., and continued to be so assessed without objection until 1886. *Held* in a declarator at the instance of the railway company against the parochial board that the pursuers were not barred by *mora* and acquiescence from having it declared that the classification was invalid in respect it was not exhaustive. *North British Railway Co. v. Cardross Parochial Board*, Feb. 17, 1887, p. 478.

Parent and child—Illegitimate child—Aliment.

2. In 1863 a woman was delivered of an illegitimate child in her father's house. The putative father admitted the paternity, and until the child was four years old made contributions in name of aliment to its maternal grandfather, with whom it continued to live. He then made an offer to take the child to his own house, which both its mother and its maternal grandfather declined. Thereafter the father contributed little or nothing towards the child's support. It continued to live with its grandfather till its seventeenth year, when it went to its mother. The maternal grandfather died in 1883, without having made any demand on the father in respect of the child's aliment. In 1886 the mother raised an action for payment of a sum in name of inlying expenses and of aliment down to the child's thirteenth year. *Held* that in the circumstances the pursuer was not entitled to recover, and defender *assolized*. *Westlands v. Pirie*, June 1, 1887, p. 763.

Transaction between trustees and beneficiaries.

3. Action raised in 1886 for reduction of a deed dated in 1852, under which the trust-estate had been conveyed by the beneficiaries to the trustees, as was averred, without adequate consideration, *held* not to have been timeously raised. *Buckner v. Jopp's Trustees*, July 16, 1887, p. 1006.

NOBILE OFFICIUM. See *Burgh*, 1, 8—*Process*, 17—*Trust*, 4, 5, 14, 15.

NUISANCE. *Dean of Guild—Jurisdiction.*

1. The Dean of Guild having refused to sanction the erection within burgh of a byre for the accommodation of twelve cows on the ground that it was likely to create a nuisance, on appeal the Court, doubting the Dean of Guild's jurisdiction to entertain the question of nuisance, *sisted* the process to enable the objectors to bring an interdict against the erection of the building in question. This having been done, after proof the interdict was *refused*, and in respect thereof the Dean of Guild's interlocutor in the other process was recalled, and a remit made to him to proceed with the lining. *Manson v. Forrest*, June 14, 1887, p. 802.
2. The surveyor of a burgh objected to warrant being granted by the Dean of Guild Court for the increase of certain stabling accommodation belonging

NUISANCE—Continued.

to a carriage-hirer, on the ground that the buildings proposed to be enlarged were in the middle of a square of buildings densely populated, and that the smell and noise from them would constitute a nuisance, and that the danger of fire in the district would be increased by them. The Dean of Guild having allowed a proof as to these objections, the petitioner appealed, and maintained that they related only to the use of the proposed building and to alleged nuisance, which were beyond the jurisdiction of the Dean of Guild. The Court (*diss.* Lord Rutherford Clark) refused the appeal on the ground that it was expedient that the facts should be ascertained before determining whether the questions raised by the objections fell within the jurisdiction of the Dean of Guild. *Robertson v. Thomas*, June 17, 1887, p. 822.

Restriction in feu-contract.

3. *Opinions* as to the effect of a stipulation in a feu-contract against the erection upon the feu of any house "for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars." *Manson v. Forrest*, June 14, 1887, p. 802.

Erection of byre in burgh.

4. *Held* that the business of cowkeeping may be so conducted and regulated within burgh as not to be a nuisance.

Circumstances in which the Court *refused* to grant interdict against the erection of a byre for twelve cows within burgh—the cowkeeper having come under an undertaking to regulate his business so as in the view of the Court to obviate the possibility of its creating a nuisance to the neighbouring proprietors. *Manson v. Forrest*, June 14, 1887, p. 802.

Property—Implied contract—Acquiescence.

5. The proprietor of an estate adjoining a town, part of which was built on land feued from him, constructed sewers so as to carry to his lands, for the purpose of irrigation, the sewage of that part of the town, and he made settling-ponds and other works on his estate for that purpose. In 1868 the Commissioners of Police of the town, which had adopted the General Police Act of 1862, executed drainage works, in doing which they took advantage of the proprietor's system of drainage, with his knowledge, connecting some of their drains with his sewers and settling-ponds. Thereafter the town increased, and the quantity of sewage drained towards the proprietor's lands was thus greatly augmented. The sewage irrigation became unsatisfactory, and was abandoned. In 1886 the proprietor, in consequence of the nuisance caused by the quantity of sewage sent upon his lands, raised an action against the Commissioners, concluding for declarator that the town was not entitled to send sewage upon the pursuer's lands, and for interdict. *Held* (1) that no contract by which the proprietor was bound to receive the town sewage upon his lands could be implied from the actings of parties; and (2) that he could not, by having allowed the drainage system of the town to be made so as to join his own without objection, be held to have acquiesced in their sending sewage upon his lands in time coming, and therefore that he was entitled to decree of declarator and interdict as craved. *Houldsworth v. Burgh of Wishaw*, July 14, 1887, p. 920.

PARENT AND CHILD. *Pater est quem nuptiæ demonstrant.*

1. The presumption *pater est quem nuptiæ demonstrant* may be rebutted by evidence which satisfies the Court that the husband was not the father.

Circumstances in which the Court *held* that the presumption was rebutted, although the husband and wife at the time of the child's conception resided in the same village. *Steedman v. Steedman*, July 20, 1887, p. 1066.

Illegitimate child—Aliment.

2. *Held* (*diss.* Lord Young) that a bastard son is liable to support his mother. *Samson v. Davis*, Nov. 26, 1886, p. 113.

INSURANCE—Continued.

repairs, she had quitted the port of Greenock within the meaning of a policy of insurance for the voyage, and "while in port thirty days after arrival"

Opinions on the point reserved by the Lord President, Lord Mure, and Lord Adam.

Opinion contra (per Lord Shand). Owners of "Afton" v. Northern Marine Insurance Co., Limited, March 4, 1887, p. 544.

INTERDICT. Trespass—Right not insisted in.

1. In a petition by a proprietor of lands for interdict to prevent persons pasturing their cattle on his lands, the defenders, *inter alia*, pleaded on record that they had a right so to pasture their cattle. Subsequently, by minute, they stated that they never claimed, and did not now claim, such a right, but they made no motion to have the pleas asserting a right deleted from the record, although asked by the Court whether they proposed to do so. *Held* that the petitioner was entitled to interdict. *MacLeod v. Davidson, &c.*, Nov. 17, 1886, p. 92.

Procedure—Breach—Patent.

2. A, the holder of a patent, obtained interim interdict against B to prevent infringement. B did not object to the validity of the patent, but immediately thereafter assumed his son C as a partner with a view to manufacturing articles which A alleged were in infringement of his patent. A thereupon presented a petition and complaint against B and C for breach of interdict. B and C averred that the articles manufactured by them did not constitute an infringement, and further C challenged the validity of A's patent. *Held* (in conformity with *Dudgeon v. Thomson and Donaldson*, 3 R. 604 and 974, and 4 R. (H. L.) 88), (1) that it was competent to bring C into the process, though the interdict was not directed against him personally, and (2) that C was not entitled to a proof of his averments regarding the validity of the patent. *Harvie v. W. & T. Ross*, Nov. 13, 1886, p. 71.

See *Justiciary Cases*, 2.

JUDICIAL FACTOR. Appointment—Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 16.

1. The appointment of a judicial factor under the 16th section of the Bankruptcy Act, 1856, is not a matter of course, and ought to be made only where immediate measures for the preservation of the estate are necessary. *Cuthbertson v. Gibson*, May 31, 1887, p. 736.

Investment of funds—Loan over buildings in course of erection.

2. Buildings in course of erection are not a security on which a judicial factor is entitled to lend trust-funds.

Circumstances in which a judicial factor was held liable to make good a loss of trust-funds arising out of a loan over subjects in course of building, which afterwards proved insufficient to meet it. *Guild v. Glasgow Educational Endowments Board*, July 16, 1887, p. 944.

Investment of funds—Trusts Amendment Act, 1884 (47 and 48 Vict. c. 63).

3. A *curator bonis*, being a trustee in the meaning of the Trusts Amendment Act, 1884, is entitled to invest the funds in his hands as curator in the purchase of the stocks and in the loans authorised as trust investments by that Act, notwithstanding that the registration of his name as holder of these stocks cannot by the practice of the Bank of England, where a large number of these stocks are transferable, be qualified by any entry to shew the character in which he holds them, the Bank of England declining to take cognisance of trusts. *Accountant of Court v. Crumpton's Curator Bonis*, Nov. 12, 1886, p. 55.

Recall—Junior Lord Ordinary—Distribution of Business Act, 1857 (20 and 21 Vict. cap. 56), sec. 6.

4. *Held* (following *Kyle*, 24 D. 1083), that the appointment of a *curator bonis* made by the Junior Lord Ordinary, may competently be recalled by him. *Tweedie*, Dec. 8, 1886, p. 212.

JUDICIAL FACTOR—*Continued.*

5. *Held* by Lord Trayner (Ordinary) that a petition for recall of the appointment of a judicial factor may be competently presented to the Junior Lord Ordinary. *Masterton v. Erskine's Trustees*, May 14, 1887, p. 712.

Recall—Bankruptcy Act, 1856 (19 and 20 *Vict. cap.* 79), *sec.* 164.

6. At the instance of certain heritable creditors, a judicial factor was appointed under the 164th section of the Bankruptcy Act, 1856, upon the estate of a person deceased who had died intestate, and whose representatives, two brothers and a sister, were then in America. One of the brothers returned temporarily to Scotland, where he was decerned executor-dative, and the other sent instructions to have his title as heir made up. The brothers and sister then presented a petition for recall of the factor's appointment, but while the petition was pending the executor returned to America. The heritable creditors opposed the recall. The Court made a remit to the Accountant in Bankruptcy, who reported that it was doubtful whether the property would realise enough to pay off the bonds in full. The Court *refused* the petition for recall. *Masterton v. Erskine's Trustees*, May 14, 1887, p. 712.

See *Minor*, 1.

JURISDICTION. *Exclusion of Courts of Law—Crofters Holdings (Scotland) Act*, 1886 (49 and 50 *Vict. cap.* 29), *sec.* 6, *subsec.* 5.

1. *Held*, on a construction of the Crofters Holdings (Scotland) Act, 1886, particularly *sec.* 6, *subsec.* 5, thereof, that the jurisdiction of the ordinary Courts of law to grant decree for payment of arrears of rent is not suspended by the presentation of an application to the Commissioners under the Act to fix a fair rent and to deal with arrears. *Fraser v. Macdonald*, Dec. 7, 1886, p. 181.

Exclusion of Courts of Law—Volunteer Act, 1863 (26 and 27 *Vict. cap.* 65), *secs.* 24, 25, and 27.

2. *Held* that the rules for the management of the property, finances, and civil affairs of a corps, made and approved in terms of the Volunteer Act, 1863, may competently include rules providing for the payment of subscriptions by officers (both active and honorary) to the funds of the corps, and that such subscriptions so provided for may be recovered in a Court of law. *Morrison v. Neilson*, Feb. 2, 1887, p. 452.

Jurisdiction of Court of Session.

3. To review entries in a valuation-roll. *Magistrates of Glasgow v. Hall*, Jan. 14, 1887, p. 319.
4. To set aside a classification of lands and heritages under the Poor-Law Amendment Act, 1845 (8 and 9 *Vict. cap.* 83), *sec.* 36. *North British Railway Co. v. Cardross Parochial Board*, Feb. 17, 1887, p. 478.
5. To reduce a Debts Recovery decree. *Robertson v. Pringle*, Feb. 5, 1887, p. 474.

Meditatio fugæ—Execution abroad.

6. *Held* (1) that a *meditatio fugæ* warrant could not be put into execution forth of Scotland, and (2) that a creditor who had by means of such a warrant brought a debtor from England to Scotland was not entitled to avail himself of the fact that he had brought the debtor within the jurisdiction of the Courts of Scotland. *Adam v. Crowe*, June 14, 1887, p. 800.

See *Burgh*, 2, 3—*Foreign—Process*, 15, 16, 17—*Sheriff*, 1, 2, 3, 4.

JUSTICIARY CASES. *Crimes—Culpable, reckless, and negligent steering—Collision—Indictment—Specification.*

1. The masters of two steamers which had been in collision in the Clyde were charged in the River-Bailie Court of Glasgow on a single complaint with "culpable negligence and reckless conduct in navigating, directing, managing, or steering steam vessels, whereby a collision took place, and the lives of the lieges were endangered, actors or actor, or art and part, in so far as," at a time and place libelled, the accused "did both and each, or one or other of them, while said vessels were approaching each other, so

JUSTICIARY CASES—*Continued.*

culpably, negligently, and recklessly navigate, direct, manage, or steer' their vessels "as to bring or cause or permit them to come into violent collision with each other, whereby" the vessels were damaged and the lives of lieges endangered. The charge was found proven against one of the accused, who was fined £3, but against the other it was found not proven. Conviction *quashed* on the ground that the libel was irrelevant for want of specification of the fault said to have been committed. *Clelland v. Sinclair*, March 18, 1887, Just. Cases, p. 23.

Crimes—Mobbing and Rioting—Deforcement.

2. An indictment charging the panels with mobbing and rioting and deforcement, in setting forth the *modus* which was applicable to both of the crimes charged, stated that the messenger-at-arms alleged to have been deforced had been instructed to serve a copy of a note of suspension and interdict and relative interlocutor upon a large number of persons, against whom the prayer of the note was directed, and that the interlocutor was in these terms, "To see and answer within fourteen days: Reserving as to interdict in the meantime"—(with no order for intimation or service). The indictment further bore that the messenger having for the purpose of serving a copy of the note on each of the persons concerned proceeded to the farm of A and there having served copies on certain persons, and having thereafter proceeded towards B for the purpose of serving the remaining copies, a mob at or near A assembled for the purpose of preventing him from fulfilling his duty of serving these copies, and by threats and acts of violence deforced the officer. The panels were charged with forming part of the mob. Objections to the relevancy of the indictment—on the grounds (1) that the duty in which the messenger was said to be engaged when deforced was the service of a copy of the note of suspension and interdict and not of the note itself; (2) that the interlocutor founded on was not a legal warrant, as it contained no express order for intimation; and (3) that the deforcement was alleged to have taken place not when the officer was actually engaged in serving, but after he had served his writs at A and before he reached B, where the remainder were to be served—*repelled*. *Her Majesty's Advocate v. McLean*, Oct. 18, 1886, Just. Cases, p. 1.

Crimes—Theft—Customer carrying off goods on credit against will of seller.

3. A shopkeeper refused to sell certain goods to one of his customers, unless the customer paid for the goods before delivery. To this the customer agreed, but after the shopkeeper had weighed the goods the customer, who was under the influence of drink, took violent possession of them, and carried them off without payment of the price, 3s., notwithstanding the remonstrances of the shopkeeper. The customer was convicted of theft of the goods. Conviction *quashed*. *Clyne v. Keith*, March 18, 1887, Just. Cases, p. 22.

Statutory offences—Poaching—Farm-servant killing rabbits under authority from his master—Day Trespass Act (2 and 3 Will. IV. c. 68)—Ground Game Act, 1880 (43 and 44 Vict. c. 47).

4. Held that rabbits not being game at common law, a farm-servant snaring rabbits under verbal authority from his master on his master's farm cannot be convicted of trespass in pursuit of conies under the Day Trespass Act, and that the provisions of the Ground Game Act, 1880, sec. 1, subsec. 1, requiring written authority from the occupier to kill ground game, did not apply. *Jack v. Nairne*, Feb. 18, 1887, Just. Cases, p. 20.

Statutory offences—Salmon Fisheries Act, 1868 (31 and 32 Vict. c. 123), sec. 15, subsec. 4—Bye-law, schedule E.

5. Size of mesh. *Mackenzie v. Pitcaithley*, Feb. 18, 1887, Just. Cases, p. 19.

Statutory offences—Ship—Employment of person as master who has no certificate—Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), sec. 136.

6. The 136th section of the Merchant Shipping Act, 1854, enacts that no ship shall proceed to sea unless the master thereof has a valid certificate under

JUDICIARY CASES—*Continued.*

the Act, and that any person who employs any person as master without ascertaining that he is possessed of such a certificate shall incur a penalty. In a complaint against the owner of a whaling ship for a contravention of the above section, it was held proved by the Sheriff that the accused had employed on board, nominally as icemaster, a person who possessed great experience as a navigator among ice, and as a whale fisher, but had no certificate under the Merchant Shipping Acts, and also another person, nominally as master, who held a master's certificate but was without experience in the two respects named; that, acting under the instructions of the accused, the icemaster assumed the command of the ship from the time she left Scotland till she was abandoned in the Arctic Seas; that he was considered by the crew as master, occupied the master's berth, and with a single exception gave all the orders, although several of the crew deposed that they would have considered themselves bound in law to obey the certificated master in preference to him; that it was requisite that the person in command should have some special knowledge of ice navigation, and that it would not have been safe to have entrusted the command to a certificated master, however good, who was not possessed of such knowledge; and that the certificated master was entered in the ship's books as master, and signed the articles as such, the icemaster being designed as "icemaster, in full charge." The Sheriff convicted the accused. On appeal the Court *quashed* the conviction. *Healop v. Cadenhead*, June 4, 1887, Just. Cases, p. 35.

Statutory Offences—Failure to educate children—Education Act, 1872 (35 and 36 Vict. cap. 62), sec. 70—Education Act, 1883 (46 and 47 Vict. cap. 56), secs. 9 and 10.

7. In order to a prosecution under the Education Acts, 1872 and 1883, for failure to educate children, it is essential that there should be produced either a certificate of failure to educate under section 70 of the Act of 1872, or an attendance order under sections 9 and 10 of that of 1883. *Macaulay v. Macdonald*, June 4, 1887, Just. Cases, p. 43.

Statutory offences—Locomotive on Highway—Locomotive Act, 1861 (24 and 25 Vict. cap. 70), sec. 6—Locomotives Amendment Act, 1878 (41 and 42 Vict. cap. 58).

8. A bridge on a highway may be stopped for locomotive traffic by a bye-law relating to it passed under the powers given by the Locomotives Amendment Act, 1878, by the road authorities of the district, and, after the advertisement specified in that Act, duly confirmed; and, therefore, a complaint alleging a contravention of such bye-law does not require to libel the Locomotives Act, 1861, or to set forth that, as required by section 6 of that Act, a notice was placed at the bridge itself that it was insufficient for the ordinary traffic of the district. *Cadenhead v. Milne*, July 14, 1887, Just. Cases, p. 58.

Statutory offences—Sunday Trading—Act 1661, cap. 18.

9. *Observations* on the question whether the Act 1661, cap. 18, was in desuetude. *Nicol v. McNeill*, July 13, 1887, Just. Cases, p. 47.

Statutory Offences—Sale of Drugs—Limited Company—Pharmacy Act, 1868 (31 and 32 Vict. c. 121), secs. 1 and 15.

10. A limited company carried on business as "Wholesale Chemists, Druggists, and Tea-merchants," doing both a wholesale and retail business. None of the shareholders was a duly qualified chemist and druggist under the Pharmacy Act, 1868, but the dispensing of drugs was done by duly qualified chemists and druggists. *Held* that the individual shareholders were not liable under sec. 1 and sec. 15 of the Act to be prosecuted for the offence of unlawfully taking and using the name chemists and druggists, and advertising the company as chemists and druggists. *Bremridge v. Gray*, July 20, 1887, Just. Cases, p. 60.

Statutory offences.

11. Public-house and police offences. See *Public-House and Police*, 1.

JUSTICIARY CASES—Continued.

Procedure—Proof.

12. A declaration taken on a charge of assault and mobbing and rioting and breach of the peace *held* to be competent evidence against the accused in a trial for breach of the peace only. *Macdougall v. MacLulich*, Feb. 18, 1887, *Just. Cases*, p. 17.
13. Competency of evidence of accused in a customs prosecution. *Dodsworth v. Rijnbergen*, Dec. 15, 1886, p. 238.
14. Competency of evidence of wife of accused in a public-house prosecution. *Morrison v. Morrison*, June 3, 1887, *Just. Cases*, p. 28.

Review—Summary Prosecutions Appeals (Scotland) Act, 1875 (38 and 39 Vict. c. 62).

15. An appellant is not entitled to raise on the facts stated in a case under the Summary Prosecutions Appeals Act, 1875, any question of law to which he has not specially directed the attention of the inferior Judge in requiring the case to be stated. *Macdougall v. MacLulich*, Feb. 18, 1887, *Just. Cases*, p. 17.

Review—Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. c. 62), sec. 3, subsec. (1)—Lodging of bond of caution.

16. In a case under the Summary Prosecutions Appeals Act, 1875, it was stated that the bond of caution required by the Act only reached the Sheriff-clerk's office by post on the morning after the statutory period of three days had expired. The Sheriff-substitute stated the case, leaving the question of the competency open as one of the questions of law for the opinion of the Court. The appellant's counsel opened the case on the merits without any objection on the part of the respondents to the competency of the appeal. *Held* that the facts in regard to the lodging of the bond of caution and the relative question of law were not competently part of the case, and that in the circumstances the Court would not entertain the objection to the competency of the appeal.

Opinion (per Lord Young) that if a bond of caution had not been timeously lodged owing to mishap not attributable to the fault of the appellant, the Court might give relief against the mishap. *Thom v. Caledonian Railway Co.*, Nov. 12, 1886, *Just. Cases*, p. 5.

Review—Amendment of incompetent sentence—Summary Prosecutions Appeals Act, 1875 (38 and 39 Vict. cap. 62), sec. 3.

17. A Sheriff sitting in the Summary Court sentenced a person to pay a fine of £1, 1s., and ordained him to find caution to the amount of £10 for twelve months. In an appeal, *held (diss. Lord Craighill)* that it was competent for the Court to amend the sentence to the effect of restricting the period of caution to six months. *Macbeath v. Fraser*, Nov. 20, 1886, *Just. Cases*, p. 16.

Objections to inferior Court proceedings—Jurisdiction—Competency of Summary Complaint—Sheriff—Alkali, &c., Works Regulations Act, 1881 (44 and 45 Vict. cap. 37).

18. *Held* that proceedings for recovering the fines imposed by the Alkali, &c., Works Regulation Act, 1881, fall within the Sheriff's criminal jurisdiction, and are competently brought by way of complaint under the Summary Jurisdiction Acts, 1864 and 1881. *Fletcher v. Eglinton Chemical Co., Limited*, Nov. 13, 1886, *Just. Cases*, p. 9.

Objections to inferior Court proceedings—Jurisdiction—Competency of Summary complaint—Sunday Trading—Act, 1861, cap. 18.

19. A complaint in a Police Court at the instance of the procurator-fiscal charging a contravention of the Act 1861, cap. 18, "for the due observation of the Sabbath-day," set forth that the accused was "liable, on conviction, to pay a penalty of £10 in Scots money, or 16s. 8d. in sterling money, and failing payment of said penalty, is liable to be exemplarily punished in his person, namely, to be imprisoned for any period not exceeding twenty days," and prayed that the accused should be punished "according to law." The complaint did not bear to proceed under any of

JUSTICIARY CASES—Continued.

the statutes relating to summary procedure. The evidence of the witnesses was recorded, and the recorded depositions were signed by the respective witnesses and by the presiding magistrate. The accused was convicted. On a suspension, conviction *quashed*, *per* the Lord Justice-General, Lord Young, and Lord M'Laren, on the ground that the case of *Bute v. More*, Nov. 24, 1870, 1 Coup. 495, 9 Macph. 180, decided that a summary complaint for a contravention of the Act 1661, cap. 18, was incompetent, and *per* the Lord Justice-Clerk, Lord Mure, Lord Craighill, and Lord M'Laren, on the ground that, even if a summary complaint were competent, the present complaint could not be sustained, not being brought under the Summary Jurisdiction Acts, 1864 and 1881. *Nicol v. M'Neill*, July 13, 1887, Just. Cases, p. 47.

Objections to inferior Court proceedings—Jurisdiction—Alleged competition of civil right—Day poaching.

20. A person charged on a summary complaint with day poaching produced a written permission by a burgh to shoot "over the lands belonging to" the burgh, and alleged that the *locus* libelled in the complaint formed part of the lands belonging to the burgh. The burgh declined to state whether they claimed the ground in question as their property, and it was not disputed that it was in the occupation of one of the complainer's tenants. The Sheriff-substitute dismissed the complaint in respect that it involved a question of civil right. On an appeal, *held* that no question of civil right was involved, and case *remitted* to the Sheriff-substitute to be tried. *Scott v. Thomson*, June 4, 1887, Just. Cases, p. 45.

Objections to inferior Court proceedings—Complaint—Fine or imprisonment—Limited Company.

21. A complaint against a limited company set forth that the company had contravened a statute in a certain way, "whereby the company" had become liable to a fine and to imprisonment in the event of the fine and costs not being paid, and prayed the Court to convict the company of the contravention, and to adjudge it "to suffer the penalties provided" by the Act. *Objection* to the relevancy of the complaint, on the ground that a company was not liable to imprisonment, *repelled*. *Fletcher v. Eglinton Chemical Co., Limited*, Nov. 13, 1886, Just. Cases, p. 9.

Objection to inferior Court proceedings—Oppression—Railway—Travelling without proper ticket.

22. A bye-law of a railway company provided that "any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings." *Held* that the bye-law was only applicable to cases where an attempt was made to cheat the company, and that it was oppressive to prosecute for the penalty when there was no such attempt. *Thom v. Caledonian Railway Co.*, Nov. 12, 1886, Just. Cases, p. 5.

Objections to inferior Court proceedings—Penalty—Modification.

23. In a prosecution for an offence against the Public Houses Acts brought under the Edinburgh Police Act, 1879, and not under the Summary Jurisdiction Acts of 1864 and 1881, the magistrate may competently exercise the power conferred by the Summary Jurisdiction Act, 1881, sec. 6, subsec. A, to impose a modified penalty. *Linton v. Sherry*, June 4, 1887, Just. Cases, p. 46.

LEASE. Lease to two persons and the survivor—Respective heirs bound conjunctly and severally.

1. In a lease in favour of two persons and the survivor the tenants bound "themselves and their respective heirs, executors, and successors, all conjunctly and severally, renouncing the benefit of discussion, to pay" the rent to the landlord. *Held* (in rev. judgment of Second Division) that on the death of one of the tenants his representatives became jointly and severally liable with the survivor for the rent till the termination of the lease. *Burns v. Martin*, Feb. 14, 1887, H. L., p. 20.

LEASE—Continued.

Partial destruction of subject—Abatement—Retention of rent—Liquid and illiquid.

2. *Held* that a tenant is not bound to pay the full rent if, during possession, through no fault of his own, he loses the beneficial enjoyment of part of the subject let, and that his claim to abatement may be stated by way of defence to an action for payment of the full rent. *Muir v. McIntyre*, Feb. 4, 1887, p. 470.

Hypothec.

3. The landlord's hypothec does not extend to articles sent to a commission-agent for exhibition as samples. *Pulsometer Engineering Co., Limited, v. Gracie*, Jan. 14, 1887, p. 316.

Removing—Title to sue.

4. The estates of A were sequestrated in 1876, and his trustee sold to B his right and interest in an inn (which he held of the proprietor under a verbal lease). The trustee granted an assignation of the rents under declaration that "I have no title to the said subjects" beyond the act and warrant, and that "I will not be bound to give any, there being no written title or right either in me or in the said A, the subjects being possessed merely at the will of the proprietor." A continued in possession of the inn till his death in April 1886. In March 1886 B had raised an action of removing against him, which was in dependence at the date of his death. In May 1886 B presented a petition in the Sheriff Court for a warrant for the summary ejection of A's widow, in which he averred that he was proprietor of the subjects occupied by the defender, and founded on the assignation as his title. On this petition the Sheriff found that A's widow had no right or title to occupy the subjects, and granted warrant for her removal. A's widow brought a suspension thereof in the Court of Session. In his answers B averred that after the date of the assignation A occupied the subjects as his tenant under a verbal agreement to that effect. The Court (*diss.* Lord Shand, *aff. judgment* of Lord McLaren) refused B a proof of his averments of tenancy, and suspended the proceedings complained of, on the ground that B had no title to sue the removing. *Sinclair v. Leslie*, June 9, 1887, p. 792.

Agricultural Holdings Act, 1883 (46 and 47 Vict. c. 62), secs. 28, 35, and 42.

5. *Held* that the Agricultural Holdings (Scotland) Act, 1883, did not apply to the case of a hotel and 30 acres of land let together as one subject. *Macintosh v. Lord Lovat*, Dec. 18, 1886, p. 282.

Agricultural Holdings Act, 1883 (46 and 47 Vict. cap. 62), secs. 1, 36, and 42—Compensation for unexhausted improvements—Renunciation.

6. *Held* that a renunciation of a lease by a tenant, accepted by the landlord, did not bar the tenant from recovering compensation for unexhausted improvements under the Agricultural Holdings Act, 1883. *Strang v. Stuart*, March 16, 1887, p. 637.

Agricultural Holdings Act, 1883 (46 and 47 Vict. cap. 62), sec. 7—Compensation for unexhausted improvements—Notice.

7. The Agricultural Holdings Act, 1883, requires a tenant who claims compensation from his landlord for unexhausted improvements to give notice of his claim four months before the termination of his tenancy. *Held* that, in the case of leases which terminate at Martinmas for the arable land, and six months later for the houses and grass, notice given four months before the latter term is sufficient notice. *Strang v. Stuart*, March 16, 1887, p. 637.

Crofters Holdings Act, 1886 (49 and 50 Vict. cap. 29), sec. 6, subsec. 5.

8. *Held*, on a construction of the Crofters Holdings (Scotland) Act, 1886, particularly sec. 6, subsec. 5, thereof, that the jurisdiction of the ordinary Courts of law to grant decree for payment of arrears of rent is not suspended by the presentation of an application to the Commissioners under the Act to fix a fair rent and to deal with arrears. *Fraser v. Macdonald*, Dec. 7, 1886, p. 181.

See Contract, 2.

LEGITIM. See *Succession*, 8.

MARRIAGE-CONTRACT. *Provision to husbands—Implied condition.*

A husband by his antenuptial marriage-contract made certain provisions for his wife "if she shall survive him," and she on the other part conveyed to him "and his heirs and assignees whomsoever, All and Sundry the whole means and effects, heritable and moveable . . . now belonging or indebted and owing to her . . . and all that she may acquire or succeed to during the subsistence of the said intended marriage, or that shall be belonging, owing, and indebted to her at the time of her death, with the exception of the provisions above made in her favour." The marriage was dissolved by the death of the husband, and the wife subsequently acquired considerable funds, and then died intestate. *Held* that the conveyance by the wife in favour of her husband, and his heirs and assignees, was subject to the implied condition that he should survive her. *Russell's Trustees*, June 30, 1887, p. 849.

MASTER AND SERVANT. See *Reparation*, 10 to 15.

MEDITATIO FUGÆ. *Execution in a foreign country.*

Held (1) that a *meditatio fugæ* warrant could not be put into execution furth of Scotland, and (2) that a creditor who had by means of such a warrant brought a debtor from England to Scotland was not entitled to avail himself of the fact that he had brought the debtor within the jurisdiction of the Courts of Scotland. *Adam v. Crowe*, June 14, 1887, p. 800.

MINES AND MINERALS. *Clay—Compulsory sale—Water-Works Clauses Act, 1847 (10 and 11 Vict. c. 17)—Railways Clauses Act, 1845 (8 and 9 Vict. c. 33).*

1. *Held* (*diss.* Lord Mure, *rev.* judgment of Lord M'Laren) that the provision of the Water-Works Clauses Act, 1847, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, iron-stone, slate, or other minerals" applied to minerals of every kind which the seller might find it profitable to work, and therefore applied to ordinary clay having a commercial value. *Magistrates of Glasgow v. Farie*, Jan. 21, 1887, p. 346.

Support to adjacent surface.

2. A proprietor of lands sold the surface, reserving the minerals and right to work the same "upon payment to the proprietors of the ground of what loss and damage they shall sustain thereby upon the land." He then worked out the whole of an upper seam of coal by stoop-and-room. Subsequently he sold a lower seam to a person who worked out the coal therein, leaving, however, a solid mass of coal unworked beneath and fifty yards round a steading which belonged to the owner of the surface. That steading having been damaged by subsidence of the ground, caused by the withdrawal of the lateral support in the lower seam, the owner of the surface raised an action against the owner of the lower seam and his tenant, in which the defenders pleaded that they were not liable for the damage in respect that it was due to the previous working in the upper seam, and that the defenders had left the subjacent support entirely unworked, and were not bound to give support *a latere*. *Held* that the pursuer was entitled to damages from the defenders on the ground that the original proprietor of the minerals after working out the upper seam could not have wrought the lower without being liable for the damage resulting therefrom, and could not transmit his right without that liability. *White's Trustees v. Duke of Hamilton*, March 10, 1887, p. 597.

MINOR AND PUPIL. *Power to grant discharge—Guardianship of Infants Act, 1886 (49 and 50 Vict. cap. 26), sec. 2.*

1. In an action of damages at the instance of children, some of whom were minors and others pupils, against a railway company for loss sustained by them through the death of their father, who was killed by an accident on the defenders' line, the defenders made a tender of £50 to each child, which was accepted. On a motion for decree, the defenders raised a question as

MINOR AND PUPIL—Continued.

to the capacity of the pursuers to grant a valid discharge. *Held* (1) that the mother of the children (sisted as a party in the cause, as tutor to the pupil children) could, under sec. 2 of the Guardianship of Infants Act, 1886, grant a valid discharge of the sums paid to the pupil children; and (2) that the minor children could themselves grant a valid discharge, and that the sums paid to them being of the nature of alimentary payments, and not capital sums for investment, it was not necessary, to secure against the risk of future challenge, to have a curator appointed to concur with them in the discharge. *Jack, &c., v. North British Railway Co.*, Dec. 17, 1886, p. 263.

Heritable bond by tutor.

2. A bond granted by a tutor over his ward's estate is null. *Scott's Trustees v. Scott*, July 19, 1887, p. 1043.

MORA. Poor—Assessment—Classification.

1. In 1846 a parochial board, with the approval of the Board of Supervision, adopted a classification of lands and heritages for occupants' rates into "(1) lands let for farming, (2) houses let as dwelling-houses and shops," the former being assessed at one-sixth of their full value, the latter at their full value. At that date there were no railways in the parish, but a railway was constructed in 1850. It was assessed in Class II., and continued to be so assessed without objection until 1886. *Held* in a declarator at the instance of the railway company against the parochial board that the pursuers were not barred by *mora* and acquiescence from having it declared that the classification was invalid in respect it was not exhaustive. *North British Railway Co. v. Cardross Parochial Board*, Feb. 17, 1887, p. 478.

Parent and child—Illegitimate child—Aliment.

2. In 1863 a woman was delivered of an illegitimate child in her father's house. The putative father admitted the paternity, and until the child was four years old made contributions in name of aliment to its maternal grandfather, with whom it continued to live. He then made an offer to take the child to his own house, which both its mother and its maternal grandfather declined. Thereafter the father contributed little or nothing towards the child's support. It continued to live with its grandfather till its seventeenth year, when it went to its mother. The maternal grandfather died in 1883, without having made any demand on the father in respect of the child's aliment. In 1886 the mother raised an action for payment of a sum in name of inlying expenses and of aliment down to the child's thirteenth year. *Held* that in the circumstances the pursuer was not entitled to recover, and defender *assolized*. *Westlands v. Pirie*, June 1, 1887, p. 763.

Transaction between trustees and beneficiaries.

3. Action raised in 1886 for reduction of a deed dated in 1852, under which the trust-estate had been conveyed by the beneficiaries to the trustees, as was averred, without adequate consideration, *held* not to have been timeously raised. *Buckner v. Jopp's Trustees*, July 16, 1887, p. 1006.

NOBILE OFFICIUM. See *Burgh*, 1, 8—*Process*, 17—*Trust*, 4, 5, 14, 15.

NUISANCE. Dean of Guild—Jurisdiction.

1. The Dean of Guild having refused to sanction the erection within burgh of a byre for the accommodation of twelve cows on the ground that it was likely to create a nuisance, on appeal the Court, doubting the Dean of Guild's jurisdiction to entertain the question of nuisance, *sisted* the process to enable the objectors to bring an interdict against the erection of the building in question. This having been done, after proof the interdict was *refused*, and in respect thereof the Dean of Guild's interlocutor in the other process was recalled, and a remit made to him to proceed with the lining. *Manson v. Forrest*, June 14, 1887, p. 802.
2. The surveyor of a burgh objected to warrant being granted by the Dean of Guild Court for the increase of certain stabling accommodation belonging

NUISANCE—Continued.

to a carriage-hirer, on the ground that the buildings proposed to be enlarged were in the middle of a square of buildings densely populated, and that the smell and noise from them would constitute a nuisance, and that the danger of fire in the district would be increased by them. The Dean of Guild having allowed a proof as to these objections, the petitioner appealed, and maintained that they related only to the use of the proposed building and to alleged nuisance, which were beyond the jurisdiction of the Dean of Guild. The Court (*diss.* Lord Rutherford Clark) refused the appeal on the ground that it was expedient that the facts should be ascertained before determining whether the questions raised by the objections fell within the jurisdiction of the Dean of Guild. *Robertson v. Thomas*, June 17, 1887, p. 822.

Restriction in feu-contract.

3. *Opinions* as to the effect of a stipulation in a feu-contract against the erection upon the feu of any house "for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars." *Manson v. Forrest*, June 14, 1887, p. 802.

Erection of byre in burgh.

4. *Held* that the business of cowkeeping may be so conducted and regulated within burgh as not to be a nuisance.

Circumstances in which the Court *refused* to grant interdict against the erection of a byre for twelve cows within burgh—the cowkeeper having come under an undertaking to regulate his business so as in the view of the Court to obviate the possibility of its creating a nuisance to the neighbouring proprietors. *Manson v. Forrest*, June 14, 1887, p. 802.

Property—Implied contract—Acquiescence.

5. The proprietor of an estate adjoining a town, part of which was built on land feued from him, constructed sewers so as to carry to his lands, for the purpose of irrigation, the sewage of that part of the town, and he made settling-ponds and other works on his estate for that purpose. In 1868 the Commissioners of Police of the town, which had adopted the General Police Act of 1862, executed drainage works, in doing which they took advantage of the proprietor's system of drainage, with his knowledge, connecting some of their drains with his sewers and settling-ponds. Thereafter the town increased, and the quantity of sewage drained towards the proprietor's lands was thus greatly augmented. The sewage irrigation became unsatisfactory, and was abandoned. In 1886 the proprietor, in consequence of the nuisance caused by the quantity of sewage sent upon his lands, raised an action against the Commissioners, concluding for declarator that the town was not entitled to send sewage upon the pursuer's lands, and for interdict. *Held* (1) that no contract by which the proprietor was bound to receive the town sewage upon his lands could be implied from the actings of parties; and (2) that he could not, by having allowed the drainage system of the town to be made so as to join his own without objection, be held to have acquiesced in their sending sewage upon his lands in time coming, and therefore that he was entitled to decree of declarator and interdict as craved. *Houldsworth v. Burgh of Wishaw*, July 14, 1887, p. 920.

PARENT AND CHILD. *Pater est quem nuptiæ demonstrant.*

1. The presumption *pater est quem nuptiæ demonstrant* may be rebutted by evidence which satisfies the Court that the husband was not the father.

Circumstances in which the Court *held* that the presumption was rebutted, although the husband and wife at the time of the child's conception resided in the same village. *Steedman v. Steedman*, July 20, 1887, p. 1066.

Illegitimate child—Aliment.

2. *Held* (*diss.* Lord Young) that a bastard son is liable to support his mother. *Samson v. Davie*, Nov. 26, 1886, p. 113.

PARENT AND CHILD—*Continued.**Illegitimate child—Aliment—Mora—Offer by father to take child.*

3. In 1863 a woman was delivered of an illegitimate child in her father's house. The putative father admitted the paternity, and until the child was four years old made contributions in name of aliment to its maternal grandfather, with whom it continued to live. He then made an offer to take the child to his own house, which both its mother and its maternal grandfather declined. Thereafter the father contributed little or nothing towards the child's support. It continued to live with its grandfather till its seventeenth year, when it went to its mother. She had previously contributed nothing directly to its support, although she was in the habit of residing with her father for considerable periods, when she was not in domestic service. The maternal grandfather died in 1883, without having made any demand on the father in respect of the child's aliment. In 1886 the mother raised an action for payment of a sum in name of inlying expenses and of aliment down to the child's thirteenth year. *Held (dub. Lord Rutherford Clark, rev. judgment of Lord M'Laren)* that in the circumstances the pursuer was not entitled to recover, and defender *assolized*. *Westlands v. Pirie*, June 1, 1887, p. 763.

Illegitimate child—Custody.

4. The mother of an illegitimate child agreed to hand over the child, then eight months old, to the custody of the father for maintenance and education. Nine months thereafter she presented a petition to the Court praying for the custody of the child. The father opposed the petition on the ground that she had bound herself by the agreement to allow him to have the custody of the child. *Held* that the mother was not bound by the agreement, but was entitled to the order craved.

Opinions that the mother of an illegitimate child cannot by agreement deprive herself of the right to its custody. *Macpherson v. Leishman*, June 4, 1887, p. 780.

PARTNERSHIP. *Joint adventure—Constitution of contract.*

1. Correspondence which was *held (rev. judgment of Lord Lee)* not to constitute a contract of joint adventure, in respect it contained no *termini habiles* for determining the duration of the contract or its essential conditions. *Young v. Dougans*, Feb. 23, 1887, p. 490.

Joint adventure—Ish of contract.

2. *Opinions (per Lord Justice-Clerk and Lord Craighill)* that a contract of joint adventure, unless there be something special in its nature, is terminable at the will of either party, if that be exercised in good faith and at a seasonable time. *Young v. Dougans*, Feb. 23, 1887, p. 490.

Process—Summons—Defenders.

3. An action was brought against a descriptive firm and the individual partners thereof, "as such partners and as individuals," concluding against the defenders, "jointly and severally," for a lump sum of £1000 in name of damages for judicial slander. The condescendence contained no averments of individual fault against any of the partners. *Held (rev. judgment of Lord M'Laren)* that the action was an action against the firm only. *Gordon v. British and Foreign Metaline Co., &c.*, Nov. 16, 1886, p. 75.

Reparation—Slander.

4. A company or private partnership may be sued for damages for judicial slander, notwithstanding that malice must be proved against the defenders. *Gordon v. British and Foreign Metaline Co., &c.*, Nov. 16, 1886, p. 75.
See *Company*, 3.

PATENT. *Procedure—Interdict.*

1. A, the holder of a patent, obtained interim interdict against B to prevent infringement. B did not object to the validity of the patent, but immediately thereafter assumed his son, C, as a partner with a view to manufacturing articles which A alleged were in infringement of his patent. A thereupon presented a petition and complaint against B and C for breach of interdict. B and C averred that the articles manufactured by them did

PATENT—Continued.

not constitute an infringement, and further, C challenged the validity of A's patent. *Held* (in conformity with *Dudgeon v. Thomson and Donaldson*, 3 R. 604 and 974, and 4 R. (H. L.) 88), (1) that it was competent to bring C into the process, though the interdict was not directed against him personally, and (2) that C was not entitled to a proof of his averments regarding the validity of the patent. *Harvie v. W. & T. Ross*, Nov. 13, 1886, p. 71.

Damages—Infringement of subsidiary part of patented mechanism.

2. Where articles are manufactured by means of pirated machinery, it is relevant for the patentees to aver as grounds of damage that they have suffered from loss of market, and obtained smaller prices for the patented goods, owing to the competition of the infringers.

In an action of damages brought by a company engaged in the manufacture of horse-shoe nails against another company engaged in the same manufacture for damages caused by the defenders' infringement of patents belonging to the pursuers for improvements in the mechanism used in the manufacture, the defenders admitted that certain boxes of nails, manufactured and sold by them, had been made by means of machines which, in a previous action, had been held to be in certain minute particulars infringements of the pursuers' patents; but they proved that the pirated portions of the mechanism were not essential to the manufacture of the nails, and that without using these portions they could have made the nails as well, and almost, if not quite, as cheaply, as with them. *Held* that inasmuch as infringement of patented right was admitted, it must be assumed that the pirated mechanism was of some utility, although it was proved to be but small, and that the amount of damages fell to be assessed on the footing that the infringer must pay merely for the benefit which he had taken from the use of the improvements pirated. Damages assessed at £50. *United Horse Shoe and Nail Co., Limited, v. Stewart & Co.*, Dec. 17, 1886, p. 266.

See *Copyright*, 2.

PERSONAL OR REAL. *Whether legacy made real burden on heritage generally conveyed by settlement—Titles to Land Consolidation Act, 1868 (31 and 32 Vict. cap. 101), sec. 19, schedule L.*

In a general settlement the testator conveyed to his son his whole means and estate, heritable and moveable, "but declaring that the above conveyance is granted with and under the following provisions, burdens, limitations, and declarations, viz."—(Here followed obligations on the disponent to pay certain annuities and legacies)—"declaring that the said provisions . . . shall form real burdens over the heritable estate hereby conveyed." The title of the disponent was completed by a notarial instrument (in terms of schedule L, sec. 19, of The Titles to Land Consolidation Act, 1868), which, after setting forth the conveyance in the general disposition, bore, "but always under the provisions, burdens, limitations, and declarations mentioned in said general disposition and deed of settlement." A legatee having failed to obtain payment of his legacy from the disponent, who had become bankrupt, brought an action of damages against the agent who had been employed by the deceased and by the disponent, alleging that he had been guilty of a breach of professional duty in not constituting the legacy a real burden when making up the disponent's title to the heritage. *Held* that the general conveyance did not create a real burden, and that there was no obligation upon the disponent or his agent to create one, and action dismissed.

Opinion (per the Lord President) that neither a general disposition without a description of the lands conveyed, nor a notarial instrument following thereon in terms of schedule L of the Titles to Land Consolidation Act, 1868, can create a real burden on the lands. *Williamson v. Begg*, May 18, 1887, p. 720.

POLICE. *Guild offence—Alterations "affecting the exterior dimensions" of a building—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 364 and 365.*

1. *Held* that the insertion of a window 5 feet by 3, which did not project beyond the plane of the wall, in each of two gables of a building was not an alteration requiring the authority of the Dean of Guild as affecting the exterior dimensions of the building in the sense of the above Act. *Gourlay v. Lang*, June 4, 1887, Just. Cases, p. 31.

Free space for air—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 370.

2. Plans of buildings proposed to be erected in Glasgow which were *held* not to comply with the provisions of the 370th section of the Glasgow Police Act, 1866, requiring a certain amount of free space in front of the windows of sleeping apartments. *Glass v. Glasgow Master of Works*, March 5, 1887, p. 567.

Sale of superfluous lands by Police Commissioners.

3. Authority granted to Police Commissioners to sell lands for which they had no use, but which they had not statutory authority to dispose of. *Linthgow Police Commissioners*, Feb. 2, 1887, p. 444.

POOR. *Relief—Poor-Law Act, 1845 (8 and 9 Vict. c. 83), sec. 70.*

1. An Irishman having no settlement in Scotland, being found destitute in the parish of Ardchattan, was sent to the combination poorhouse for the parishes of Ardchattan, Kilmore, and others, at Oban, in the parish of Kilmore. After remaining some months in the house the pauper applied to the governor for leave of absence for a night to attend a wedding, and asked for his own clothes to go in. The governor told him that he could not give him leave of absence for a night, but in the belief that he wished to leave the poorhouse finally, gave him his clothes. The pauper then left the house, but returned the same afternoon. The governor refused to admit him without an order. Next morning the pauper applied to the inspector of Kilmore, who gave him an order form, with blanks to be filled up by the medical officer and by the inspector, and sent him to the medical officer. After seeing the medical officer, who filled up the blanks requiring to be filled up by him, the pauper returned to the poorhouse and was admitted, the inspector not having filled in any blanks. The governor made no new entry in the admission-book. *Held* that the pauper had not ceased to be an inmate of the poorhouse chargeable to the parish of Ardchattan, and had not become chargeable to Kilmore. *McCaig v. Sinclair*, March 4, 1887, p. 539.

Assessment—Valuation-roll—Review by Court of Session—Poor-Law (Scotland) Amendment Act, 1845 (8 and 9 Vict. c. 83), sec. 37.

2. A parochial board assessed for poor-rates the owner and occupier of water-works on the annual value of the subjects appearing in the Valuation-roll without allowing deduction of the average cost of repairs, insurance, &c., in terms of the 37th section of the Poor-Law Act, 1845, on the ground that the assessor in preparing the Valuation-roll had already made these deductions. In a suspension *held* (1) that for the purposes of assessment under the Poor-Law Act, 1845, the Valuation-roll as completed in terms of the Valuation of Lands (Scotland) Act, 1854, was conclusive as to the yearly rent or value of lands and heritages entered therein, and that the Court of Session had no jurisdiction to review the process by which the entry there made was reached, and (2) that before assessment the suspender was entitled to have the above deductions made from the sum entered in the Valuation-roll. *Magistrates of Glasgow v. Hall*, Jan. 14, 1887, p. 319.

Assessment—Classification—Railway—Poor-Law Amendment Act, 1845 (8 and 9 Vict. cap. 83), sec. 36.

3. A classification of lands and heritages for occupants' rates, under section 36 of the Poor-Law Amendment Act, 1845, in order to be legal, must be exhaustive.

POOR—Continued.

In 1846 a parochial board, with the approval of the Board of Supervision, adopted a classification of lands and heritages for occupants' rates into "(1) lands let for farming, (2) houses let as dwelling-houses and shops," the former being assessed at one-sixth of their value, the latter at their full value. At that date there were no railways in the parish, but a railway was constructed in 1850. It was assessed in Class II. at its full value, and continued to be so assessed without objection until 1886. *Held*, in a declarator at the instance of the railway company against the parochial board, (1) that while the Court had no jurisdiction to set aside a classification on the ground that it was inequitable, or to order a parochial board to adopt a new classification, it had jurisdiction to declare a classification to be invalid on the ground that it was not exhaustive of the lands and heritages in the parish; (2) that the classification in question was invalid on that ground, in respect that it did not, according to the ordinary meaning of its language, provide a place for railways, and was not shewn to have been approved by the Board of Supervision as implying anything else than its ordinary meaning; (3) that the pursuers were not barred by *mora* and acquiescence from having it declared that the classification was an invalid classification; and (4) that until a legal and valid classification had been adopted and approved, they were entitled to interdict against the parochial board levying from them as occupants higher rates than were imposed on any other occupant of lands and heritages in the parish. *North British Railway Co. v. Cardross Parochial Board*, Feb. 17, 1887, p. 478.

PRESCRIPTION. Entail—Limited and unlimited title—Consolidation.

1. An entail, dated in 1715, comprised, *inter alia*, certain lands the *dominium utile* of which had been disposed by the entailer or his predecessors prior to the date of the entail, so that the entail only carried the superiority thereof. The *dominium utile* was acquired in 1721 by the next succeeding heir of entail, who took a disposition in favour of himself and his heirs and assignees whomsoever, being a different destination from that contained in the entail. He was not infeft either under the entail or under the disposition. In 1765 the next heir was infeft upon the unexecuted precept in the conveyance of 1721, having previously served heir in general to the last heir. The next heir in 1780 made up a title under the entail, but no separate title to the said lands, which he possessed along with the entailed estate down to 1843, when he died. *Held* that consolidation had not operated so as to bring the *dominium utile* of the said lands within the entail, and that a subsequent heir was therefore proprietor thereof in fee-simple. *Earl of Glasgow v. Boyle*, Jan. 28, 1887, p. 419.

Foreshore—Prescriptive possession.

2. A proprietor, with titles dating from 1804, flowing from a subject-superior, which described his property as "bounded on the south by the sea," brought a declarator of property in the seashore *ex adverso* of his lands against the Crown. As he could not recover his immediate superior's titles, he founded on his own possession on his own titles. He proved that one of his predecessors under the subject-superior had built a retaining wall whereby a considerable portion of the foreshore was reclaimed, that he and they had for more than the prescriptive period been in use to cart drift sea-ware (no ware grew on the shore) in large quantities from the shore for manure, that they had occasionally taken stones or gravel from the shore for various purposes, and that they had built and used a private bathing-house on the shore. The Crown in defence proved that a large quantity of stones had been taken (by fishermen in their boats) from that part of the coast to build a public break-water, but it was not shewn that any considerable quantity had been taken from the part of the foreshore claimed by the pursuer, or that he or his authors knew what was being done. The Crown further proved that members of the public had taken sea-ware from the foreshore claimed by the pursuer, in creels or in barrows (but they never did so in carts, having only

PRESCRIPTION—Continued.

a right of access by foot to that part of the shore); and that they had also taken whelks, mussels, and other shellfish, and shot gulls on the foreshore.

Held (aff. judgment of Second Division) that the pursuer had established a case of prescriptive possession, and was entitled to decree of declarator accordingly. *Young v. North British Railway Co. and the Lord Advocate*, August 1, 1887, H. L., p. 53.

Arrestments—Forthcoming—Act 1669, cap. 9—Personal Diligence Act, 1838 (1 and 2 Vict. c. 114), sec. 22.

3. A creditor arrested upon a decree a fund vested in his debtor, but not payable till the death of an annuitant. Within three years of the date of the arrestments the debtor applied for and obtained decree of *cessio*. The arrester appeared to oppose the application, but did not found on his arrestments. Held that on the lapse of the three years, the arrestments prescribed, as they had not been "pursued or insisted on" in the sense of the Act 1669, cap. 9.

Observed, that though the arrested fund was not payable till the death of the annuitant, it would have been competent for the arrester to interrupt the course of prescription by raising an action of forthcoming, concluding for payment upon that event. *Jameson v. Sharp*, March 18, 1887, p. 643.

See *Bill of Exchange*, 1—Road, 1, 2.

PRESUMPTION. Presumption of Life Limitation (Scotland) Act, 1881 (44 and 45 Vict. cap. 47), secs. 5 and 8.

1. Held that to exclude the presumption of death under the above Act on the day completing the seven years, the presumption arising from the facts must be such as would have been sufficient to overcome the presumption of life at common law. *Williamson v. Williamson, &c.*, Dec. 10, 1886, p. 226.

Pater est quem nuptiæ demonstrant.

2. The presumption *pater est quem nuptiæ demonstrant* may be rebutted by evidence which satisfies the Court that the husband was not the father.

Circumstances in which the Court held that the presumption was rebutted although the husband and wife at the time of the child's conception resided in the same village. *Steedman v. Steedman*, July 20, 1887, p. 1067.

Presumption against child-bearing.

3. Anticipation of period of payment by trustees. *Urquhart's Trustees v. Urquhart*, Nov. 23, 1886, p. 112.

PROCESS. Summons—Defenders—Partnership.

1. An action was brought against a descriptive firm and the individual partners thereof, "as such partners and as individuals," concluding against the defenders, "jointly and severally," for a lump sum of £1000 in name of damages for judicial slander. The condescendence contained no averments of individual fault against any of the partners. Held (rev. judgment of Lord McLaren) that the action was an action against the firm only. *Gordon v. British and Foreign Metaline Co., &c.*, Nov. 16, 1886, p. 75.

2. A company or a private partnership may be sued for damages for judicial slander, notwithstanding that malice must be proved against the defenders. *Gordon v. British and Foreign Metaline Co., &c.*, Nov. 16, 1886, p. 75.

Summons—Relevancy—Malice.

3. Necessity for specific averments of malice in actions of damages for slander or wrongful apprehension. See *Reparation*, 22, 23, 24, 32.

Revisal of Pleadings—Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 25.

4. Where defences include a separate statement of facts, and an order for revisal of the condescendence and defences, in terms of sec. 25 of the Court of Session Act, 1868, is pronounced, the pursuers ought to lodge specific answers to the defenders' revised statement of facts. *Reid v. Reid's Trustees*, June 2, 1887, p. 770.

PROCESS—*Continued.**Reclaiming Note—Bankruptcy—Sequestration.*

5. Held that the Court of Session Act, 1868, did not apply to proceedings under the Bankruptcy Acts, and that a reclaiming note against an interlocutor of the Lord Ordinary on the Bills in an appeal against a resolution of creditors in a sequestration under the 169th section of the Bankruptcy Act, 1856, was competently brought within fourteen days, and without leave of the Lord Ordinary. *M'George v. M'George's Creditors*, June 25, 1887, p. 841.

Reponing—Expenses—Husband and Wife.

6. The condition imposed by 48 Geo. III. cap. 151, sec. 16, does not apply to a wife seeking to be reponed in an action between her and her husband. *Steedman v. Steedman*, March 19, 1887, p. 682.

Amendment of interlocutor.

7. A note having been presented to have an interlocutor which had been erroneously framed varied, held that, as the party aggrieved could not in the particular case appeal to the House of Lords, the only remedy was for the Court to amend the interlocutor. *Ferguson Bequest Fund v. Commissioners on Educational Endowments*, May 17, 1887, p. 717.

Proof—Recalling witness—Evidence Act, 1852 (15 and 16 Vict. c. 27), secs. 3, 4.

8. Opinions that it is incompetent to recall a witness to be examined as to statements alleged to have been made by him since he was examined as a witness in contradiction of the evidence he then gave. *Begg v. Begg*, Feb. 25, 1887, p. 497.

Proof or jury trial—Declarator of right of way.

9. An action of declarator of a public right of way appointed to be tried by a Lord Ordinary without a jury, in respect that the alleged right of way, which was in Forfarshire, had been the subject of correspondence in the *Scotsman* newspaper, and of a report submitted by the Scottish Rights of Way and Recreation Society to its members. *Scottish Rights of Way and Recreation Society v. Macpherson*, Oct. 23, 1886, p. 7.

Jury trial—Slander—Provinces of Judge and of jury.

10. A person charged with having contravened the Weights and Measures Act, 1878, by having in his possession or using measures which were not of any Board of Trade standard, and were false or unjust, was convicted of the offence except in so far as it was charged that his measures were false or unjust. He afterwards brought an action of damages against the printer and publisher of a newspaper for slander contained in an article commenting on the case, which, upon the face of it, assumed that there had been a conviction upon both charges. There was no issue of justification, and the defender in his defences offered a retraction and apology, and a nominal sum of damages, and in the witness-box admitted that the article charged the pursuer with dishonest conduct. The presiding Judge (Lord M'Laren) told the jury that it was for them to consider whether the article was false and calumnious, and no exception was taken to his charge. The jury having returned a verdict for the defender, the Court granted a new trial upon the ground that the verdict was contrary to evidence—*dis.* Lord M'Laren, who held that it being the province of the jury and not of the Court to determine whether the article was or was not a defamatory libel, their verdict affirming that it did not exceed the limits of fair criticism ought not to be interfered with. *Ross v. M'Kittrick*, Dec. 17, 1886, p. 255.

Judicial sale—Storage of goods pending litigation.

11. Where a trustee on a sequestrated estate incurred expense in storing goods till it should be ascertained whether they belonged to the bankrupt estate, held, on its being found that they did not belong to it, that the owner was not bound to repay to the trustee the cost of storage, as the latter should have applied for a warrant to sell them. *Wilson's Trustee v. Fraser's Trustee*, March 1, 1887, p. 504.

PROCESS—*Continued.**Reduction—Partial reduction—Fou-contract.*

12. Partial reduction of a feu-contract on the ground of error. *Glasgow Feuing and Building Co., Limited, v. Watson's Trustees*, March 11, 1887, p. 610.

Reduction—Partial reduction—Exxcambion of glebe and churchyard.

13. The minister of a parish, with consent of the Presbytery, excambied the site of the church, the churchyard, and part of the glebe, for other lands belonging to a heritor in the parish. In an action of reduction by the minister and the kirk-session for reduction of the deed as being null without consent of the heritors, *held* (1) that in so far as regarded the site of the church and the churchyard, the deed was invalid; (2) that *quoad ultra* the deed was valid—the pursuer and his successors in the benefice not being prejudiced by its partial reduction, or by the failure of the transaction with regard to the site of the church and the churchyard. *Bain v. Lady Seafield*, July 15, 1887, p. 939.

Reduction—Debts recovery decree.

14. Reduction of a decree under the Debts Recovery Act, 1867 (30 and 31 Vict. cap. 96), *held* to be incompetent. *Robertson v. Pringle*, Feb. 3, 1887, p. 474.

Petition—Judicial Factor—Recall—Junior Lord Ordinary—Distribution of Business Act, 1857 (20 and 21 Vict. cap. 56), sec. 6.

15. *Held* (following *Kyle*, 24 D. 1083) that the appointment of a *curator bonis* made by the Junior Lord Ordinary may competently be recalled by him. *Tweedie*, Dec. 8, 1886, p. 212.
16. *Held* by Lord Trayner (Ordinary) that a petition for recall of the appointment of a judicial factor may be competently presented to the Junior Lord Ordinary. *Masterton v. Erskine's Trustees*, May 14, 1887, p. 712.

Petition—Jurisdiction of Inner-House.

17. A petition by beneficiaries under a trust-deed for advances out of the trust-funds rested alternatively upon the *nobile officium* of the Court and the provisions of the Trusts Act, 1867, is competently presented in the Inner-House. *Websters v. Miller's Trustees*, Feb. 26, 1887, p. 501.

Petition—Intimation—Companies Act, 1862 (25 and 26 Vict. cap. 89), sec. 100.

18. The liquidator of a company applied for an order under the 100th section of the Companies Act, 1862, on a former agent of the company, who was resident in Canada, to deliver up books and papers in his possession belonging to the company, and moved the Court to pronounce the order without intimation. The Court *refused* the motion, and ordered intimation. *British Canadian Lumbering and Timber Co., Limited*, Dec. 3, 1886, p. 160.

Appeal—Dispensation from printing in hoc statu—Boxing of prints.

19. The provisions of sec. 3, subsec. 2, of the A. S., 10th March 1870, relating to the lodging of manuscript copies or prints in appeals from the Sheriff Court, do not apply to cases where an interlocutor has been pronounced dispensing with printing *in hoc statu*; and should the Court subsequently refuse to dispense with printing, a day will then be fixed for the boxing of the necessary prints. *Ross v. Gray*, June 2, 1887, p. 768.

Appeal—Interlocutor—Findings in fact.

20. A possessory judgment granting interdict was pronounced by a Sheriff after a proof. Pending an appeal against this judgment the defender raised a declarator of property, in which he was ultimately unsuccessful. The pursuer having stated that in the event of an appeal to the House of Lords his case might be prejudiced by findings of fact in the interdict process, the Court pronounced an interlocutor dismissing the appeal in respect of the judgment in the declarator. *Keiller v. Magistrates of Dundee*, Dec. 7, 1886, p. 191.

21. In a petition in a Sheriff Court by a professor for interdict to prevent the defender publishing a book alleged to be in substance a reproduction of the pursuer's lectures, the case, on appeal to the Second Division, was referred to the whole Court, with the result that nine Judges were of the opinion that

PROCESS—Continued.

the book was in substance a reproduction of the lectures, three were of opinion that it was not, while the remaining Judge reserved his opinion on this point. On the question as to whether the pursuer, being a university professor, was entitled to the protection of an interdict, six Judges were of the opinion that he was, five that he was not, while the two remaining Judges gave no judgment on the question, holding that the book was not a reproduction of the lectures. The Second Division of the Court, before whom the appeal depended, thereupon pronounced judgment, finding that the lectures referred to on record were delivered by the pursuer as part of his course, and that the book complained of was published by the defender, having been compiled by a student who had attended the lectures and taken notes in shorthand; they then found, "in conformity with the opinions of the majority of the whole Court, that such publication did not constitute an infringement of any legal right of property belonging to or otherwise vested in the pursuer," and refused the interdict. In an appeal, held that, in compliance with the 40th section of the Judicature Act, 1850, the Court ought to have inserted in the interlocutor a finding in fact, in conformity with the opinions of the majority of the Judges, that the book in question was a reproduction of the lectures, and that the case fell to be dealt with as if such finding had been inserted. Caird v. Sime, June 13, 1887, H. L., p. 37.

Appeal from Sheriff Court in sequestrations. See *Bankruptcy*, 5, 6, 7, 8.

Procedure for enforcement of foreign decrees. See *Foreign*, 3.

Procedure in Interdicts. See *Interdict*, 2.

PROOF. Parole—Guarantee by commission agent of minimum price.

1. *Question*, whether, in an action of accounting between a principal and a commission agent, it was competent to prove by parole that the agent, in order to retain his principal's custom, had agreed in a particular transaction to pay a minimum sum as the price of the goods to be sold, whether that sum should be realised on sale or not. *Opinions per Lord Justice-Clerk and Lord Young* that it was not; *per Lord Craighill and Lord Rutherford Clark contra*. Reid v. Reid Brothers, June 8, 1887, p. 789.

Testament—Extrinsic evidence.

2. In the construction of a will and codicils, the Court is entitled to have regard to the state of the testator's circumstances at the dates when they were written, but not to indications of intention appearing in jottings or memoranda by him. Trustees of the Free Church of Scotland v. Maitland, &c., Jan. 14, 1887, p. 333.

Customs prosecution—Evidence of accused—Customs Consolidation Act, 1876 (39 and 40 Vict. c. 36), secs. 179, 259.

3. Certain foreigners were convicted and sentenced before a Justice of Peace Court, upon a complaint under the 179th section of the Customs Consolidation Act, 1876, charging them with having on board a foreign ship, within one league of the British coast, packages of spirits, tobacco, &c., of a size and character which are prohibited to be imported. In an appeal against the conviction, *held* that the Judge in the inferior Court had rightly declined to admit the evidence of the accused, section 259 of the Customs Law Consolidation Act, 1876, which admits such evidence in certain circumstances, not being applicable to the case.

Held further, that it was not a good objection to the conviction that the evidence had not been recorded by the Judge in the inferior Court, the accused not having asked him to do so. Dodsworth v. Rijnbergen, Dec. 15, 1886, p. 238.

Husband and Wife—Evidence of wife of accused in public-house prosecution.

4. A public-house keeper, convicted of a breach of his certificate, appealed on the ground, *inter alia*, that he had tendered his wife as a witness, and her evidence had been rejected by the magistrates as incompetent. The Court, without deciding that the evidence of the wife of the accused in a public-house prosecution was in all circumstances incompetent, *refused* the appeal. Morrison v. Morrison, June 3, 1887, Just. Cases, p. 28.

PROPERTY. *Golfing Links—Servitude—Possessory judgment.*

1. In 1799 the Magistrates of St Andrews granted a feu-disposition of a large part of the Pilmour Links, belonging to the burgh, "reserving the bleaching ground, as particularly marked out by march-stones placed therein, on which the inhabitants of St Andrews are to have the liberty and privilege of bleaching in all time coming"; and also, *inter alia*, "under the reservation always that no hurt or damage shall be done thereby to the golf links, nor shall it be in the power of any proprietor of said Pilmour Links to plough up any part of said golf links in all time coming, but the same shall be reserved entirely, as it has been in times past, for the comfort and amusement of the inhabitants and others who shall resort thither for that amusement." In 1881 the successor of the original donee, with consent of his grazing tenant, let a portion of the ground to the St Andrews Ladies' Golf Club for seven years from Martinmas 1880, at a rent of £4 per annum, payable to the grazing tenant. The lease excepted "from said piece of ground hereby let any portion thereof over which the inhabitants of St Andrews may be entitled to exercise the liberty and privilege of bleaching" under the feu-disposition, and declared that "the piece of ground hereby let is to be made use of for the purpose of golfing or putting by the members of St Andrews Ladies' Golf Club, and by such other persons as the said club may allow, but by no others," the pasturage being reserved to the grazing tenant. The club had from 1867 had possession of the same piece of ground under a missive offer of lease with similar conditions. In 1885 the club brought an action in the Sheriff Court to have an inhabitant of St Andrews, who was not a member of the club, interdicted from golfing on the ground let to them. The defences were (1) that the lease was *ultra vires* of the granter, in respect that the right of golfing reserved in the original feu-disposition extended over the whole Links, or at all events over the ground said to have been let to the pursuers; (2) that the lease expressly excluded the bleaching ground, and that the bleaching ground included the whole or a part of the ground claimed by the pursuers; (3) that the pursuers had not proved exclusive possession. It was, in the opinion of a majority of the Court, proved in point of fact that the public golf course was defined and marked out by march-stones, that the ground in dispute formed no part of that course, and that since 1880 the pursuers had had exclusive possession of that ground under a lease granted by the proprietor thereof, and for thirteen years previously under a missive of lease with him. *Held (diss. Lord Young)* that the pursuers were entitled to a possessory judgment. *St Andrews Ladies' Golf Club v. Denham*, May 13, 1887, p. 686.

Conveyance of front area to lower proprietor in tenement—Right of upper proprietor.

2. The proprietor of a dwelling-house with an area fronting the street disposed the two upper stories and attics of the house, with a declaration that the donee should have no right to the area. Subsequently the proprietor of the lower floors and area built over the area to the height of his part of the house. The proprietor of the upper floors having proposed to erect a new building and rest it upon this addition, *held* that he was not entitled to do so. *Question*, whether he was entitled to extend his house over the area provided he did not rest upon the lower proprietor's extension. *Arrol v. Inches, &c.*, Jan. 27, 1887, p. 394.

See *Nuisance*, 5—*River, &c.*

PUBLIC-HOUSE. *Hotel certificate—Bona fide traveller.*

1. Circumstances which were held sufficient to justify a hotel-keeper in regarding certain persons to whom he sold refreshments on a Sunday as *bona fide* travellers. *Dickson v. Linton*, Nov. 19, 1886, Just. Cases, p. 13.

Breach of public-house certificate—"Giving out" alone charged.

2. A public-house keeper was charged with an offence against the Public-Houses Acts, in so far as at a time and place libelled he did "give out" a

PUBLIC-HOUSE—Continued.

certain quantity of whisky in breach of his certificate. He was convicted "of the offence charged," and appealed on a case stated, pleading, *inter alia*, that the complaint was irrelevant, in respect that "giving out" by itself did not necessarily import a breach of the certificate. The Court, being of opinion that on the facts stated in the case the appellant had committed a breach of his certificate, *refused* the appeal. *Morrison v. Morrison*, June 3, 1887, Just. Cases, p. 28.

Penalty—Modification.

3. In a prosecution for an offence against the Public Houses Acts brought under the Edinburgh Police Act, 1879, and not under the Summary Jurisdiction Acts, 1864 and 1881, the magistrate may competently exercise the power conferred by the Summary Jurisdiction Act, 1881, sec. 6, subsec. A, to impose a modified penalty. *Linton v. Sherry*, June 4, 1887, Just. Cases, p. 46.

Proof—Husband and Wife.

4. Competency of evidence of wife of accused in a public-house prosecution. *Morrison v. Morrison*, June 3, 1887, Just. Cases, p. 28.

PUBLIC RECORDS. Mistake in recorded deed.

Held that where a feu-contract was not intended to impose an obligation to make certain roads on the superior, and where a company in purchasing from the vassal did not stipulate for and did not understand that they were getting such an obligation, the mere fact that such obligation erroneously appeared in the feu-contract and in the record did not entitle the company, though *bona fide* purchasers for value, to object to the Court rectifying the feu-contract and the records.

Observed (*per* Lord Young) that one purchasing on the faith of the records is not entitled to rely on the validity or subsistence of such incidental obligations as an obligation to make roads although appearing on the records undischarged. *Glasgow Feuing and Building Co., Limited, v. Watson's Trustees*, March 11, 1887, p. 610.

RAILWAY. Mines and Minerals—Clay—Compulsory sale—Water-Works Clauses Act, 1847 (10 and 11 Vict. c. 17)—Railways Clauses Act, 1845 (8 and 9 Vict. c. 33).

1. *Held* (*diss.* Lord Mure, *rev.* judgment of Lord M'Laren) that the provision of the Water-Works Clauses Act, 1847, excluding from conveyances of lands purchased under the Act (when not expressly included) "mines of coal, ironstone, slate, or other minerals" applied to minerals of every kind which the seller might find it profitable to work, and therefore applied to ordinary clay having a commercial value. *Magistrates of Glasgow v. Farie*, Jan. 21, 1887, p. 346.

Bye-law—Travelling without proper ticket—Oppression.

2. A bye-law of a railway company provided that "any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings." *Held* that the bye-law was only applicable to cases where an attempt was made to cheat the company, and that it was oppressive to prosecute for the penalty when there was no such attempt. *Thom v. Caledonian Railway Co.*, Nov. 12, 1886, Just. Cases, p. 5.

See *Contract*, 3—*Poor*, 3—*Reparation*, 1, 6.

RECOMPENSE. See Bankruptcy, 9—Compensation.**REPARATION. Consequential damages—Carrier—Conveyance of goods.**

1. A manufacturer forwarded a bale of cloth by rail, consigned to a shipping agent at Grimsby, who was to ship it for Germany. On arrival at Grimsby the package was found to be frayed, and some slight damage done to the cloth. The shipping agent refused to take delivery, being of opinion that

REPARATION—Continued.

the goods could not be safely forwarded in their damaged package. The railway company thereupon returned them to the manufacturer, who repacked them, and forwarded them to Germany. On arrival there they were rejected as being too late. The manufacturer having sued the railway company for damages for loss of market, *held* that the shipping agent was entitled to refuse to take delivery, and that the loss of market was the direct result of the damage done to the package by the railway company, who were therefore liable for it. *Keddie, Gordon, & Co. v. North British Railway Co.*, Dec. 15, 1886, p. 233.

Consequential damages—Dangerous animal—Dog.

2. A porter brought an action against the occupier of a house at which he had been delivering coals, alleging that he had received injuries through the occupier's dog leaping upon another porter who was working along with the pursuer, and causing him to drop a piece of coal on the pursuer's foot; and further, that the dog was known by its owner to be of vicious and ferocious habits. *Held* that the action was relevant. *Fraser v. Bell*, June 14, 1887, p. 811.

Contributory negligence—Quarryman.

3. *Held* that an ordinary labourer in a quarry, who, along with a skilled quarryman appointed by the manager, was employed in extracting an unusually large unexploded blast charge, which was an operation of peculiar difficulty, danger, and rarity, and was injured by an explosion caused probably by the skilled workman having made use of a steel jumper instead of a copper needle, was not barred by contributory negligence from obtaining damages from his employer. *Cook v. Stark*, Oct. 15, 1886, p. 1.
4. An action of damages was raised against quarrymasters by the representatives of a workman killed while engaged at the quarry in tunnelling a bank of earth with a view to its removal. The work was thus carried on: Two chambers were cut about ten feet apart, and a tunnel was cut between them, supports being left for the roof on each side. The supports were then removed, and the soil allowed to fall in. This work was safe at first, but became dangerous as it approached completion. It was the practice, as a necessary precaution to prevent accident, to station a man on the top of the ground, as the work became dangerous, to warn the workmen below if any cracks shewed themselves, but it did not appear to be understood whether it was the duty of the foreman or of the workmen engaged in the work to see to this being done when it became necessary. When the accident happened the deceased was engaged in removing one of the supports, and no watcher had been stationed on the surface of the tunnel. *Held* that there was fault on the part of the employer in respect either that the foreman had not sent a man to watch the surface or made it clear to the workmen that that was their duty, and that there was no contributory negligence on the part of the deceased, who was entitled to rely on the precaution having been taken, and did not carelessly rush upon a seen danger. *M'Inally v. King's Trustees*, Oct. 27, 1886, p. 8.

Contributory negligence—Railway—Driver.

5. An engine-driver was killed by his head coming in contact with a bridge over the railway as he was leaning over the side of the engine to see if the brakes were working properly. It was averred, in an action of damages by his widow and children against the company, that the bridge was greatly narrower than any other in the kingdom, and was four inches narrower than was required by the Board of Trade in the case of new works. The bridge was upwards of thirty years old. There was no averment as to the length of time the driver had been in the service of the company, or as to his knowledge of the line. *Held* that there was no relevant averment of fault, and that the pursuers were not entitled to an issue. *M'Ghie v. North British Railway Co.*, Feb. 26, 1887, p. 499.

Contributory negligence—Child.

6. Two children, aged three and five, who were crossing a crowded city street,

REPARATION—Continued.

unattended by any person in charge of them, were knocked down and injured by a passing vehicle. In an action by their father for reparation, it was proved that the driver was to blame. *Held* that it was not a good defence that the pursuer had contributed to the accident by allowing such young children to be in a place of danger without someone in charge of them. *Martin v. Wards*, June 15, 1887, p. 814.

Contributory negligence—Tramway-car—Rule of road.

7. A passenger who had alighted from a tramway-car, and was crossing from the car to the pavement on the left, was knocked down by a van going in the same direction as the car, and passing it on the left-hand side. In an action of damages brought against the van owners for injuries thereby received, the Court *assuizied* the defenders, holding that fault had not been proved on the part of the van-driver, while there had been carelessness on the part of the pursuer in not looking to his own safety.

Observed (per the Lord President) that the rule of the road requires that a tramway-car shall be passed by a following vehicle on the left-hand side. *Jardine v. Stonefield Laundry Co.*, June 24, 1887, p. 839.

Dangerous animal—Dog.

8. *Held* that the owner of a dog which he knew to be vicious, and which he allowed to go unrestrained through his garden, was liable in damages to a person who had permission to enter the garden, and had been injured there by the dog. *Smillies v. Boyd*, Dec. 2, 1886, p. 150.
9. A workman unnecessarily went within reach of a dog belonging to his employers, and known by them to be of a vicious disposition, which was chained to a kennel in the workyard. He was bitten by the dog. *Held* that he was not entitled to damages from his employers on account of the injury thereby sustained, the Court being of opinion that the injury was due solely to his own negligence. *Daly v. Arrol Brothers*, Dec. 2, 1886, p. 154.

See also 2, *supra*.

Master and Servant—Fellow-servant—Common object.

10. A grain-merchant employed a carting contractor to carry a quantity of grain from a ship to be stored with a storing agent. One of the bags of grain, while it was being hoisted into the store, fell upon the carter employed by the contractor and killed him. Its fall was due to the fault of a servant of the storekeeper. *Held* that the carter and the storekeeper's servant being engaged in common labour for a common object, the storekeeper was not liable to the carter's representatives for the consequences of his servant's fault. *Congleton v. Angus*, Jan. 12, 1887, p. 309.

Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. cap. 42)—Scope of Employment, and of foreman's authority.

11. During the execution of a contract for laying concrete in the premises of a tramway company, the foreman of the contractor had been in the habit of giving orders to the labourers employed under him to come ten minutes before their ordinary work hours each morning to remove from the sheds certain tram-cars which obstructed their work, but which it was the duty of the company to have removed daily. In an action of damages raised by one of the labourers, who had been injured in assisting to remove the cars, against the contractor, on the ground that the accident had been caused by the fault of his foreman, the defender alleged and adduced evidence to the effect that the removal of the cars did not fall within his contract, and that the employment of his men in this work by the foreman was without his knowledge, and was not authorised by him, and pleaded that he was not responsible. *Held* that the foreman's orders for removal of the cars, being in furtherance of the contract work, were orders which the labourers were bound to obey, and that the defender was responsible under the Employers Liability Act for the negligence of his foreman; *dis.* Lord Craighill, on the grounds that in removing the cars the labourer was not working in the contractor's employment, and that the order to remove

REPARATION—Continued.

the cars was not within the scope of the foreman's authority. *Sweeney v. M'Gilvray*, Nov. 23, 1886, p. 105.

Master and Servant—Power of manager to delegate his duty of superintendence.

12. While the manager of a quarry may in ordinary circumstances delegate his duty of personally superintending particular operations in the quarry, yet, if the operation be one of peculiar difficulty, danger, and rarity, it is his duty personally to superintend it, and if he neglects to do so, and one of the workmen taking part in the operation is injured, the fact of his absence will be a ground for rendering his employer liable in damages to the injured workman, under the Employers Liability Act, 1880. *Cook v. Stark*, Oct. 15, 1886, p. 1.

Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), secs. 1 and 2—Tramway "Plant"—"Superior Servant."

13. By the Employers Liability Act, 1880, an employer is made liable to any workman employed by him for injury arising from defects of the plant used in his business, when the defect has arisen from, or has not been discovered and remedied owing to the negligence of the employer, or of some person entrusted by him with the duty of seeing that the plant is in proper condition. But the injured workman is not entitled to reparation if he knew of the defect or negligence and failed to give information thereof to his employer, or to a servant superior to himself, unless he was aware that the employer or such superior already knew of the defect or negligence. In an action of damages brought under the Act by a trace-boy, employed by a tramway company, against his employers, it was proved that the pursuer had been injured by the falling of a horse, on which he was riding, in the performance of his duty, that the horse was in a defective and dangerous condition and had been so for some time before the accident, and had fallen on several occasions with other trace-boys. The pursuer had made no complaint as to the unfitness of the horse, either to the company itself or to their servants, but it was proved that its liability to fall was well known among the trace-boys and stablemen. *Held* that the company were liable in damages, the Court being of opinion (1) that the horse was part of the company's plant in the sense of the Act, and was defective, and (2) that, in the circumstances, servants of the company superior to the trace-boy must be held to have been aware of the horse's unfitness. *Haston v. Edinburgh Street Tramways Co., Limited*, March 11, 1887, p. 621.

Master and Servant—Employers Liability Act, 1880 (43 and 44 Vict. c. 42), sec. 1—Defect in condition of way.

14. In an action brought by a miner against his employer for damages at common law or under the Employers Liability Act, the pursuer averred that when attending a horse in the mine he was knocked down by it, and that he was seriously injured by falling on a sleeper with a nail protruding from it, which had been left on the roadway through the fault of the roadsman. *Held* that there was no relevant averment that the road was in a defective condition, or that the accident was caused by the fault of the defender. *M'Quade v. Wm. Dixon, Limited*, July 19, 1887, p. 1039.

Master and Servant—Master's liability for servant's fault.

15. A shopkeeper instructed his salesman to remove certain articles from one of his shops to another. The salesman borrowed a van from a friend, who came with it to drive it, and the articles were placed on it with the shopkeeper's knowledge and assent. While the van was passing through the streets the salesman assumed the reins because his friend had become intoxicated, and owing to his careless driving an accident occurred. *Held* (*dis. Lord Craighill*) that the shopkeeper was not responsible for the consequences of the accident, because the salesman was acting outwith his duty in undertaking to drive the van. *Martin v. Wards*, June 15, 1887, p. 814.

Precautions for public safety—Fastening of a shed.

16. The front of a peat shed was closed by a door or shutter, 6 feet 3 inches in

REPARATION—*Continued.*

height, and 2½ cwt. in weight. This door was not hinged, but fitted into a frame, and was lifted bodily out when it was desired to open the shed. It was fitted with louver boards, which could be opened from the outside, and which, when opened, enabled children to climb up the face of the door. The only fastening which prevented the door from falling outwards was an iron drop-bar, 3½ inches long, at the top. While this was in its place the door could not be opened. The shed stood on waste ground open to the public and frequented by children. As three children of about ten years of age were playing about the shed, two of them climbed on the front of the door, and lifted the drop-bar, the consequence being that the door fell out and injured the third. *Held* that the owner of the shed was liable in damages, the fastening of the door not being sufficient for a shed standing in such a public place. *Findlay v. Angus*, Jan. 14, 1887, p. 312.

Precautions for public safety—Liability to persons entering manufacturer's store.

17. A man, on a winter evening, entered the store of an oil manufacturer (who had an office in another part of the town for business purposes), desiring to buy old barrels for firewood. Being directed by one of the employees to go upstairs to a clerk, he went up, and was informed by the clerk that (as was the fact) the manufacturer never sold old barrels. On his way back he was killed by falling into the well of a hoist in the store. This hoist was situated in the course which a person unacquainted with the locality (as the man in question was) would naturally take in leaving the clerk's office, unless the well was either fenced or lighted, which it was not at the time, though there were the means of doing both. In an action by the representatives of the deceased against the proprietor of the store, *held* that the deceased entered the premises for a legitimate purpose, that his death was attributable to the negligence of the defender in failing to light and fence the well of the hoist, and that therefore the defender was liable in damages to the pursuers. *Brady v. Parker*, June 7, 1887, p. 783.

River—Liability of upper heritor in respect of operations in alveo.

18. A farm road, running midway along the steep face of a hill, was carried through the bed of a little burn upon an embankment or breastwork, built up by the proprietor so as to keep the road on a level, the burn running over the surface of the road. The embankment had been there for upwards of forty years, and had been repaired and strengthened from time to time. In 1884 the proprietor put sheep drains into his farm, and at the same time increased the breadth of the embankment. A lower heritor, who had been injured in the autumn of 1885 by an extraordinary flood in the burn, raised an action of damages against the upper proprietor, averring that the flood had been caused by the flood-water of the burn being obstructed by the stones and rubbish which had gradually gathered across its course upon the embankment, and so diverted out of its proper channel against his property. The Court *held* that in point of fact the overflow had not been caused in that way, and had not happened at that point. *Opinions* (per Lord Justice-Clerk, Lord Young, and Lord Craighill) that the proprietor would not have been liable even if the flood had been due to the embankment, the operations of the upper proprietor having been lawful and ordinary operations, involving no risk of damage except from some extraordinary cause. *Filshill v. Campbell*, March 10, 1887, p. 592.

Road—Duty of driver.

19. Foot-passengers on a country road with footpaths on either side are entitled to walk upon the road itself, and the drivers of vehicles are bound to keep clear of them. *M'Kechnie v. Couper*, Jan. 20, 1887, p. 345.

See also 7, *supra*.

Road—Harbour Commissioners—Obligation to provide improved plant.

20. Harbour Commissioners, as empowered by their Acts of Parliament, laid down and maintained rails on the streets and quays adjoining the harbour. A horse crossing the rails on its way to a ship in the harbour was injured through its foot being caught in the space left between the rail and the cause-

REPARATION—*Continued.*

way blocks for the flanges of waggon-wheels. The owner of the horse brought an action against the Harbour Commissioners, alleging that a new and improved description of rail, which would have rendered the accident unlikely, had been introduced since the rails were laid down, and pleading that it was the duty of the commissioners to have substituted such rails for those in use at the time of the accident. *Held* (*dub.* Lord Young) that although the new rails were on the whole of a safer description than the old, the Commissioners had not been negligent in continuing the use of the old, which were of the form common at the date when they were laid down. Defenders therefore *assolviéd*. *Wisely v. Aberdeen Harbour Commissioners*, Feb. 2, 1887, p. 445.

Ship—Trawler—Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22).

21. In an action of damages by fishermen against a trawler *held*, after a proof, that the defenders had proved that the loss sustained did not result from their fault, in the sense of sched. art. xix. of the above Act. Defenders therefore *assolviéd*. *Lealies v. Walker, &c.*, Dec. 18, 1886, p. 288.

Slander—Wrongous apprehension—Malice and want of probable cause.

22. In an action of damages for alleged wrongous apprehension, the pursuer averred that he had passed the night in a hotel, and had left in the morning to attend a market in the neighbourhood without paying his bill; that he had not returned to do so, but that when seated in the train in the afternoon on his way home he had beckoned to the innkeeper (the defender), whom he saw on the platform, and was told by him that the amount of the bill was 3s. 6d.; that he then produced a £1 note, and without parting with it received from the innkeeper the 16s. 6d. of change, and that while they were discussing the proper amount due the train left the station, the pursuer taking both sums with him; that the defender forthwith telegraphed, or caused the constable on duty to telegraph, to the police authorities at next station to have the pursuer arrested on a charge of theft; that the pursuer was apprehended at the next station, which was his destination and that on the following day the defender falsely, maliciously, recklessly, and without probable cause, informed, or caused to be informed, the procurator-fiscal that the pursuer had stolen 16s. 6d., and that he did this for the purpose of inducing him to prosecute the pursuer as being guilty of said crime. It was not stated that the pursuer was known to the defender, or that the latter even knew what he was or where he lived. The Court allowed the pursuer an issue. *Urquhart v. M'Kenzie*, Oct. 30, 1886, p. 18.

Slander—Privilege—Malice—Public officer.

23. A police-officer brought an action of damages for slander against an inspector of police and a procurator-fiscal, stating that they, acting in concert, or one or other of them, had maliciously and without probable cause prepared and sent to the pursuer's superior officer, the chief constable of the county, a report, falsely stating that there were current in certain parts of the county rumours to the effect that he had been guilty of immoral conduct and that an official investigation as to his conduct was required, in consequence of which report he had been suspended for a time from duty, and had suffered in feelings and reputation. *Held*, having regard to the nature of the report and its privileged character, that in order to the relevancy of such an action a specific statement of the grounds on which malice was to be inferred was required, and that such not being given, the action was irrelevant.

Opinion that an action will not lie against a public officer in respect of defamatory statements made in a report sent in the discharge of his duty to his superior officer. *M'Murphy v. Campbell*, May 21, 1887, p. 725.

Compare 32 *infra*.

Slander—Judicial slander—Malice.

24. In an action for damages for judicial slander the pursuer must aver facts and circumstances from which the jury may reasonably infer malice. Averments of facts and circumstances which were *held* relevant to sup-

REPARATION—Continued.

port an issue for judicial slander. *Gordon v. British and Foreign Metaline Co., &c.*, Nov. 16, 1886, p. 75.

Slander—Judicial slander.

25. *Held* (rev. judgment of Lord M'Laren) that an action of damages for judicial slander is relevant although the matter alleged to be libellous formed the whole subject-matter of the original action. *Gordon v. British and Foreign Metaline Co., &c.*, Nov. 16, 1886, p. 75.

Slander—Partnership.

26. A company or a private partnership may be sued for damages for judicial slander, notwithstanding that malice must be proved against the defenders. *Gordon v. British and Foreign Metaline Co., &c.*, Nov. 16, 1886, p. 75.
27. Where the officials of a company had prepared and published, but without the authority, knowledge, or assent of the directors, a libellous circular concerning another company, and the latter company asked for interdict against the former circulating the document in question, the Court found that the publication and circulation by the officials of the defenders' company having been allowed to continue after the action was raised and the facts were brought to the knowledge of the directors, the pursuers were entitled to interdict. *British Legal Life Assurance and Loan Co., Limited, v. Pearl Life Assurance Co., Limited*, June 15, 1887, p. 818.

Slander—Province of Judge and of jury.

28. A person charged with having contravened the Weights and Measures Act, 1878, by having in his possession or using measures which were not of any Board of Trade standard, and were false or unjust, was convicted of the offence except in so far as it was charged that his measures were false or unjust. He afterwards brought an action of damages against the printer and publisher of a newspaper for slander contained in an article commenting on the case, which, upon the face of it, assumed that there had been a conviction upon both charges. There was no issue of justification, and the defender in his defences offered a retraction and apology, and a nominal sum of damages, and in the witness-box admitted that the article charged the pursuer with dishonest conduct. The presiding Judge (Lord M'Laren) told the jury that it was for them to consider whether the article was false and calumnious, and no exception was taken to his charge. The jury having returned a verdict for the defender, the Court granted a new trial upon the ground that the verdict was contrary to evidence—*dis.* Lord M'Laren, who held that it being the province of the jury and not of the Court to determine whether the article was or was not a defamatory libel, their verdict affirming that it did not exceed the limits of fair criticism ought not to be interfered with. *Ross v. M'Kittrick*, Dec. 17, 1886, p. 255.

Slander—Publication of decrees of Court—Trade Protection Society.

29. A private firm instituted an agency which they described in a prospectus as "a medium for interchange of information, by enabling the trading classes to communicate one to another their knowledge of doubtful and habit and repute bad payers." The prospectus stated, "A book is issued to subscribers containing upwards of 1000 names and addresses of people against whom decrees in absence has been obtained." The firm issued to their subscribers a list headed "List of Names," Edinburgh, 1885, and containing simply names and addresses. The list in point of fact contained the names (to a certain extent selected) of persons against whom decree in absence had been granted in the Small-Debt Court of the county during several months previous to publication. Prefixed to the list was a leaflet headed "Caution," which stated, "It is possible that there are names contained in this list of people to whom credit under certain circumstances might be given, but it is recommended that use be made of the inquiry department of the agency before the entailing the risk." In an action of damages for slander, raised by a person whose name appeared in the list, against the firm, *held* that the defenders, by means of the list of names and "caution"

REPARATION—Continued.

circulated by them, had slandered the pursuer, and were liable in damages. Damages assessed at £5. *Andrews v. Drummond & Graham*, March 5, 1887, p. 568.

Slander.

30. Nominal damages—Expenses. *Bonnar v. Roden*, June 1, 1887, p. 761.

Slander—Newspaper article—Parliamentary Election.

31. During a contest for a seat in Parliament a newspaper published an article concerning one of the candidates, in which he was described as a “scoffer,” who talked in a “morally offensive way,” and spoke sarcastically about “God Almighty’s earth.” In an action of damages against the proprietor of the newspaper, *held* (rev. judgment of Lord M’Laren) that the expression “scoffer” was *prima facie* defamatory, and that the candidate was entitled to an issue, putting the question whether the article falsely and calumniously represented him as a “scoffer at religion, as morally offensive in his public addresses, and as sneering at the Divine Government and Providence.”

During a parliamentary election a newspaper stated that it was alleged that a boat’s crew from the yacht of one of the candidates was captured while poaching, and that it was “affirmed” that a boat’s crew from his yacht had been seen fishing on a Sunday. In an action of damages raised by him, *held* (*diss.* Lord Young) that he was not entitled to an issue, as it was not averred that the acts alleged had been done with the pursuer’s knowledge or authority. *Macfarlane v. Black & Co.*, July 6, 1887, p. 870.

Wrongous apprehension—Public officer—Malice.

32. In order to found a relevant action of damages against a public officer for a wrongful official act, it is not enough to aver malice in general terms, but facts and circumstances must be set forth from which the Court or a jury may legitimately infer that the defender was not acting in the discharge of his duty, but from a malicious motive.

Observed that there may be cases between private individuals where a general averment of malice may be sufficient. *Beaton v. Ivory*, July 19, 1887, p. 1057.

Assessment of damages for infringement of patent. See *Patent*, 2.

RES JUDICATA. Identity of parties.

A plea of *res judicata* sustained against a claimant in a multipoleinding claiming upon a title upon the future and contingent possession of which another person had founded unsuccessfully in a previous process with reference to the same fund. *M’Caig v. Maitland*, Jan. 5, 1887, p. 295.

RETENTION. Lien of Company over shares for debts due by shareholder.

1. A limited company, incorporated under the Companies Acts, has, at common law, a right of retention over the shares of a partner in security of debts due by him to the company. *Bell’s Trustee v. Coatbridge Tinplate Co., Limited*, Dec. 17, 1886, p. 246.

Lease—Retention of rent—Partial destruction of subject.

2. *Held* that a tenant is not bound to pay the full rent if, during possession, through no fault of his own, he loses the beneficial enjoyment of part of the subject let, and that his claim to abatement may be stated by way of defence to an action for payment of the full rent. *Muir v. M’Intyres*, Feb. 4, 1887, p. 470.

Deposit.

3. *Held* that a depository was bound to restore to the depositor the balance that remained of a fund deposited to meet a contingent claim when that claim had been ascertained and satisfied, and was not entitled to retain any part of the balance on the plea that he himself had a claim against the depositor for expenses incurred in ascertaining by arbitration the amount of the contingent claim to meet which the fund was deposited. *M’Gregor v. Alley & M’Lellan*, March 4, 1887, p. 535.

REVENUE. Income-Tax—Schedule D, Cases I. and IV.—Foreign investments.

1. A Scottish company which had invested funds in America, instead of

REVENUE—Continued.

bringing home the interest, invested it in America, but deducted an equivalent amount from capital raised in this country for transmission to America for investment. The amount so deducted was divided as income among the shareholders. *Held* that the interest was to be regarded as interest received in this country, and was therefore liable to assessment for income-tax under the fourth case of schedule D of the Income-Tax Act, 1842.

A Scottish company which carried on the business of borrowing money in this country and lending it on American securities, having been charged with income-tax on interest received from American investments under the fourth case of schedule D, objected to the assessment on the ground that the company, as a trading company, could only be assessed upon its profits under the first case of schedule D. *Held* that the assessment under the fourth case was competent. *Scottish Mortgage and Land Investment Co. of New Mexico v. Commissioners of Inland Revenue*, Nov. 19, 1886, p. 98.

2. A company carrying on the business of borrowing money in this country and investing it abroad may, in the option of the Surveyor of Taxes, be assessed for income-tax under schedule D either upon profits under the first case or upon the interest received from abroad under the fourth case of that schedule. *Surveyor of Taxes v. Northern Investment Co. of New Zealand, Limited*, May 31, 1887, p. 734.

Income-tax—Burgh water-works.

3. The Hamilton Water-Works Commissioners, by local Act, were empowered (1) to charge a "domestic water-rate on all premises within the town which were supplied with water; (2) to levy a "public water-rate" upon all premises within the town whether supplied with water or not; and (3) to sell water for other than domestic uses at such rates as should be agreed upon. The Commissioners annually made up a tariff of charges for supply under this head. It was further provided that the supply for domestic use should not be held to include a supply "for railway purposes or for public baths, or for public establishments." The barracks, which were within burgh, did not pay the domestic rate, but paid for water supplied to them according to measurement at the tariff rate. *Held* that the payment thus derived was profit, and liable to assessment for income-tax under schedule D. *Allan v. Hamilton Water-Works Commissioners*, Feb. 22, 1887, p. 485.

Income-tax—Schedule D, Cases I. and II., Rule first—Deduction for value of premises occupied as dwelling-house.

4. A bank was charged with income-tax under schedule A of the Income-Tax Act, 1842, on certain premises belonging to it in which it carried on its business, and which were also to some extent occupied as dwelling-houses by the manager and agents, that accommodation being given by the bank to them as part of their emoluments. In assessing the bank for income-tax under schedule D, the Income-Tax Commissioners refused to allow deduction from the gross profits of the bank of the annual value of these premises, in so far as they were occupied as dwelling-houses. In an appeal *held* that the bank was entitled to deduct the value of the whole premises in question—the portions used as dwelling-houses not being beneficially enjoyed as such by the bank. *Town and County Bank, Limited, v. Inland Revenue*, March 4, 1887, p. 528.

Corporation Tax—Customs and Inland Revenue Act, 1885 (48 and 49 Vict. cap. 51), sec. 11—Exemptions.

5. *Held* that a building belonging to and occupied as a library by the Society of Writers to the Signet did not fall within the exemption contained in the 11th section of the Customs and Inland Revenue Act, 1885.

Held that the income of the Society of Writers to the Signet was exempt from duty to the extent of £105 per annum, appropriated by contract to the perpetual endowment of a chair of conveyancing in a university.

Held further, that the exemption under the same section of "property acquired by or with funds voluntarily contributed to any body, corporate or

REVENUE—Continued.

unincorporate, within a period of thirty years immediately preceding" was solely applicable to property acquired by funds gratuitously given, and did not cover property acquired by monies paid by those entering the Society as a necessary condition of their obtaining admission.

Held that deductions fell to be made from the annual value and income, before assessment, of (1) land-tax, and the owner's proportion of rates; (2) premium of insurance on the subjects assessed; (3) reasonable remuneration to the treasurer for drawing the Society's income; and (4) an allowance for repairs. *Society of Writers to the Signet v. Commissioners of Inland Revenue*, Nov. 3, 1886, p. 34.

6. *Held* that funds belonging to an incorporated body, which were derived from the entry-moneys of members and were solely applicable as pensions to decayed members and widows of members at the absolute discretion of certain office-bearers, were not to be regarded as funds appropriated "to a charitable purpose" in the sense of the statute. *Incorporation of Tailors in Glasgow v. Inland Revenue*, May 26, 1887, p. 729.

Customs—Contraband—Evidence of accused—Customs Consolidation Act, 1876 (39 and 40 *Vict. cap.* 36), *secs.* 179, 259.

7. Certain foreigners were convicted and sentenced before a Justice of Peace Court, upon a complaint under the 179th section of the Customs Consolidation Act, 1876, charging them with having on board a foreign ship, within one league of the British coast, packages of spirits, tobacco, &c., of a size and character which are prohibited to be imported. In an appeal against the conviction, *held* that the Judge in the inferior Court had rightly declined to admit the evidence of the accused, section 259 of the Customs Law Consolidation Act, 1876, which admits such evidence in certain circumstances, not being applicable to the case.

Held further, that it was not a good objection to the conviction that the evidence had not been recorded by the Judge in the inferior Court, the accused not having asked him to do so. *Dodsworth v. Rijnbergen, &c.*, Dec. 15, 1886, p. 238.

REVOCATION. See *Succession*, 10.

RIGHT IN SECURITY. *Absolute disposition with back-letter—Advances by third party on assignation of reversionary interest intimated to the disponee.*

1. A bank held a recorded absolute disposition granted by A of certain subjects, which by back-letter it agreed to hold "in security, and until full and final payment of all sums of money now due, or which may hereafter become due." The back-letter was not recorded. Some months afterwards A, for onerous considerations, granted to another bank a deed by which she alienated, assigned, and disposed her whole right and interest and right of reversion in the subjects. Intimation of the assignation was made to the first bank. Thereafter advances were made to A by both banks. In a competition between the two banks, *held* (rev. judgment of the Court of Session) that, in a question between the two banks, the first bank's security was limited to advances made prior to the date when the assignation was intimated. *Union Bank of Scotland, Limited, v. National Bank of Scotland, Limited*, Dec. 10, 1886, H. L., p. 1.

Bond and disposition in security—Personal obligation—Sale.

2. The creditor in a bond and disposition in security in the form prescribed by the Titles to Land Consolidation Act, 1868, and containing the usual clause consenting to registration for execution, gave notice requiring payment of his loan along with the usual three months' premonition that failing payment he might proceed to sell. Immediately thereafter the creditor charged the debtor on the personal obligation contained in the bond. The debtor having brought a suspension of the charge, *held* that the creditor was entitled to both remedies, and note refused accordingly. *M'Whirter v. M'Culloch's Trustees*, July 9, 1887, p. 918.

See *Bankruptcy*, 9—*Insurance*, 1—*Minor and Pupil*, 2.

RIVER, LOCH, SEA. *River—Liability of upper heritor in respect of operations in alveo.*

1. A farm road, running midway along the steep face of a hill, was carried through the bed of a little burn upon an embankment or breastwork, built up by the proprietor so as to keep the road on a level, the burn running over the surface of the road. The embankment had been there for upwards of forty years, and had been repaired and strengthened from time to time. In 1884 the proprietor put sheep drains into his farm, and at the same time increased the breadth of the embankment. A lower heritor, who had been injured in the autumn of 1885 by an extraordinary flood in the burn, raised an action of damages against the upper proprietor, averring that the flood had been caused by the flood-water of the burn being obstructed by the stones and rubbish which had gradually gathered across its course upon the embankment, and so diverted out of its proper channel against his property. The Court *held* that in point of fact the overflow had not been caused in that way, and had not happened at that point. *Opinions* (per Lord Justice-Clerk, Lord Young, and Lord Craighill) that the proprietor would not have been liable even if the flood had been due to the embankment, the operations of the upper proprietor having been lawful and ordinary operations, involving no risk of damage except from some extraordinary cause. *Filshill v. Campbell*, March 10, 1887, p. 592.

River—Tidal and Navigable river—White fishings—Acts Anne 1705, cap. 2, and 29 Geo. II. cap. 23.

2. A member of the public brought an action against the riparian proprietor concluding for declarator that he had a right to fish with single rod and line for floating white fish, including trout, flounders, eels, and any other sort of floating white fish which were not of the salmon kind, in that part of the river Doon where the tide ebbed and flowed, and as far as the highest point reached by the ordinary spring-tides; and averred that the portion of the Doon so described extended from the sea to a distance of about 500 yards inland. The action was founded both on common law and the Acts of Anne, 1705, cap. 2, and 29 Geo. II. cap. 23. *Held*, after a proof, (1) that the Doon between the points in question was neither a tidal nor a navigable river, and that the pursuer was not entitled to declarator either at common law or under the statutes; and (2) that the defender under his titles had right to the whole fishings therein, and had had from time immemorial exclusive possession thereof. Defender therefore *assoiized*. *Bowie v. Marquis of Ailsa*, March 18, 1887, p. 649.

Sea—Foreshore—Line of high-water mark.

3. *Held* (per Lord Trayner, Ordinary) that the right of the Crown in the sea-shore extends to the line of high-water of ordinary spring tides, and is not limited (as is the rule in England) to the line reached by the average of the medium high tides between the spring and the neap. *Bowie v. Marquis of Ailsa*, March 18, 1887, p. 649.

Sea—Foreshore—Burgh—Title of Magistrates to resist declarator of property of foreshore.

4. In an action raised in 1885 against the magistrates of a burgh (and also against the Crown, which did not defend), by the proprietor of lands within the burgh for declarator of property in the foreshore *ex adverso* of these lands, the pursuer produced as his immediate title a disposition from a subject to the foreshore dated in 1884. *Held* (1) that as the inhabitants of the burgh had been in use from time immemorial to resort to the foreshore for purposes of recreation, that was sufficient to give the magistrates a title to challenge the disposition of 1884; and (2) that as the prior titles produced shewed that the disposition of 1884 flowed *a non habente potestatem*, the defenders fell to be *assoiized*. *Keiller v. Magistrates of Dundee*, Dec. 7, 1886, p. 191.

Sea—Foreshore—Burgh—Jus spatiandi—Act to extend the royalty of Dundee, 1831 (1 and 2 Will. IV. cap. xlv.).

5. *Held* that the above Act did not transfer the property of the foreshore *ex*

RIVER, LOCH, SEA—Continued.

adverso of the extended royalty of the burgh of Dundee from the Crown to the Magistrates as representing the burgh.

A proprietor of land within the extended royalty of the burgh of Dundee held a conveyance from the Crown, dated in 1853, "of all right, title, and interest of Her Majesty, her heirs and successors," in a portion of the foreshore *ex adverso* of his property, lying between high-water mark and a line of railway formed along the foreshore. *Held*, in a declarator at his instance against the magistrates (1) that the pursuer had a right of property in this piece of foreshore; but (2) that, as the inhabitants of Dundee had used it from time immemorial for purposes of recreation, he had no right to exclude them from resorting thither for such purposes. *Scott v. Magistrates of Dundee*, Dec. 7, 1886, p. 191.

Sea—Foreshore—Possession—Prescription.

6. A proprietor, with titles dating from 1804, flowing from a subject-superior, which described his property as "bounded on the south by the sea," brought a declarator of property in the seashore *ex adverso* of his lands against the Crown. As he could not recover his immediate superior's titles, he founded on his own possession on his own titles. He proved that one of his predecessors under the subject-superior had built a retaining wall whereby a considerable portion of the foreshore was reclaimed, that he and they had for more than the prescriptive period been in use to cart drift sea-ware (no ware grew on the shore) in large quantities from the shore for manure, that they had occasionally taken stones or gravel from the shore for various purposes, and that they had built and used a private bathing-house on the shore. The Crown in defence proved that a large quantity of stones had been taken (by fishermen in their boats) from that part of the coast to build a public breakwater, but it was not shewn that any considerable quantity had been taken from the part of the foreshore claimed by the pursuer, or that he or his authors knew what was being done. The Crown further proved that members of the public had taken sea-ware from the foreshore claimed by the pursuer, in creels or in barrows (but they never did so in carts, having only a right of access by foot to that part of the shore); and that they had also taken whelks, mussels, and other shellfish, and shot gulls on the foreshore.

Held (aff. judgment of Second Division) that the pursuer had established a case of prescriptive possession, and was entitled to decree of declarator accordingly. *Young v. North British Railway Co. and the Lord Advocate*, August 1, 1887, H. L., p. 53.

See *Insurance*, 3.

ROAD. Right of way—Evidence of public use.

1. In an action of declarator that there existed a public right of way for passengers on foot and on horseback, and for driving cattle and sheep through the Glen of the Doll in Forfarshire, it was proved that the pass formed the direct and natural access from Clova to Braemar, and that from time immemorial there had existed a well-known and well-defined track through the glen; that there had been a practice of drovers taking sheep by this track from the public market at Braemar in spring and autumn to a public market near Kirriemuir; that the track had been used by farmers in the district going to Clova or to Braemar, and occasionally by tourists going between these places; that there had been a repute in the district, both among the public and the proprietors of the ground over which the track passed, that there was a public right of way. *Held*, on a consideration of the whole proof, that the use proved was, having regard to the nature of the district, sufficient in amount, and that it was to be attributed not to tolerance, but to the assertion of a public right. *Scottish Rights of Way and Recreation Society, Limited, v. Macpherson*, July 6, 1887, p. 875.

Statute Labour Road—Effect of closing road under statutory authority.

2. *Held* that a road over which the public had acquired a right of way for all purposes became thereby a statute labour road, whether the Statute Labour Trustees had allocated statute labour money to its maintenance or not.

ROAD—*Continued.*

Where a public road which is not shewn to have originated as a footpath is shut up as superfluous by the statutory authority, it is shut up for all purposes, and not merely as a cart and carriage road; but *question* whether the same result would follow if it were shewn that the road was one over which the public had acquired a right of footpath before it became a cart and carriage road. *Hope Vere v. Young*, Jan. 28, 1887, p. 425.

Rule of the road—Tramway-car.

3. *Observed* (per the Lord President) that the rule of the road requires that a tramway-car shall be passed by a following vehicle on the left-hand side. *Jardine v. Stonefield Laundry Co.*, June 24, 1887, p. 839.

Foot-passengers—Duty of drivers towards.

4. Foot-passengers on a country road with footpaths on either side are entitled to walk upon the road itself, and the drivers of vehicles are bound to keep clear of them. *M'Kechnie v. Couper*, Jan. 20, 1887, p. 345.

Road trustees—Barbed wires.

5. A proprietor of lands bordering a public road is not entitled to erect a barbed wire fence along the road, where such fencing is dangerous to persons or bestial using the road, and road trustees have a good title to sue an action against the proprietor for the purpose of having him ordained to remove the fence. *Elgin County Road Trustees v. Innes*, Nov. 10, 1886, p. 48.

General Police and Improvement Act, 1862 (25 and 26 Vict. cap. 101), sec. 397—Private Street—Notice.

6. The Commissioners of a burgh put up a notice at the market cross, and at each end of a road which had long been used as a public road, intimating the intention of the Commissioners "to fix the level" of the road, "to make the roadway thereof, and a footpath on both sides, with kerb and gutters," but the notice did not state that the road was to be dealt with as a private street (to which alone sec. 397 of the above Act applied), and did not shew that the Commissioners intended to hold the owners of property fronting or abutting on the road liable for the cost. In an action brought by the Commissioners against the owner of property abutting on the street for payment of a proportion of the cost, *held* (1) that the road was a private street, and (2) that the notice was sufficient under sec. 397 of the Act. *Youden v. Jackson*, July 16, 1887, p. 1001.

Roads and Bridges Act, 1878 (41 and 42 Vict. c. 51), sec. 32—Transference of statutory obligations.

7. *Held* (in rev. judgment of Second Division) that sec. 32 of the Roads and Bridges Act, 1878, in providing that county road trustees to whom a road is thereby transferred shall be liable in all the debts, liabilities, claims and demands, in which the trustees of such road "are or were liable under any general or local Act then in force," does not continue and transfer to the county road trustees the statutory powers and duties conferred and imposed by such prior Acts upon the trustees from whom the road is transferred, and that county trustees are not entitled to spend money raised by assessment for the maintenance of a road in lighting the same, although the trustees from whom the road had been transferred were bound to do so under a local Act. *Lanarkshire (Lower Ward) Road Trustees v. Kelvinside Estate Trustees*, Nov. 12, 1886, H. L., p. 18.

Roads and Bridges Act, 1878 (41 and 42 Vict. cap. 51), secs. 37 and 88—Bridge partly in burgh and partly in county, and accommodating traffic of other places—Apportionment of liability for maintenance.

8. *Held* (1) that while section 37 of the Roads and Bridges Act imposes the burden of maintaining a bridge, situate in more than one county, or burgh, on each equally, that provision does not apply in cases in which, under the 88th section, the Secretary of State determines that a bridge accommodates the traffic of a county or burgh in which it is not situate, and that in these cases the Secretary of State is empowered by section 88 to determine as he may see fit the proportions in which each county or burgh liable to contribute shall contribute to the expense of maintenance, &c.; and (2)

ROAD—Continued.

that any county or burgh so contributing to the maintenance of a bridge beyond its limits is entitled to take part in the management of the bridge, and to appoint representatives on the Joint Bridge Committee, appointed under section 39 of the Roads and Bridges Act, 1878. *Lower Ward of Lanarkshire Road Trustees v. Magistrates of Glasgow*, July 8, 1887, p. 890.

Roads and Bridges (Scotland) Act, 1878 (41 and 42 Vict. c. 51), secs. 54, 55, and 86—General Police and Improvement (Scotland) Act, 1862 (25 and 26 Vict. c. 110), secs. 87, 88, and 89.

9. *Held* on a construction of the foregoing and relative provisions of the above Acts, that the occupiers of houses within a burgh, under the Roads and Bridges Act, 1878, are entitled to the exemptions provided to occupiers by the 87th, 88th, and 89th sections of the General Police and Improvement Act, 1862, but that the exemptions were inapplicable to an assessment imposed on owners as such.

Held further, that the 86th section of the Roads and Bridges Act, in giving the local authority power to relieve occupiers of lands and heritages under the annual value of £4 on the ground of poverty, was not inconsistent with and did not supersede the power given under the 88th section of the General Police and Improvement Act to remit payment of the assessment under the Roads and Bridges Act on the ground of poverty irrespective of the amount of rent. *Govan Police Commissioners v. Armour*, Feb. 3, 1887, p. 461.

Roads and Bridges Act, 1878 (41 and 42 Vict. c. 51), sec. 54.

10. *Held (diss. Lord Rutherford Clark)* that under sec. 54 of the Roads and Bridges Act, 1878, the commissioners were to levy from the individual owners and occupiers such equal rate per pound as would produce the aggregate sum required, and that the principle of *Galloway v. Nicolson*, March 19, 1875, 2 R. 650, under which the aggregate sum required would have been divided into two equal parts, and the one part levied from the owners as a class, and the other from the occupiers as a class, did not apply. *Govan Police Commissioners v. Armour*, Feb. 3, 1887, p. 461.

Roads and Bridges Act, 1878, sec. 119—Maintenance of Roads—Lighting.

11. *Held (rev. judgment of Second Division)* that sums raised by assessment under the Roads and Bridges Act, 1878, for "maintaining and repairing" roads cannot be applied to light them. *Lanarkshire (Lower Ward) Trustees v. Kelvin-side Estate Trustees*, Nov. 12, 1886, H. L., p. 18.
See *Justiciary Cases*, 8—*Reparation*, 20.

SCHOOL. Powers of school board—Use of buildings.

1. A school board has a discretion to allow the use of its schools for purposes which do not interfere with proper educational purposes.

Held that a country school board had not abused this discretion by granting its school for five days in vacation to a charitable society to be used as a sleeping and cooking place for a large number of poor children brought from a town for a holiday. *Hunter v. School Board of Lochgilphead*, Dec. 1, 1886, p. 135.

Educational Endowments Act, 1882 (45 and 46 Vict. c. 59)—Discretion of the Commissioners.

2. *Held* that the Court could not review the Commissioners under the above Act in the exercise of their discretion in determining the proportion of the endowment to be applied to educational purposes in the case of a mixed endowment, or as to the proper amount of regard to be shewn to the spirit of the founder's intention. *Ferguson Bequest Fund v. Commissioners on Educational Endowments*, March 15, 1887, p. 624.

Prosecution for failure to educate.

3. In order to a prosecution for failure to educate children it is essential that there should be produced either a certificate of failure to educate under section 70 of the Education Act, 1872, or an attendance order under sec-

SCHOOL—*Continued.*

tions 9 and 10 of that of 1883. *Macaulay v. Macdonald*, June 4, 1887, Just. Cases, p. 43.

SEA. See *River, &c.*, 3, 4, 5, 6.

SERVITUDE. See *Property*, 1.

SHERIFF. *Jurisdiction—Public Trust.*

1. Question whether the Sheriff has jurisdiction to control the managers of public property in their administration. *Opinion (per Lord Young)* that he has not. *Hunter v. School Board of Lochgilphead*, Dec. 1, 1886, p. 135.

Jurisdiction—Executor.

2. Held that the fact that confirmation of an executor has been taken out in the Sheriff Court of the deceased's domicile does not of itself subject the executors to the jurisdiction of that Court, and that an action will not lie against them if none of them is resident within that jurisdiction. *Halliday's Executor v. Halliday's Executors*, Dec. 17, 1886, p. 251.

Jurisdiction—Declarator—Sheriff Court Act, 1877 (40 and 41 Vict. cap. 50), sec. 8—Value of subjects.

3. Question, whether in an action of declarator in the Sheriff Court under the Sheriff Courts Act, 1877, the value of the subjects is to be determined by reference to the pursuer's or to the defender's interest. *Bowie v. Marquis of Ailsa*, March 18, 1887, p. 649.

Jurisdiction—Alkali, &c. Works Regulations Act, 1881 (44 and 45 Vict. cap. 37)—Summary Jurisdiction (Scotland) Acts, 1864 and 1881.

4. Held that proceedings for recovering the fines imposed by the above statute fall within the Sheriff's criminal jurisdiction, and are competently brought by way of complaint under the Summary Jurisdiction Acts, 1864 and 1881. *Fletcher v. Eglinton Chemical Co., Limited*, Nov. 13, 1886, Just. Cases, p. 9.

Procedure—Sheriff Court Act, 1876 (39 and 40 Vict. cap. 70), sec. 6.

5. Question, whether petitions in the Sheriff Court for sequestration under the Bankruptcy Act, 1856, must be in the form prescribed by the 6th section of the Sheriff Court Act, 1876. *Opinion (per Lord Young)* that they need not. *Cuthbertson v. Gibson*, May 31, 1887, p. 736.

Expenses—Employment of counsel.

6. In a Sheriff Court action both parties appeared by counsel at the proof and debate thereon. The Sheriff-substitute having assoilzied the defender, with expenses, the pursuer appealed to the Court of Session. The Court affirmed the judgment, and remitted the defender's account of expenses to the Auditor. At the taxation on 8th July 1887 the Auditor disallowed the charges for instructing counsel in the Sheriff Court, because no application had been made to the Sheriff-substitute while the case was in the Sheriff Court, either for authority to employ counsel, or for approval of their employment. After the taxation the agent for the defender presented to the Auditor a certificate by the Sheriff-substitute, dated 7th July 1887, stating that counsel were employed with his approval. The Auditor was of opinion that the certificate was too late, but reported the point to the Court. Held that the sum fell to be added to the amount of the defender's taxed expenses. *M'Kercher v. M'Quarrie*, July 19, 1887, p. 1038.

Debts Recovery Act, 1867 (30 and 31 Vict. c. 96), sec. 17—Review in debts recovery actions.

7. A person against whom a decree had been obtained in the Debts Recovery Court brought a reduction thereof in the Court of Session, on the ground that the Sheriff had refused to hear evidence tendered by him. Held that the action of reduction was incompetent under sec. 17 of the Debts Recovery Act, 1867. *Robertson v. Pringle*, Feb. 5, 1887, p. 474.

SHIP. *Carriage of goods—Condition—Construction of contract.*

1. Question, whether a printed circular post-card sent by shipowners to possible shippers of goods in Galway, which stated that the s.s. "Clara" would sail from Glasgow to Galway on a date named, and contained this intimation:

SHIP—*Continued.*

—"All goods carried on conditions as per sailing bills," which conditions relieved the shipowners from all liability for the consequences of their own or their servants' fault, could be held to apply to the return voyage of the "Clara" from Galway to Glasgow, so as to import the conditions on the sailing bills into a contract for that voyage. *Lightbody's Trustees v. J. & P. Hutchison*, Oct. 16, 1886, p. 4.

Charter-party—Guarantee that vessel should carry a certain dead weight of cargo.

2. By charter-party for a voyage it was stipulated that the vessel (then at sea) should proceed to G., and there load all such goods and merchandise as the charterers should tender alongside for shipment, including machinery, the dimensions of the largest pieces thereof being specified, but not beyond what the ship could reasonably stow and carry; that the charterers should pay a slump freight for the voyage, of £2200; that the "owners guarantee that the vessel shall carry not less than 2000 tons dead weight of cargo"; that, "should the vessel not carry the guaranteed dead weight as above, any expense incurred from this cause to be borne by the owners, and a *pro rata* reduction per ton to be made" from the freight; and that a regular stevedore, to be appointed by the charterers, should be employed by the owners to stow the cargo, "to be paid by and to be under the direction of the master, who is responsible for improper stowage." The charterers tendered 2000 tons of cargo, consisting partly of pieces of machinery, partly of coal, and partly of general goods. Had the coal and the machinery been stowed together the whole cargo tendered could have been loaded, but as the coals and the machinery were stowed in separate holds, only 1691 tons were shipped. *Held (diss. Lord Rutherford Clark)* that the clause of guarantee imported a guarantee of the vessel's carrying capacity merely, but that the clause providing for a *pro rata* reduction applied if the vessel actually carried less than 2000 tons through no fault on either side, which the majority of the Court were of opinion was the case. *Mackill & Co. v. Wright Brothers & Co.*, July 5, 1887, p. 863.

Sale—Purchaser's liability for furnishings prior to sale.

3. The owner of certain shares in a vessel sold them, and delivered a bill of sale to the purchaser. At the time the vessel was completely fitted and provisioned and laden with a cargo for a voyage under a charter-party. The ship was lost on the voyage. In an action subsequently brought by the managing owner against the purchaser for the proportion effeiring to his shares of the cost of repairs executed before the sale, and of provisions for the voyage, on the ground that he would have been entitled to a share of the freight if earned, *held* (1) that the purchaser was not liable for repairs executed prior to the sale, and (2) that although the cost of provisions for the voyage would have been a proper deduction from the gross freight if earned, yet as they had not been bought on the purchaser's credit he had incurred no liability. *Carswell & Son v. Finlay*, July 8, 1887, p. 903.

Master—Employment of person as master who has no certificate.

4. The owner of a whaling ship had on board her, in addition to a certificated master, a person designed in the ship's books as "icemaster in full charge" who held no certificate, but was a person of experience as a navigator among ice. He, under the instructions of the owner, assumed the charge of the navigation of the ship from the date of her departure from Scotland till she was lost in the Arctic Seas. The owner was convicted of having, in contravention of the 136th section of the Merchant Shipping Act, 1854 (17 and 18 Vict. cap. 104), employed a person as master who had no certificate as such. Conviction *quashed*. *Heslop v. Cadenhead*, June 4, 1887, *Just. Cases*, p. 35.

See *Arrestment*, 1—*Expenses*, 8—*Justiciary Cases*, 1.

STAMP. *Promissory-note—Stamp Act, 1870 (33 and 34 Vict. cap. 97), sec. 17, 54.*

1. In an action to recover the amount contained in a foreign promissory-note,

STAMP—Continued.

which, at the date of the action, was properly stamped, *held* that an averment that, when originally presented for payment in the United Kingdom, it was unstamped, was irrelevant, since presentation without a stamp did not involve nullity. *Broddelius v. Grischotti*, March 4, 1887, p. 536.

"*Conveyance on sale*" proceeding upon verdict of jury under *Lands Clauses Act, 1845*—Sum in name of compensation of loss of business—*Stamp Act, 1870* (33 and 34 *Vict. cap. 97*), sec. 70.

2. In a compulsory sale under the *Lands Clauses Act, 1845*, a jury awarded the owners of the subjects, who were also the occupants, three specific sums (1) for the value of land taken, (2) for the value of buildings, machinery, plant, &c., and (3) for compensation for loss of business previously carried on by them on the premises in question. The verdict of the jury was incorporated in the supervening conveyance of the subjects in question. *Held* (rev. judgment of First Division) that the ad valorem stamp which fell to be affixed to the deed in terms of the *Stamp Act, 1870* (33 and 34 *Vict. cap. 97*), fell to be assessed on the whole sum paid by the railway company, and not merely on the first and second items. *Commissioners of Inland Revenue v. Glasgow and South-Western Railway Co.*, May 20, 1887, H. L., p. 33.

STATUTE. Transference of statutory obligations—*Roads and Bridges Act, 1878* (41 and 42 *Vict. c. 51*), sec. 32.

1. *Held* (in rev. judgment of Second Division) that sec. 32 of the *Roads and Bridges Act, 1878*, in providing that county road trustees to whom a road is thereby transferred shall be liable in all the debts, liabilities, claims, and demands, in which the trustees of such road "are or were liable under any general or local Act then in force," does not continue and transfer to the county road trustees the statutory powers and duties conferred and imposed by such prior Acts upon the trustees from whom the road is transferred, and that county trustees are not entitled to spend money raised by assessment for the maintenance of a road in lighting the same, although the trustees from whom the road had been transferred were bound to do so under a local Act. *Lanarkshire (Lower Ward) Road Trustees v. Kelvinside Estate Trustees*, Nov. 12, 1886, H. L., p. 18.

Prospective or retrospective—*Volunteer corps subscription*—*Volunteer Act, 1863* (26 and 27 *Vict. cap. 65*).

2. The rules of a volunteer corps, made in terms of the *Volunteer Act, 1863*, were dated 26th March 1885, and provided, *inter alia*, that subscriptions of members to the regimental funds should fall due on the 31st October in each year for the twelve months preceding; and that all members of the corps should be liable for the full year's subscription, provided they had been members of the corps for one calendar month in the year. *Held* (diss. Lord Young) that a subscription was due for the year ending 31st October 1885, although four months of that year had elapsed when the rules were made. *Morrison v. Neilson*, Feb. 2, 1887, p. 452.

STATUTES.

1661, cap. 18. See *Justiciary Cases*, 9, 19.

1669, cap. 9. See *Arrestment*, 2.

1696, cap. 5. See *Bankruptcy*, 1.

Anne 1705, cap. 2. See *Fishings*, 2.

29 Geo. II. cap. 23. See *Fishings*, 2.

12 Geo. III. cap. 72 (*Sexennial Limitation Act*). See *Bill of Exchange*, 1.

48 Geo. III. cap. 151 (*Administration of Justice and Appeals Act, 1808*).

See *Expenses*, 4.

9 Geo. IV. cap. 58 (*Home Drummond Act*). See *Justiciary Cases*, 23.

1 and 2 Will. IV. cap. xlv. (*Act to Extend the Royalty of Dundee, 1831*).

See *Burgh*, 6.

2 and 3 Will. IV. cap. 68 (*Day Trespass*). See *Justiciary Cases*, 4.

1 and 2 *Vict. cap. 114* (*Personal Diligence Act*). See *Arrestment*, 2.

5 and 6 *Vict. cap. 35* (*Property and Income-Tax, 1842*). See *Revenue*, 1, 2, 3, 4.

STATUTES—Continued.

- 8 and 9 Vict. cap. 33 (*Railways Clauses Act*, 1845). See *Railway*, 1.
 8 and 9 Vict. cap. 83 (*Poor-Law Amendment Act*, 1845). See *Poor*.
 10 and 11 Vict. cap. 17 (*Water-Works Clauses Act*, 1847). See *Mines and Minerals*, 1.
 11 and 12 Vict. cap. 36 (*Entail Amendment Act*, 1848). See *Entail*, 2.
 15 and 16 Vict. cap. 27 (*Evidence Act*, 1852). See *Process*, 8.
 17 and 18 Vict. cap. 91 (*Valuation of Lands Act*, 1854). See *Valuation Acts*.
 17 and 18 Vict. cap. 104 (*Merchant Shipping Act*, 1854). See *Justiciary Cases*, 6.
 19 and 20 Vict. cap. 79 (*Bankruptcy Act*, 1856). See *Bankruptcy—Judicial Factor*, 1, 6.
 20 and 21 Vict. cap. 56 (*Distribution of Business Act*, 1857). See *Process*, 15, 16.
 24 and 25 Vict. cap. 70 (*Locomotive Act*, 1861). See *Justiciary Cases*, 8.
 24 and 25 Vict. cap. 84 (*Trusts Act*, 1861). See *Trust*, 1.
 25 and 26 Vict. cap. 35 (*Public-House Acts Amendment Act*, 1862). See *Public-House*.
 25 and 26 Vict. cap. 89 (*Companies Act*, 1862). See *Company*.
 25 and 26 Vict. cap. 101 (*General Police and Improvement Act*, 1862). See *Burgh*, 8—*Road*, 6, 9.
 26 and 27 Vict. cap. 65 (*Volunteer Act*, 1863). See *Statute*, 2—*Ultra Vires*.
 27 and 28 Vict. cap. 53 (*Summary Procedure Act*, 1864). See *Justiciary Cases*, 18, 19.
 29 and 30 Vict. cap. cclxxiii. (*Glasgow Police Act*, 1866). See *Burgh*, 4 and 5.
 30 and 31 Vict. cap. 96 (*Debts Recovery Act*, 1867). See *Sheriff*, 7.
 31 and 32 Vict. cap. 54 (*Judgments Extension Act*). See *Foreign*, 3.
 31 and 32 Vict. cap. 96 (*Ecclesiastical Buildings Act*, 1868). See *Church*, 1.
 31 and 32 Vict. cap. 100 (*Court of Session Act*, 1868). See *Process*.
 31 and 32 Vict. cap. 101 (*Titles to Lands Consolidation Act*, 1868). See *Personal or Real*.
 31 and 32 Vict. cap. 121 (*Pharmacy Act*, 1868). See *Justiciary Cases*, 10.
 31 and 32 Vict. cap. 123 (*Salmon Fisheries*, 1868). See *Justiciary Cases*, 5.
 33 and 34 Vict. cap. 97 (*Stamp Act*, 1870). See *Stamp*.
 35 and 36 Vict. cap. 62 (*Education Act*, 1872). See *Justiciary Cases*, 7.
 36 and 37 Vict. cap. 63 (*Law-Agents Act*, 1873). See *Administration of Justice*, 1.
 37 and 38 Vict. cap. 94 (*Conveyancing Act*, 1874). See *Superior and Vassal*, 2—*Writ*, 2.
 38 and 39 Vict. cap. 61 (*Entail Amendment Act*, 1875). See *Entail*, 3.
 38 and 39 Vict. cap. 62 (*Summary Prosecutions Appeals Act*, 1875). See *Justiciary Cases*, 15, 16, 17.
 39 and 40 Vict. cap. 36 (*Customs Consolidation Act*, 1876). See *Revenue*, 7.
 39 and 40 Vict. cap. 70 (*Sheriff Court Act*, 1876). See *Bankruptcy*, 3.
 40 and 41 Vict. cap. 50 (*Sheriff Court Act*, 1877). See *Sheriff*, 3.
 41 and 42 Vict. cap. 51 (*Roads and Bridges Act*, 1878). See *Road*, 7, 8, 9, 10, 11.
 41 and 42 Vict. cap. 58 (*Locomotive Amendment Act*, 1878). See *Justiciary Cases*, 8.
 42 and 43 Vict. cap. cxxxi. (*Edinburgh Municipal and Police Act*, 1879). See *Justiciary Cases*, 23.
 43 and 44 Vict. cap. 42 (*Employers Liability Act*, 1880). See *Reparation*, 11, 12, 13, 14.
 43 and 44 Vict. cap. 47 (*Ground Game Act*, 1880). See *Justiciary Cases*, 4.
 44 and 45 Vict. cap. 21 (*Married Women's Property Act*, 1881). See *Husband and Wife*, 2.
 44 and 45 Vict. cap. 33 (*Summary Jurisdiction Act*, 1881). See *Justiciary Cases*, 18, 19.

STATUTES—Continued.

- 44 and 45 Vict. cap. 37 (*Alkali, &c. Works Regulation*, 1881). See *Justiciary Cases*, 18.
- 44 and 45 Vict. cap. 47 (*Presumption of Life Limitation Act*). See *Presumption*, 1.
- 45 and 46 Vict. cap. 59 (*Educational Endowments Act*, 1882). See *Trust*, 13.
- 45 and 46 Vict. cap. 61 (*Bills of Exchange Act*, 1882). See *Husband and Wife*, 2.
- 45 and 46 Vict. cap. 77 (*Citation Amendment Act*, 1882). See *Expenses*, 7.
- 46 and 47 Vict. cap. 22 (*Sea Fisheries Act*, 1883). See *Fishings*, 1.
- 46 and 47 Vict. cap. 56 (*Education Act*, 1883). See *Justiciary Cases*, 7.
- 46 and 47 Vict. cap. 57 (*Patents, Designs, and Trade-Marks Act*, 1883). See *Copyright*, 2.
- 46 and 47 Vict. cap. 62 (*Agricultural Holdings Act*, 1883). See *Lease*, 5, 6, 7.
- 47 and 48 Vict. cap. 63 (*Trusts Amendment Act*, 1884). See *Trust*, 7, 8.
- 48 and 49 Vict. cap. 3 (*Representation of the People Act*, 1884). See *Election Law*, 1, 3.
- 48 and 49 Vict. cap. 51 (*Customs and Inland Revenue Act*, 1885). See *Revenue*, 5, 6.
- 49 and 50 Vict. cap. 26 (*Guardianship of Infants Act*, 1886). See *Minor*, 1.
- 49 and 50 Vict. cap. 29 (*Crofters Holdings Act*, 1886). See *Lease*, 8.

STOCK EXCHANGE. *Agent and Principal—Contract for differences.*

A stockbroker, in carrying over at the settlement £10,000 "Trunk Thirds" stock bought for a client, sent his client a continuation-note in these terms:—"I have continued for you as under. Sold 10,000 Trunk 3ds at £50, bought at £50, 3s. 3d. com. in a/c." In reality the broker had not bought that amount of stock at the price stated, but had bought a much larger quantity in different parcels and at different prices. These he lumped together and divided among those of his clients who had given him orders for Trunk Thirds, charging as the price the average of the different prices. This average price was that stated in the above continuation-note, and it corresponded to none of the individual prices. In an action by the stockbroker against the client for payment of the differences on a series of such transactions, *held* by a majority of seven Judges (viz., Lord Justice-Clerk, Lords Craighill, Shand, and Adam, *diss.* Lords Mure, Young, and Rutherford Clark), that in so purchasing the stock the pursuer was to be regarded as having bought it on his own account, and not as agent for the defender, and that the defender having employed the pursuer merely as a broker was not responsible, no special custom of trade in regard to brokers on the Stock Exchange having been averred or proved. *Maffett v. Stewart*, March 4, 1887, p. 506.

SUCCESSION. *Conditio si sine liberis testator decesserit—Implied will.*

1. A father executed a holograph will in 1878, when he was a widower, leaving his whole estates, heritable and moveable, to his two children *nominationem*. In 1884, before entering into a second marriage, he executed a marriage-contract in which he assigned £3000 to trustees to secure payment of an annuity of £150 to his second wife should she survive him, with directions to the trustees on her death, should she survive him, to divide the trust-funds among his children of both marriages equally, and, in the event of his wife predeceasing him, to restore the fund to himself, the marriage-contract, in that event, containing no provision for children of the second marriage. He died six months after this marriage, survived by his widow, who subsequently gave birth to a posthumous child. This child claimed a share of the provisions made for the other children in the holograph will in addition to a share of the trust fund. The Lord Ordinary (Kinnear) *repelled* the claim. *Findlay's Trustees v. Findlays*, Dec. 7, 1886, p. 167.

SUCCESSION—Continued.

Conjunct fee and liferent—Husband and Wife—Property coming from wife's family.

2. A father by an *inter vivos* deed gratuitously disposed to himself in liferent for his liferent use alienably, and to his daughter and her husband "in conjunct fee and liferent, and to the children" of the marriage equally share and share alike, "whom all failing, to the heirs and assignees whomsoever of the longest liver" of the spouses, certain heritable property belonging to him. The husband was the longest liver of the spouses, and he was survived by children of the marriage. *Held* that under the destination no fee ever vested in the husband. *Brough v. Adamson*, July 2, 1887, p. 858.

Construction—Extrinsic evidence.

3. In the construction of a will and codicils, the Court is entitled to have regard to the state of the testator's circumstances at the dates when they were written, but not to indications of intention appearing in jottings or memoranda by him. *Trustees of the Free Church of Scotland v. Maitland*, Jan. 14, 1887, p. 333.

Double legacy.

4. A testator in his settlement, dated in June 1862, bequeathed (subject to his widow's liferent, which extended over the whole estate) a sum of £6000 to the General Trustees of the Free Church of Scotland, towards an endowment of the Free Church College, subject to certain discretionary powers given to the General Assembly of that church. He bequeathed the residue to three nephews, to whom also he gave special legacies of £2000 each. In a codicil to the settlement executed in March 1864 he directed his trustees that "in addition to all sums therein bequeathed by me, and particularly in addition to the sum of £4000 therein bequeathed by me to my brother F. C. M., to pay to him the annual interest on the sum of £6000, and if they see cause to do so, to set apart the said sum for his liferent use and behoof; . . . and at decease of both these liferenters," namely, F. C. M. and his widow, "to pay the said principal sum of £6000 to the General Trustees of the Free Church of Scotland for the benefit of the Free Church College in Edinburgh, to be applied in such manner as the General Assembly of the said Free Church may direct." In a special case presented by the General Trustees of the Free Church, who claimed two legacies of £6000, and the residuary legatees, it appeared that the testator had entered annually in his books an estimate of his estate. The memorandum of January 1862 shewed a residue available for residuary legatees of £1931, 0s. 10d. The memorandum of 20th January 1864 (being three months before the date of the codicil) shewed a residue available for residuary legatees of £3176, 3s. 2d. The testator died in September 1865. The effect of the codicil as in 1864, assuming it to have created a new legacy of £6000, would have been to extinguish the residue and to diminish the prior legacies *pro rata*, including the legacy to F. C. M. *Held* that the codicil could not be construed as giving a second legacy of £6000 to the Free Church. *Trustees of the Free Church of Scotland v. Maitland*, Jan. 14, 1887, p. 333.

Election—Essential error.

5. A daughter, who had intimated to her father's trustees her election to take legitim in place of her testamentary provisions in the belief that her right to the whole legitim fund was admitted by the trustees, of whom her brother was one, subsequently, when her brother declared his intention to dispute her right to more than half of the legitim fund, withdrew her election and claimed the testamentary provisions. *Held* that she was not barred from doing so.

Opinion (per Lord Shand) that even if the error had been one of law, and whether induced by another or not, the daughter would have been entitled to withdraw her election. *Inglis' Trustees v. Inglis*, May 31, 1887, p. 740.

SUCCESSION—Continued.

Election—Withdrawal.

6. *Question*, whether an election well made and intimated can be withdrawn. *Inglis' Trustees v. Inglis*, May 31, 1887, p. 740.

Heritable or Moveable—Conversion—Intestacy.

7. A direction by a testator to convert will not affect the legal rights of the heir in heritage or the heirs *in mobilibus*, unless the succession is given to some other person.

A truster, by trust-deed and settlement, directed his trustees (1) to pay his debts; (2) to deliver to his wife his furniture and personal effects; and (3) "as soon after my death as possible, to realise the remainder of my said estate and effects, and divide and pay over the nett proceeds thereof in such manner" as he might direct by any writing under his hand. By subsequent codicil he directed his trustees "to dispose of the nett proceeds" of his estate "as follows:—To my widow an annuity as long as she lives of £70." He further left legacies to a considerable extent. At the death of the widow, and after the purposes of the trust were all fulfilled, the moveable estate was exhausted, but the heritable estate remained unsold. In a competition between the heir-at-law and the next of kin *held* (1) that the direction of the testator to realise the estate must be held to have been carried out, and (2) that the balance of the fund thus formed, after payment of the annuity and legacies, fell to be divided as intestate succession between the heir in heritage and the heirs *in mobilibus* in the proportions in which the fund had been derived from the testator's heritable and moveable estates respectively. *Cowan v. Cowan*, March 19, 1887, p. 670.

Legitim—Approbate and Reprobate—Provisions in marriage-contract not declared to be in satisfaction of legitim.

8. H. S., in his daughter's antenuptial marriage-contract, bound himself, within one month of the marriage, to convey £8000 in Government Stock to trustees, to hold in trust for the spouses and the longest liver of them in life-tenant allenerly, the fee to belong to the children of the marriage, whom failing, to such persons as H. S. might appoint, whom failing, to his heirs and successors whomsoever, "but under this provision that, notwithstanding the above destination, it shall be in the power of the said" daughter, "in the event of her having no children, or if they shall all predecease her without leaving issue, to dispose, by will or testamentary deed executed by her, of any part of the said trust-funds, not exceeding £4000 sterling." There was no clause by which the daughter accepted these provisions as in full of her legal rights over her father's estate. The father, H. S., executed a trust-settlement by which, in the event of his daughter and her husband dying without issue, the whole property liferented by the spouses was to be divided amongst certain legatees. After the father's death the daughter, in an action of multiplepoinding, claimed her legitim. The Court in that action found that she was not barred by her acceptance of the provisions in the marriage-contract from claiming legitim. The daughter thereafter, there being no issue of the marriage, exercised the power to test on the £4000, and also to claim as legitim half of the remaining £4000. In a question between the daughter's testamentary trustees and those of H. S., her father, *held* that the daughter was not barred from testing on the £4000, either (1) by having claimed legitim generally, or (2) by having claimed as legitim half of the remaining £4000. *Somerville's Trustees v. Dickson's Trustees*, June 3, 1887, p. 770.

Mutual settlement by spouses—Destination to "nearest in kin of us equally."

9. Two spouses by contract and mutual disposition disposed their whole estate to the survivor, and on the death of the survivor "to the nearest in kin of us, the said . . . equally." In a question between the sole next of kin of the wife and three next of kin of the husband, *held*, on a construction of the whole deed, that the estate fell to be divided among the next of kin of both spouses as a single class *per capita*. *Hogg v. Bruce*, July 8, 1887, p. 887.

SUCCESSION—Continued.

Mutual settlement by spouses—Protected Succession—Revocation.

10. A husband and wife executed a mutual deed whereby, on the narrative of their affection to each other, and for other good causes, they each bequeathed to the other, if survivor, the whole moveable estate of which the predeceaser might die possessed, and severally constituted the survivor executor and universal legatory of the predeceaser, and on the further narrative that they were desirous to settle the succession to their moveable estate in the event of the decease of the longest liver of them, they jointly and severally, and each of them, whichever of them might be the survivor, bequeathed the whole moveable property of which the longest liver might die possessed to certain relatives of the husband, one of whom was appointed executor to the surviving spouse. A power of revocation was reserved to the spouses jointly, and to the husband if survivor. The husband died shortly after the execution of the deed, and the wife survived for over twenty years. She had no separate estate, and her only means of support were her husband's moveable property, which she took under the deed, amounting to about £300, and the liferent of her husband's heritage, about £75 a-year, which she enjoyed under another settlement by him. She was able to save considerable sums of money, which she, with the view of defeating the legacies to her husband's relatives in the mutual deed, placed in bank on deposit-receipt or on current account in the names of various persons to whom she wished to make donations, who on her death uplifted the money, and declined to account therefor to the general legatees, who had been appointed executors-dative to the widow. The latter accordingly brought an action of count, reckoning, and payment. *Held* that the deed conveyed the moveable property of the predeceasing spouse to the survivor absolutely in fee, and that *quoad ultra* the deed was merely the testament of the surviving spouse and revocable by her, and that therefore the donations made by her, whether *inter vivos* or *mortis causa*, were effectual. *Nicoll's Executors v. Hill, &c.*, Jan. 25, 1887, p. 384.

Vesting—Effect of ulterior destination of residue to "nearest of kin."

11. In a postnuptial contract of marriage the spouses conveyed, "each of them to the other, in case of his or her survivancy, in liferent," and to the children of their marriage in fee, divisible as after mentioned, their "whole estate and effects, heritable and moveable," it being declared "that the said funds and estate hereby settled upon the children of the present marriage in fee in manner above mentioned shall be divisible amongst such children in such shares as their father should appoint, and failing such appointment, equally." The deed further declared "that in the event of the dissolution of the said marriage by the predecease of any of the said spouses without leaving children, or of the decease of all such children during the lifetime of the survivor," then "it shall be in the power of the said married parties severally to dispose by testament of the proper share of the said funds and effects belonging to the said parties severally, but such disposition not to take effect until the decease of the longest liver of the said married parties, and failing any such disposition, then, and in that case, the said whole funds and estate settled by these presents shall, after the decease of the said parties, suffer division in manner after mentioned,—that is to say, the whole funds and estate above mentioned belonging or which may belong to" the husband "shall fall to and become the property of his own nearest of kin," and the wife's property to her nearest of kin. Then followed a declaration that the surviving spouse should, in the event of a second marriage, have power to settle the half of his or her estate on the spouse and children of the second marriage. The husband was survived by his wife and by one child, who predeceased his mother. In a competition for the husband's estate raised after the death of the surviving spouse between the representatives of the husband's nearest of kin at the date of his death and those nearest of kin to him at the date of his widow's death, *held (diss. Lord Shand)* (1) that the husband's estate

SUCCESSION—Continued.

did not vest in the legatees till the death of the surviving spouse; and (2) that the persons then called to the succession were his nearest of kin as at that date. *Murray, &c. v. Gregory's Trustees, &c.*, Jan. 21, 1887, p. 368.

Vesting—Destination over.

12. A trustor directed his trustees to retain a share of the residue of his estate and invest the same in their own names for behoof of the children *nomi-natim* of his brother "equally between and among them in liferent, and their lawful issues, born and to be born, equally among them in fee." In the event of the death of a child, payment was not to be made to his issue until the youngest of the issue attained majority. There was further a declaration that in the event of any of such issue "dying before the period fixed for division of their shares respectively leaving lawful issue, such issue shall come in place of the parent, and take and receive what the parent would have been entitled to if then in life." *Held* that the clause first above quoted imported an absolute gift to the issue of the children of the testator's brother, and that the subsequent clauses did not control the absolute character of that gift, and consequently that the fee of the shares vested in the issue of the children *a morte testatoris*. *Byars' Trustees v. Hay*, July 19, 1887, p. 1034.

Writ—Holograph unsigned document—Revocation by pencil marking.

13. Unsigned pencil alterations made by a testator on his testament written in ink will be presumed to be deliberative merely, but if there is evidence, parole or otherwise, to shew that he intended them to be final they will receive effect.

A trustor in his trust-deed directed his trustees to give effect to "any codicil or separate writing under my hand or signed by me, from which my trustees may be satisfied as to my wishes and intentions, notwithstanding the same may be defective in the solemnities required by law." By holograph codicil written in ink and signed he bequeathed £10,000 to the Magistrates of Glasgow, with directions how it was to be applied in charity. In his repositories these documents were found along with two other holograph pencil documents, which were both undated and unsigned. In one of these, headed "Notes as to settlement and alterations," he stated that he had "now meantime cancelled" his bequest to the Magistrates of Glasgow, "owing to losses on investments." The other was a list of charities to which he had left bequests, but that to the Magistrates was not mentioned. Through the bequest and instructions relative thereto in the holograph codicil were drawn perpendicular pencil lines, and along its margin was drawn in ink a bracket. It was admitted that a few months before his death the testator had called upon his law-agents and informed them that, having lost £30,000, he had resolved to make some alterations on his settlement and codicil, and that he got possession of these documents, which were at that time free from deletions and interlineations. *Held* that it had been proved that the bequest had been effectually cancelled by the trustor.

Question, whether the first unsigned holograph writing was a valid testamentary writing of the deceased. *Lamont v. Magistrates of Glasgow*, March 10, 1887, p. 603.

SUPERIOR AND VASSAL. Entry—Taxed entry—Assignees.

1. By a feu-contract dated in 1631, the Earl of Montrose feued to three of his kindly tenants and their "aires whatsomever (or assignayes, wha shall not exceed three chalders victuall in yeirlie standant rent)" a certain parcel of lands, the vassals binding themselves not only to pay the feu-duties, but to attend the Earl in time of war, and at frays and followings. The superior bound himself to receive the vassals and their heirs in and to the said lands, and also, "ony tennant that shall happin to buy the same frae the saids persons, or ony of them or yr fords (the buyers yrof not exceeding the rank above wryttine) . . . for payment of tenn pounds money for yr entrie to ilk five shilling land forsaid, and accepting ane new con-

SUPERIOR AND VASSAL—*Continued.*

queiser yrintill." In 1886, after the feu-right had been more than once sold, the superior demanded a year's rent of the subjects as composition from a singular successor in the feu, entered by implied entry under the Conveyancing Act, 1874. The vassal tendered £10 Scots, and maintained that he was entitled to the benefit of the taxed entry. The only other heritable property belonging to him was a subject in Glasgow, the agricultural value of which was trifling, although it was valuable in other ways. *Held* (1) that although the superior had no longer an interest to exclude vassals above the rank of three chalders men, a vassal of that rank was yet entitled to claim the benefit of the taxation, and (2) that the defender was entitled to the benefit of the taxed entry, (a) because "assignayes" was intended to include any disponees of the real right after infestment, and (b) because the agricultural value of their property was the only measure by which the "three chalders victual in annual rent" could be determined. *Duke of Montrose v. Provan's Trustees*, Jan. 25, 1887, p. 378.

Entry—Implied entry—Trustees for payment of debts—Conveyancing Act, 1874 (37 and 38 Vict. cap. 94), sec. 4, subsecs. 1 and 3.

2. *Held* (by Lord Kinnear, Ordinary) that the infestment of trustees under a trust-disposition for payment of debts with power of sale does not divest the grantor of the feudal fee, and that an implied entry obtained by the trustees by recording the disposition does not *per se* entitle the superior to a casualty. *Marquis of Huntly v. Earl of Fife*, Dec. 5, 1885, p. 1091.

Building restriction.

3. A feu-charter provided that the vassal should within three years from the term of entry "erect and constantly maintain on the said piece of ground buildings of the value of £12,000 at least, which buildings shall consist of a range of four-storey tenements similar to those already built" in the street. The vassal was further taken bound to form and constantly maintain a foot-pavement "in front of the houses to be built on the said piece of ground . . . the foot-pavement being formed within the area of the said piece of ground to the extent of eight feet." After he had erected houses of the character and value specified, the vassal proposed to erect on a part of the ground as yet unbuilt on stables of one storey in height. He also proposed that these stables should come to the edge of his ground, without leaving eight feet for a foot-pavement. *Held* that he was within his right in both respects, the Court being of opinion (1) that the feu-charter could not be construed to import any restriction on building on the ground feued (except in regard to those buildings the erection of which was stipulated for), and (2) that the buildings which the vassal proposed to erect were not of a character to require him to form a foot-pavement in terms of the second of the clauses above quoted, although if he came to erect buildings of another class his obligation to form the foot-pavement might come into operation. *Cowan v. Magistrates of Edinburgh*, March 19, 1887, p. 682.
4. *Opinions* as to the effect of a stipulation in a feu-contract against the erection upon the feu of any house "for the carrying on any trade or manufacture which may operate as a nuisance to the neighbouring feuars." *Manson v. Forrest*, June 14, 1887, p. 802.

See *Error*, 1.

TITLE TO SUE AND DEFEND. *Road—Road trustees—Barbed wires.*

1. A proprietor of lands bordering a public road is not entitled to erect a barbed wire fence along the road, where such fencing is dangerous to persons or bestial using the road, and road trustees have a good title to sue an action against the proprietor for the purpose of having him ordained to remove the fence. *Elgin County Road Trustees v. Innes*, Nov. 10, 1886, p. 48.

Removal of law-agent's name from roll.

2. *Observed* (*per Lord President*) that the title to petition for the removal of

TITLE TO SUE AND DEFEND—*Continued.*

the name of a law-agent from the roll is sufficient if the petitioner is himself a law-agent and has an interest to see that the roll is kept pure. *Incorporated Society of Law-Agents in Scotland v. Clark*, Dec. 3, 1886, p. 161.

Title of Magistrates to resist declarator of property of foreshore.

3. *Held* that the magistrates of a burgh, the inhabitants of which had been in use from time immemorial to resort to a particular piece of foreshore for purposes of recreation, had a good title to challenge a disposition which purported to convey that foreshore in property to a private person. *Keiller v. Magistrates of Dundee*, Dec. 7, 1886, p. 191.

Trust for creditors—Right of non-acceding creditor to sue trustee for share.

4. Where a debtor executed a trust-deed for behoof of acceding creditors, with the condition that all creditors acceding or receiving a dividend should be held to have discharged their claims in full, *held* (1) that a creditor who did not accede to the trust was entitled to a share of the estate in proportion to his debt unconditionally, and (2) that he was entitled to recover his share by direct action against the trustee. *Ogilvie & Son v. Taylor*, Jan. 27, 1887, p. 399.

Lease—Removing.

5. The estates of A were sequestrated in 1876, and his trustee sold to B his right and interest in an inn (which he held of the proprietor under a verbal lease). The trustee granted an assignation of the rents under declaration that "I have no title to the said subjects" beyond the act and warrant, and that "I will not be bound to give any, there being no written title or right either in me or in the said A, the subjects being possessed merely at the will of the proprietor." A continued in possession of the inn till his death in April 1886. In March 1886 B had raised an action of removing against him, which was in dependence at the date of his death. In May 1886 B presented a petition in the Sheriff Court for a warrant for the summary ejection of A's widow, in which he averred that he was proprietor of the subjects occupied by the defender, and founded on the assignation as his title. On this petition the Sheriff found that A's widow had no right or title to occupy the subjects, and granted warrant for her removal. A's widow brought a suspension thereof in the Court of Session. In his answers B averred that after the date of the assignation A occupied the subjects as his tenant under a verbal agreement to that effect. The Court (*diss.* Lord Shand, *aff.* judgment of Lord M'Laren) refused B a proof of his averments of tenancy, and suspended the proceedings complained of, on the ground that B had no title to sue the removing. *Sinclair v. Leslie*, June 9, 1887, p. 792.

TRAMWAY. See *Reparation*, 7, 13.

TRUST. *Constitution—Whether trustees or executors—Trusts Act, 1861 (24 and 25 Vict. c. 84), sec. 1.*

1. A testator in his will nominated certain persons as "executors," and directed them "to make and continue" certain annual payments to certain persons "till death or marriage," and to pay the liferent of his estate to his widow and a niece, and, on the death of the survivor of these two, to close their accounts at as early a date as practicable, and to divide the proceeds among specified persons. A "house, stable, and their fixtures," were to be sold soon after the testator's death. The executors were further directed to retain, or to realise for reinvestment, in their discretion, various securities, &c., held by him. There was no clause conveying any part of the estate to the executors. *Held* in a question between the co-executors, that though called "executors" in the deed, the executors were truly "gratuitous trustees nominated in a deed," and therefore were entitled to exercise the powers of assumption conferred on such trustees by sec. 1 of the Trusts Act, 1861. *Ainslie, &c. v. Ainslie*, Dec. 8, 1886, p. 209.

Administration—Assumption of new trustees.

2. By an antenuptial contract of marriage, dated in October 1860, the spouses

TRUST—Continued.

provided that, in the case of the death, or resignation, or legal incapacity of the trustees named in the deed, it should be competent to them, the spouses, or to the survivor, to appoint new trustees, and also that the trustees should have power after the death of the survivor to assume new trustees. *Held* that this trust could not be held, during the lifetime of the survivor of the spouses, to include a power of assumption by the trustees nominated, the provisions of the deed being to the contrary. *Munro's Trustees v. Young*, March 9, 1887, p. 574.

Administration—Assignment—Intimation.

3. Intimation of an assignment of a beneficial right under a trust was made to A, one of the two trustees. The other trustee was in bad health, but was able for business, and had not resigned. The funds were in A's hands, and he managed the whole affairs of the trust. *Held* that the intimation was sufficient. *Jameson v. Sharp*, March 18, 1887, p. 643.

Administration—Advances out of income.

4. Circumstances in which the Court authorised advances to be made out of the income of trust-funds directed to be accumulated, being of opinion that it was highly expedient, if not necessary, for the maintenance and education of the beneficiaries that such advances should be made. *Websters v. Miller's Trustees*, Feb. 26, 1887, p. 501.

Administration—Anticipation of period of payment.

5. A father and mother in the antenuptial marriage-contract of their son bound themselves to convey by deeds (which they subsequently executed), to take effect at their respective deaths, their heritable and moveable estates to their son's marriage-contract trustees for behoof of their son in liferent, for his liferent use alienably, and of the children of the marriage in fee. After the death of his father and mother the son, as their heir-at-law and sole next of kin, with consent of his wife, called upon the trustees to convey the estates to him, on the ground that no child had been born of the marriage, which had subsisted for thirty-nine years, and that his wife was now sixty-one years of age. In a special case presented by the marriage-contract trustees and the son, *held* that he was entitled to the conveyance. *Urquhart's Trustees v. Urquhart*, Nov. 23, 1886, p. 112.

Administration—Investment—Personal liability of trustees.

6. Circumstances in which family trustees, with the fullest powers of investment on such securities, heritable or personal, as they should think proper, were made liable for the loss of a sum lent to a member of the family on insufficient security. *Millar's Factor v. Millar's Trustees*, Nov. 2, 1886, p. 22.

Administration—Investment—Trust Amendment Act, 1884 (47 and 48 Vict. c. 63).

7. A *curator bonis*, being a trustee in the meaning of the Trusts Amendment Act, 1884, is entitled to invest the funds in his hands as curator in the purchase of the stocks and in the loans authorised as trust investments by that Act, notwithstanding that the registration of his name as holder of these stocks cannot by the practice of the Bank of England, where a large number of these stocks are transferable, be qualified by any entry to shew the character in which he holds them, the Bank of England declining to take cognisance of trusts. *Accountant of Court v. Crumpton's Curator Bonis*, Nov. 12, 1886, p. 55.
8. *Observations* on the expression "approved by the Court of Session" with reference to the investments authorised as trust investments by the Trusts Act, 1884.

Observed (per Lord Adam) that stocks approved of in a particular application for approval were not thereby pronounced to be eligible in all cases or in any other case than that before the Court. *Accountant of Court v. Crumpton's Curator Bonis*, Nov. 12, 1886, p. 55.

Administration—Investment—Loan over buildings in course of erection.

9. Buildings in course of erection are not a security on which a judicial factor is entitled to lend trust-funds.

TRUST—*Continued.*

Circumstances in which a judicial factor was held liable to make good a loss of trust-funds arising out of a loan over subjects in course of building, which afterwards proved insufficient to meet it. *Guild v. Glasgow Educational Endowments Board*, July 16, 1887, p. 944.

Administration—Investment—Real security.

10. *Held* that an English will authorising investments on "real security" authorised investment on a railway mortgage. *Breatcliff, &c., v. Bransby's Trustees*, Jan. 11, 1887, p. 307.

Administration—Warrandice—Personal liability of trustee.

11. A person infest as trustee in certain heritable subjects, after consenting to certain bonds being granted over them by his author, which were duly recorded, granted a bond and disposition in security for a new loan which he acknowledged to have received, and bound himself to repay "as trustee." In security of the personal obligation he disposed the subjects "as trustee," and the bond further contained this clause—"I grant warrandice." In an action by the last bondholder upon the clause of warrandice against the representative of the trustee, *held* that the trustee was personally bound in warrandice from fact and deed, and was liable for loss arising from the prior bonds to which he was a consenter. *Horsbrugh's Trustees v. Welch*, Nov. 12, 1886, p. 67.

Administration—Transaction between trustees and beneficiaries—Mora.

12. A testator died in 1844. By his settlement he left legacies to A and to other persons to the amount of £17,000, and life annuities amounting to £100 per annum, but he died intestate *quoad* residue. His heritable and moveable estates were large, but he had extensive liabilities undertaken for three trading and manufacturing concerns, whose estates were conveyed to trustees named by him in security of his advances. He was also liable for annuities to the extent of £350, which did not admit of valuation. In the years 1846 and 1847 the trustees made payment to the legatees of one-half of their legacies, but delayed payment of the remainder. In 1849 A and other legatees employed two law-agents to attend to their respective interests. The trust affairs being very complicated, by direction of the trustees the firm of J. & S., their law-agents, laid the trust-accounts before an accountant. The accountant's reports, after estimating unrealised assets and liabilities, shewed that probably the trust-funds would not be sufficient to pay the legacies and testamentary annuities in full. On 2d September 1851 the trustees, through their law-agents, offered to compromise the claims of the legatees by payment of the legacies in full without interest, on condition that they obtained from the legatees an assignation of their claims and a discharge from the next of kin. On 20th September 1851 this offer was accepted by the law-agents for the legatees and next of kin. Subsequently the trustees having discovered another liability of the deceased for £1700, proposed to rescind from the agreement, but the agents for the legatees threatened legal proceedings if it was not implemented. In February 1852 a deed was executed by A as one of the legatees, and also as one of the next of kin, and by the other legatees and next of kin, by which, in consideration of the legacies having been paid in full, they assigned their whole claims against the trust to a person as trustee for J. & S. J., one of the partners of J. & S., was one of the trustees. In 1886 the representatives of A raised a reduction of the deed of assignation and discharge against the representatives of the trustees, based on general averments of fraud, misrepresentation, and concealment and an averment that the pursuers had been greatly prejudiced by the deed, and on the plea that as the transaction involved the purchase of the trust-estate by one of the trustees, it was illegal. At the date of the action nearly all those who had taken part in bringing about the arrangement were dead. The Court *assoluted* the defenders, holding that fraud had not been proved, and that, *quoad ultra*, the action had not been timely raised,—Lord Young and Lord Craighill further holding that no relevant ground of

TRUST—*Continued.*

action had been stated. *Buckner v. Jopp's Trustees*, July 16, 1887, p. 1006.

Charitable and Educational Trust—Educational Endowments Act, 1882 (45 and 46 Vict. c. 59)—Scope of Act, and discretion of the Commissioners.

13. A trustor left the residue of his estate to be applied "towards the maintenance and promotion of religious ordinances and education and missionary operations" in a certain district, "and that by means of payments for the erection and support of churches and schools belonging to and in connection with" certain religious bodies. The trustees were to consist of members of these bodies in full communion with them. It was declared in the trust-deed that "the application and appropriation of the trust-funds shall be entirely at the option and discretion of the quorum of my said trustees as to the proportions thereof to be applied to the said several objects." The Commissioners under the Educational Endowments Act, 1882, having framed a scheme, whereby the administration of a part of the trust-funds (being the average amount annually devoted by the trustees to educational purposes) was transferred to a governing body, and the funds were devoted to the advancement of higher education in the district, the trustees submitted a case to the Court under the Act 1882, pleading, first, that the fund was not an educational endowment in the sense of the Act, and second, that the scheme was not in conformity with its provisions, as having diverted to educational purposes funds in use to be applied to other charitable purposes, and as not having had "regard to the spirit of the founder's intentions." *Held* (1) that the fund was in part an educational endowment in the sense of the statute, the discretion given to the trustees not entitling them to withhold all payments from any of the three trust purposes; and (2) that the Court could not review the Commissioners in the exercise of the discretion committed to them by the statute in determining the proportion of the endowment to be applied to educational purposes in the case of a mixed endowment, or as to the proper amount of regard to be shewn to the spirit of the founder's intention. *Ferguson Bequest Fund v. Commissioners on Educational Endowments*, March 15, 1887, p. 624.

Charitable and Educational Trust—Alteration of purposes.

14. The Court approved of a scheme by which a trust constituted in the Glasgow Royal Infirmary, "for a fever convalescent home when erected," was altered into a trust "towards payment of the cost of a nurses' home," the purpose of erecting a fever convalescent home, which was in the mind of the directors of the infirmary when the original trust was constituted, having been abandoned as unnecessary. *Glasgow Infirmary*, March 19, 1887, p. 680.

Church—Cy près.

15. Circumstances in which it was *held* that it had not been proved that the purposes of a trust under which a dissenting place of worship had been built had failed, and petition to have the trust property conveyed to the church of which the congregation had originally formed a part *dismissed*. *Thomson v. Anderson*, July 19, 1887, p. 1026.

See *Church*, 4.

ULTRA VIRES. *Volunteer Act, 1863 (26 and 27 Vict. cap. 65), secs. 24, 25, and 27.*

Held that the rules for the management of the property, finances, and civil affairs of a corps, made and approved in terms of the Volunteer Act, 1863, may competently include rules providing for the payment of subscriptions by officers (both active and honorary) to the funds of the corps, and that such subscriptions so provided for may be recovered in a Court of law. *Morrison v. Neilson*, Feb. 2, 1887, p. 452.

See *Minor and Pupil, 2—Superior and Vassal, 2.*

UNIVERSITY. See *Copyright, 1.*

VALUATION ACTS. *Conclusiveness of Valuation-roll—Poor-Law (Scotland) Amendment Act, 1845 (8 and 9 Vict. cap. 83), sec. 37.*

1. A parochial board assessed for poor-rates the owner and occupier of water-works on the annual value of the subjects appearing in the Valuation-roll without allowing deduction of the average cost of repairs, insurance, &c., in terms of the 37th section of the Poor-Law Act, 1845, on the ground that the assessor in preparing the Valuation-roll had already made these deductions. In a suspension *held* (1) that for the purposes of assessment under the Poor-Law Act, 1845, the Valuation-roll as completed in terms of the Valuation of Lands (Scotland) Act, 1854, was conclusive as to the yearly rent or value of lands and heritages entered therein, and that the Court of Session had no jurisdiction to review the process by which the entry there made was reached, and (2) that before assessment the suspender was entitled to have the above deductions made from the sum entered in the Valuation-roll. *Magistrates of Glasgow v. Hall*, Jan. 14, 1887, p. 319.

“Consideration other than the rent”—“Power” to make improvements.

2. Terms of a lease conferring “power” on the tenant to make improvements on a harbour which was the subject of the lease, which were *held* to provide for a consideration other than the rent in the sense of the Lands Valuation Act, 1854, sec. 6. *Prestongrange Coal and Fire-Brick Co., Limited, v. Assessor for Haddingtonshire*, March 9, 1887, p. 589.

“Consideration other than the rent”—Goodwill.

3. A sum of money paid by a tenant to his landlord in name of “goodwill” on obtaining a lease of premises previously occupied by the landlord, is in the general case to be regarded as “a consideration other than the rent” named in the lease paid for the occupation of the premises, and as such is to be divided by the number of years for which the lease is to run, and the quotient added every year to the rent.

In addition to a rent of £48 yearly named in the lease of a hotel for seven years, the tenant agreed to pay to the landlord a sum of £220 in name of goodwill, the landlord who had previously been in occupation of the hotel becoming bound not to commence business as a hotel-keeper in opposition to the tenant. *Held* that this obligation by the landlord was a valuable consideration, apart from the occupation of the premises, for which compensation was due by the tenant, and consequently that a proportion was to be deducted from the sum of £220 before making any addition to the rent named in the lease in terms of the above rule. Determination of the Magistrates deducting one-half from the £220 on this principle *affirmed*. *Assessor for Lanark v. Selkirk*, March 9, 1887, p. 579.

4. A sum paid by the incoming to the outgoing tenant in name of goodwill is not to be taken into account in reaching the value of the subjects, even when the outgoing tenant is one of the joint proprietors of the subjects. *Assessor for Kilmarnock v. Allan*, March 9, 1887, p. 581.

5. M offered to take the premises of which Mrs B was tenant, under a lease of which three years were yet to run, and to pay her £400 in name of goodwill, provided the proprietor would cancel her lease and grant him a new one for seven years. The proprietor would consent only if he received £50 from M and £70 from Mrs B. M and Mrs B agreed to these terms, and a new lease for seven years was granted at the old rent. *Held* that both the £50 and the £70 so received by the proprietor were considerations other than the rent to be taken into account in reaching the valuation of the subjects. *Assessor for Kilmarnock v. M’Nally*, March 9, 1887, p. 582.

Principle of valuation—Gas-works belonging to gas company.

6. Gas-works, the property of a gas company, were valued by the assessor on the principle of taking the cost of the company’s works, less an allowance for depreciation, and assessing the annual value at a percentage on the balance. The company maintained that the works ought to be valued on the principle of taking the revenue of the company for their preceding financial year, and deducting therefrom the expenses (excluding capital expenses), and also deducting 5 per cent on the expenses in name of tenants’

VALUATION ACTS—*Continued.*

profits—the balance being taken as the value of the subjects. The Magistrates confirmed the assessor's valuation. The company appealed. The Judges being divided in opinion (in accordance with their respective opinions in the *Falkirk* case, Feb. 24, 1883, 10 R. 651), the valuation stood. *Edinburgh Gas-Light Co. v. Assessor for Leith*, March 9, 1887, p. 583.

Lease of Minerals and of Harbour—Duration of lease.

7. Question, whether a lease of minerals for thirty-one years, and of the harbour dues of a harbour adjacent to the minerals and belonging to the same proprietor for twenty-one years with right to use, but not to use exclusively, the harbour for the purposes of the mineral workings, was to be construed as a lease of the harbour for thirty-one years, entitling the assessor to enter the tenants on the Valuation-roll as proprietors of improvements which they had executed on the harbour. *Opinion per Lord Lee* that it was not; *per Lord Fraser contra*. *Prestongrange Coal and Firebrick Co., Limited, v. Assessor for Haddingtonshire*, March 9, 1887, p. 589.

VOLUNTEER. See *Statute*, 2—*Ultra Vires*.

WARRANTICE. See *Heir and Executor*, 1—*Trust*, 11.

WRIT. *Description of lands.*

1. A bond and disposition in security contained this description of the security subjects,—“All and Whole that piece of ground fronting Baker Street of Aberdeen, in the burgh and county of Aberdeen, being the subjects and others particularly described in the feu-charter thereof granted by” certain persons named and designed “in my favour, dated the 6th and 7th, and recorded in the Division of the General Register of Sasines applicable to the county of Aberdeen on the _____, all days of November 1882.” The foregoing were the only subjects in Baker Street, Aberdeen, belonging to the granter. *Held (per Lord Trayner, Ordinary)* that apart from the provisions of the Conveyancing Act, 1874, sec. 61, and schedule O, there was in the bond a sufficient description of the subjects. *Murray's Trustee v. Wood*, July 2, 1887, p. 856.

Description of lands—Description by reference—Conveyancing Act, 1874 (37 and 38 Vict. cap. 94), sec. 61, and schedule O.

2. In a description of lands by reference to a prior recorded deed, under the Conveyancing Act, 1874, sec. 61, and schedule O, the omission to state the day of the month on which the prior deed was recorded will not invalidate the subsequent deed. *Murray's Trustee v. Wood*, July 2, 1887, p. 856.

Delivery—Trust—Policy of insurance in favour of wife and children.

3. *Held (rev. judgment of Lord McLaren)* that a policy of insurance taken by a husband in favour of trustees for behoof of his wife and the children of the marriage did not confer a vested right in the beneficiaries without delivery, actual or constructive, of the policy.

Circumstances which were *held* not to amount to delivery of a policy of insurance taken by a husband in favour of trustees for behoof of his wife and children. *Jarvie's Trustee v. Jarvie's Trustees*, Jan. 28, 1887, p. 411.

Succession—Revocation by pencil marking.

4. Unsigned pencil alterations made by a testator on his testament written in ink will be presumed to be deliberative merely, but if there is evidence, parole or otherwise, to shew that he intended them to be final they will receive effect. *Lamont v. Magistrates of Glasgow*, March 10, 1887, p. 603.

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